Free to Teach, Free to Learn

Understanding and Maintaining Academic Freedom in Higher Education

A Trustee Guide from
the AMERICAN COUNCIL OF TRUSTEES AND ALUMNI

ACTA
American Council of Trustees and Alumni

ACKNOWLEDGMENTS

This guide for trustees on academic freedom in higher education was prepared by project director Rachel Wildavsky and senior researcher Dr. Erin O'Connor, with the support of the staff of the American Council of Trustees and Alumni (ACTA). ACTA thanks the Ewing Marion Kauffman Foundation and the Bodman Foundation for their generous support of this project.

The **American Council of Trustees and Alumni** (ACTA) is an independent non-profit dedicated to academic freedom, academic excellence, and accountability at America's colleges and universities. Since its founding in 1995, ACTA has counseled boards, educated the public, and published reports about such issues as good governance, historical literacy, core curricula, the free exchange of ideas, and accreditation. ACTA's previous publications on academic freedom and intellectual diversity include *Freedom of Association: Supreme Court Decision CLS versus Martinez; Trouble in the Dorms: A Guide to Residential Life Programs for Higher Education Trustees; Intellectual Diversity: Time for Action;* and *Protecting the Free Exchange of Ideas: How Trustees Can Advance Intellectual Diversity on Campus.*

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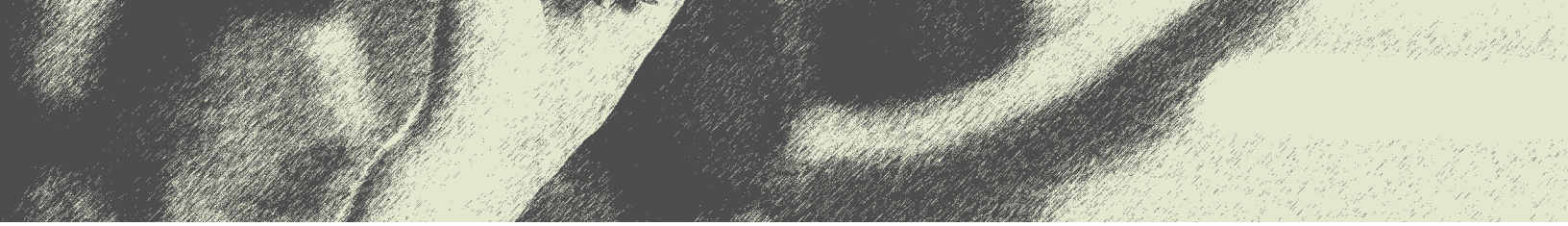
April 2013



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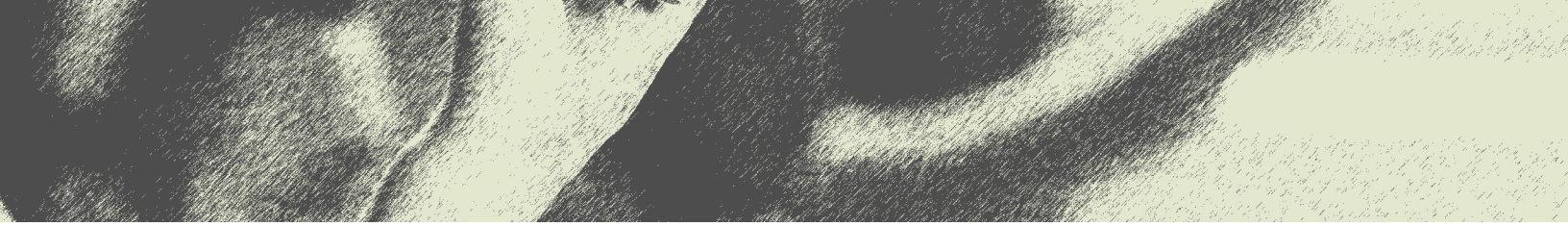


PREFACE

Academic freedom, the freedom of thought to challenge widely-held beliefs, and to speak one's mind—these are indispensable habits and practices of any university worthy of the name. Professors require substantial independence from political pressure and utilitarian economics in order to teach, discover, study, and invent—and the public needs professors' teaching and research in order to enjoy the knowledge, the opportunities, and the future that a vibrant college and university system fosters. On these things, most everyone can agree.

But theory and practice are two different things—and when it comes to putting the principle of academic freedom into practice, confusion reigns. Is academic freedom a right that cannot be taken away—or a privilege that must be earned? Do only professors have academic freedom—or should students, administrators, presidents, and even trustees have it, too? Does academic freedom allow professors to bring their political views into the classroom—or does it protect students from professors' political agendas? Can trustees undertake such activities as instituting core curricular requirements or eliminating departments without trampling upon academic freedom? Can there be academic freedom without tenure? The answer to each of these questions is often contested: It depends on whom you ask.

Lawmakers, government officials, and trustees are so chronically uncertain about the boundaries of academic freedom that they veer wildly between two ineffectual poles, at times inappropriately interfering in academic matters and at others failing to hold professors and institutions accountable to the public they serve. The courts are not much better—over the years, they have found that academic freedom is both a "special concern" of the First Amendment and that professors may be punished and even fired for speaking out. Polls reveal that the public, for its part, is not convinced that professors deserve the trust upon which academic freedom and tenure are predicated.

Meanwhile, professors have been known to invoke academic freedom in ways that can only be described as self-serving. The principle has been claimed to defend such behavior as the refusal to cooperate when a department is moving from one building to another; research misconduct that rose to the level of criminal charges; sexual involvement with students; faked credentials; political harangues in the classroom; and the blocking of curricular review. Professional organizations such as the American Association of University Professors (AAUP) and the American Federation of Teachers (AFT) are embracing an expansive definition of academic freedom that emphasizes rights, job security, and collective bargaining, but has significantly less to say about accountability and responsibility.

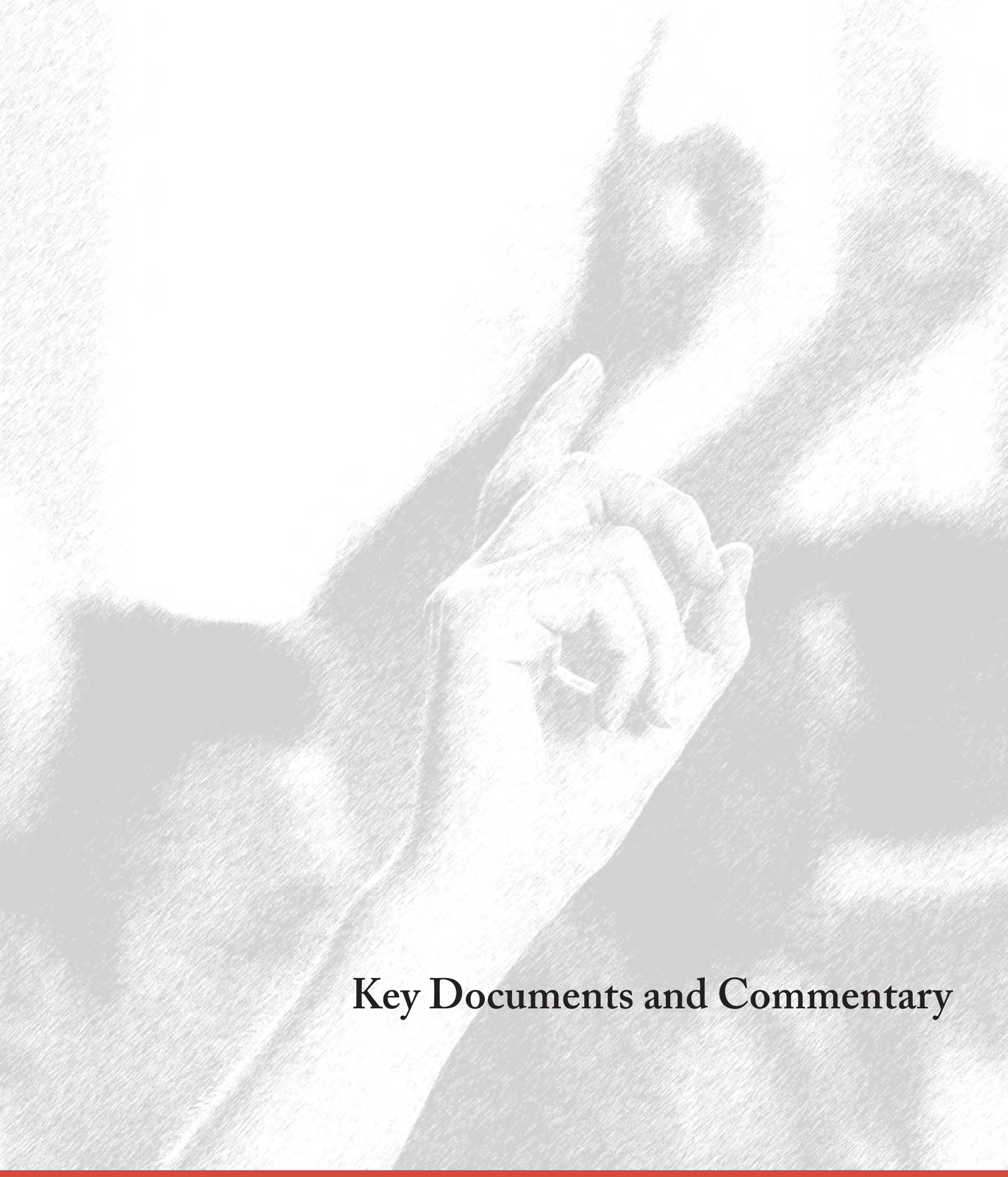
Academic freedom is in danger on many fronts. Campus speech codes and double standards have produced an environment where professors and students are punished for expressing unorthodox views, and where robust debate among multiple viewpoints is discouraged. Post-tenure review is ineffective and peer review is compromised: Studies show that cheating among faculty and students is widespread, that training in professional ethics is almost nonexistent, and that policies on conflict of interest, plagiarism, and research misconduct are erratically and weakly enforced. Shared governance is a cornerstone of academic life and a primary component of academic freedom—and yet, in the wake of the U.S. Supreme

Court's 2006 ruling in *Garcetti v. Ceballos*, lower courts are finding that professors may be disciplined and even fired for speaking out on governance matters.

Academic freedom may be the defining value of America's colleges and universities, but there is no real clarity or consensus about how that value ought to be implemented, what its limits are, or how best to preserve it. Constructive action is urgently needed. It is with this purpose that the American Council of Trustees and Alumni has prepared *Free to Teach, Free to Learn.* We begin by reprinting excerpts from eight key historical documents on academic freedom and academic responsibility, each with commentary by leaders in the field mirroring the vigorous and open debate on these topics and designed to foster discussion about which policies would benefit trustees' institutions. We follow with nine case studies describing real issues in academic freedom, each accompanied by questions for consideration and discussion points describing their implications and significance. Our goal is to offer a practical examination of recent real-life academic freedom problems—what happened, and what should have happened—in order to provide guidance to trustees who will inevitably face similar challenges. We conclude with action items of particular interest to university trustees.

The work of our colleges and universities is critically important to our cities, our states, and our nation. We know our work depends on academic freedom, but we sorely lack a common understanding of what that is. Lacking that understanding, we are jeopardizing the underlying academic enterprise itself. With this return to first principles, ACTA aims to set matters on a more hopeful course, that promises academic freedom, academic responsibility, and high academic achievement.

Benno C. Schmidt
New York City
April 2013



Key Documents and Commentary

> “The most serious problems of freedom of expression in our society today exist on our campuses.... The assumption seems to be that the purpose of education is to induce correct opinion rather than to search for wisdom and to liberate the mind.”

— Benno Schmidt, chairman, CUNY Board of Trustees;
former president of Yale University

KEY DOCUMENT #1

American Association of University Professors
1915 Declaration of Principles on Academic Freedom and Academic Tenure (excerpts)

...

General Declaration of Principles

The term "academic freedom" has traditionally had two applications—to the freedom of the teacher and to that of the student, *Lehrfreiheit* and *Lernfreiheit*. It need scarcely be pointed out that the freedom which is the subject of this report is that of the teacher. …

1. *Basis of Academic Authority.* American institutions of learning are usually controlled by boards of trustees as the ultimate repositories of power. ...

   An eminent university president thus described the situation not many years since:

   > In the institutions of higher education the board of trustees is the body on whose discretion, good feeling, and experience the securing of academic freedom now depends. There are boards which leave nothing to be desired in these respects; but there are also numerous bodies that have everything to learn with regard to academic freedom. These barbarous boards exercise an arbitrary power of dismissal. They exclude from the teachings of the university unpopular or dangerous subjects. …

2. *The Nature of the Academic Calling.* … If education is the cornerstone of the structure of society and if progress in scientific knowledge is essential to civilization, few things can be more important than to enhance the dignity of the scholar's profession, with a view to attracting into its ranks men of the highest ability, of sound learning, and of strong and independent character. ...

   Indeed, the proper fulfillment of the work of the professoriate requires that our universities shall be so free that no fair minded person shall find any excuse for even a suspicion that the utterances of university teachers are shaped or restricted by the judgment, not of professional scholars, but of inexpert and possibly not wholly disinterested persons outside of their ranks. The lay public is under no compulsion to accept or to act upon the opinions of the scientific experts whom, through the universities, it employs. But it is highly needful, in the interest of society at large, that what purport to be the conclusions of men trained for, and dedicated to, the quest for truth, shall in fact be the conclusions of such men, and not echoes of the opinions of the lay public, or of the individuals who endow or manage universities. To the degree that professional scholars, in the formation and promulgation of their opinions, are, or by the character of their tenure appear to be, subject to any motive other than their own scientific conscience and a

desire for the respect of their fellow experts, to that degree the university teaching profession is corrupted; its proper influence upon public opinion is diminished and vitiated; and society at large fails to get from its scholars, in an unadulterated form, the peculiar and necessary service which it is the office of the professional scholar to furnish. ...

3. *The Function of the Academic Institution.* The importance of academic freedom is most clearly perceived in the light of the purposes for which universities exist. These are three in number:

    a. to promote inquiry and advance the sum of human knowledge;
    b. to provide general instruction to the students; and
    c. to develop experts for various branches of the public service.

    Let us consider each of these. In the earlier stages of a nation's intellectual development, the chief concern of educational institutions is to train the growing generation and to diffuse the already accepted knowledge. It is only slowly that there comes to be provided in the highest institutions of learning the opportunity for the gradual wresting from nature of her intimate secrets. The modern university is becoming more and more the home of scientific research. There are three fields of human inquiry in which the race is only at the beginning: natural science, social science, and philosophy and religion, dealing with the relations of man to outer nature, to his fellow men, and to ultimate realities and values. In natural science all that we have learned but serves to make us realize more deeply how much more remains to be discovered. In social science in its largest sense, which is concerned with the relations of men in society and with the conditions of social order and well-being, we have learned only an adumbration of the laws which govern these vastly complex phenomena. Finally, in the spirit life, and in the interpretation of the general meaning and ends of human existence and its relation to the universe, we are still far from a comprehension of the final truths, and from a universal agreement among all sincere and earnest men. In all of these domains of knowledge, the first condition of progress is complete and unlimited freedom to pursue inquiry and publish its results. Such freedom is the breath in the nostrils of all scientific activity.

    The second function—which for a long time was the only function—of the American college or university is to provide instruction for students. It is scarcely open to question that freedom of utterance is as important to the teacher as it is to the investigator. No man can be a successful teacher unless he enjoys the respect of his students, and their confidence in his intellectual integrity. It is clear, however, that this confidence will be impaired if there is suspicion on the part of the student that the teacher is not expressing himself fully or frankly, or that college and university teachers in general are a repressed and intimidated class who dare not speak with that candor and courage which youth always demands in those whom it is to esteem. The average student is a discerning observer, who soon takes the measure of his instructor. It is not only the character of the instruction but also the character of the instructor that counts; and if the student has reason to believe that the instructor is not true to himself, the virtue of the instruction as an educative force is incalculably diminished. There must be in the mind of the teacher no mental reservation. He must give the student the best of what he has and what he is.

    The third function of the modern university is to develop experts for the use of the community. If there is one thing that distinguishes the more recent developments of democracy, it is the recognition by legislators of the inherent complexities of economic, social, and political

> life, and the difficulty of solving problems of technical adjustment without technical knowledge. The recognition of this fact has led to a continually greater demand for the aid of experts in these subjects, to advise both legislators and administrators. The training of such experts has, accordingly, in recent years, become an important part of the work of the universities; and in almost every one of our higher institutions of learning the professors of the economic, social, and political sciences have been drafted to an increasing extent into more or less unofficial participation in the public service. It is obvious that here again the scholar must be absolutely free not only to pursue his investigations but to declare the results of his researches, no matter where they may lead him or to what extent they may come into conflict with accepted opinion. To be of use to the legislator or the administrator, he must enjoy their complete confidence in the disinterestedness of his conclusions.
>
> It is clear, then, that the university cannot perform its threefold function without accepting and enforcing to the fullest extent the principle of academic freedom. The responsibility of the university as a whole is to the community at large, and any restriction upon the freedom of the instructor is bound to react injuriously upon the efficiency and the *morale* of the institution, and therefore ultimately upon the interests of the community.
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> * * * * *

... In the early period of university development in America the chief menace to academic freedom was ecclesiastical, and the disciplines chiefly affected were philosophy and the natural sciences. In more recent times the danger zone has been shifted to the political and social sciences—though we still have sporadic examples of the former class of cases in some of our smaller institutions. But it is precisely in these provinces of knowledge in which academic freedom is now most likely to be threatened, that the need for it is at the same time most evident. No person of intelligence believes that all of our political problems have been solved, or that the final stage of social evolution has been reached. ... But if the universities are to render any such service toward the right solution of the social problems of the future, it is the first essential that the scholars who carry on the work of universities shall not be in a position of dependence upon the favor of any social class or group, that the disinterestedness and impartiality of their inquiries and their conclusions shall be, so far as is humanly possible, beyond the reach of suspicion.

The special dangers to freedom of teaching in the domain of the social sciences are evidently two. The one which is the more likely to affect the privately endowed colleges and universities is the danger of restrictions upon the expression of opinions which point toward extensive social innovations, or call in question the moral legitimacy or social expediency of economic conditions or commercial practices in which large vested interests are involved. In the political, social, and economic field almost every question, no matter how large and general it at first appears, is more or less affected by private or class interests; and, as the governing body of a university is naturally made up of men who through their standing and ability are personally interested in great private enterprises, the points of possible conflict are numberless. When to this is added the consideration that benefactors, as well as most of the parents who send their children to privately endowed institutions, themselves belong to the more prosperous and therefore usually to the more conservative classes, it is apparent that, so long as effectual safeguards for academic freedom are not established, there is a real danger that pressure from vested interests may, sometimes deliberately and sometimes unconsciously, sometimes openly and sometimes subtly and in obscure ways, be brought to bear upon academic authorities.

On the other hand, in our state universities the danger may be the reverse. Where the university is dependent for funds upon legislative favor, it has sometimes happened that the conduct of the institution has been affected by political considerations; and where there is a definite governmental policy or a strong public feeling on economic, social, or political questions, the menace to academic freedom may consist in the repression of opinions that in the particular political situation are deemed ultra-conservative rather than ultra-radical. The essential point, however, is not so much that the opinion is of one or another shade, as that it differs from the views entertained by the authorities. The question resolves itself into one of departure from accepted standards; whether the departure is in the one direction or the other is immaterial.

This brings us to the most serious difficulty of this problem; namely, the dangers connected with the existence in a democracy of an overwhelming and concentrated public opinion. The tendency of modern democracy is for men to think alike, to feel alike, and to speak alike. Any departure from the conventional standards is apt to be regarded with suspicion. Public opinion is at once the chief safeguard of a democracy, and the chief menace to the real liberty of the individual. It almost seems as if the danger of despotism cannot be wholly averted under any form of government. In a political autocracy there is no effective public opinion, and all are subject to the tyranny of the ruler; in a democracy there is political freedom, but there is likely to be a tyranny of public opinion.

An inviolable refuge from such tyranny should be found in the university. It should be an intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may become a part of the accepted intellectual food of the nation or of the world. Not less is it a distinctive duty of the university to be the conservator of all genuine elements of value in the past thought and life of mankind which are not in the fashion of the moment. Though it need not be the "home of beaten causes," the university is, indeed, likely always to exercise a certain form of conservative influence. For by its nature it is committed to the principle that knowledge should precede action, to the caution (by no means synonymous with intellectual timidity) which is an essential part of the scientific method, to a sense of the complexity of social problems, to the practice of taking long views into the future, and to a reasonable regard for the teachings of experience. One of its most characteristic functions in a democratic society is to help make public opinion more self-critical and more circumspect, to check the more hasty and unconsidered impulses of popular feeling, to train the democracy to the habit of looking before and after. It is precisely this function of the university which is most injured by any restriction upon academic freedom; and it is precisely those who most value this aspect of the university's work who should most earnestly protest against any such restriction. For the public may respect, and be influenced by, the counsels of prudence and of moderation which are given by men of science, if it believes those counsels to be the disinterested expression of the scientific temper and of unbiased inquiry. It is little likely to respect or heed them if it has reason to believe that they are the expression of the interests, or the timidities, of the limited portion of the community which is in a position to endow institutions of learning, or is most likely to be represented upon their boards of trustees. And a plausible reason for this belief is given the public so long as our universities are not organized in such a way as to make impossible any exercise of pressure upon professorial opinions and utterances by governing boards of laymen.

Since there are no rights without corresponding duties, the considerations heretofore set down with respect to the freedom of the academic teacher entail certain correlative obligations. The claim to freedom of teaching is made in the interest of the integrity and of the progress of scientific inquiry; it is, therefore,

only those who carry on their work in the temper of the scientific inquirer who may justly assert this claim. The liberty of the scholar within the university to set forth his conclusions, be they what they may, is conditioned by their being conclusions gained by a scholar's method and held in a scholar's spirit; that is to say, they must be the fruits of competent and patient and sincere inquiry, and they should be set forth with dignity, courtesy, and temperateness of language. The university teacher, in giving instruction upon controversial matters, while he is under no obligation to hide his own opinion under a mountain of equivocal verbiage, should, if he is fit for his position, be a person of a fair and judicial mind; he should, in dealing with such subjects, set forth justly, without suppression or innuendo, the divergent opinions of other investigators; he should cause his students to become familiar with the best published expressions of the great historic types of doctrine upon the questions at issue; and he should, above all, remember that his business is not to provide his students with ready-made conclusions, but to train them to think for themselves, and to provide them access to those materials which they need if they are to think intelligently.

It is, however, for reasons which have already been made evident, inadmissible that the power of determining when departures from the requirements of the scientific spirit and method have occurred, should be vested in bodies not composed of members of the academic profession. Such bodies necessarily lack full competency to judge of those requirements; their intervention can never be exempt from the suspicion that it is dictated by other motives than zeal for the integrity of science; and it is, in any case, unsuitable to the dignity of a great profession that the initial responsibility for the maintenance of its professional standards should not be in the hands of its own members. It follows that university teachers must be prepared to assume this responsibility for themselves. They have hitherto seldom had the opportunity, or perhaps the disposition, to do so. The obligation will doubtless, therefore, seem to many an unwelcome and burdensome one; and for its proper discharge members of the profession will perhaps need to acquire, in a greater measure than they at present possess it, the capacity for impersonal judgment in such cases, and for judicial severity when the occasion requires it. But the responsibility cannot, in this committee's opinion, be rightfully evaded. If this profession should prove itself unwilling to purge its ranks of the incompetent and the unworthy, or to prevent the freedom which it claims in the name of science from being used as a shelter for inefficiency, for superficiality, or for uncritical and intemperate partisanship, it is certain that the task will be performed by others—by others who lack certain essential qualifications for performing it, and whose action is sure to breed suspicions and recurrent controversies deeply injurious to the internal order and the public standing of universities. ...

There is one case in which the academic teacher is under an obligation to observe certain special restraints—namely, the instruction of immature students. In many of our American colleges, and especially in the first two years of the course, the student's character is not yet fully formed, his mind is still relatively immature. In these circumstances it may reasonably be expected that the instructor will present scientific truth with discretion, that he will introduce the student to new conceptions gradually, with some consideration for the student's preconceptions and traditions, and with due regard to character-building. The teacher ought also to be especially on his guard against taking unfair advantage of the student's immaturity by indoctrinating him with the teacher's own opinions before the student has had an opportunity fairly to examine other opinions upon the matters in question, and before he has sufficient knowledge and ripeness of judgment to be entitled to form any definitive opinion of his own. It is not the least service which a college or university may render to those under its instruction, to habituate them to looking not only patiently but methodically on both sides, before adopting any conclusion upon

controverted issues. By these suggestions, however, it need scarcely be said that the committee does not intend to imply that it is not the duty of an academic instructor to give to any students old enough to be in college a genuine intellectual awakening and to arouse in them a keen desire to reach personally verified conclusions upon all questions of general concernment to mankind, or of special significance for their own time. ...

There is one further consideration with regard to the classroom utterances of college and university teachers to which the committee thinks it important to call the attention of members of the profession, and of administrative authorities. Such utterances ought always to be considered privileged communications. Discussions in the classroom ought not to be supposed to be utterances for the public at large. ...

In their extramural utterances, it is obvious that academic teachers are under a peculiar obligation to avoid hasty or unverified or exaggerated statements, and to refrain from intemperate or sensational modes of expression. But, subject to these restraints, it is not, in this committee's opinion, desirable that scholars should be debarred from giving expression to their judgments upon controversial questions, or that their freedom of speech, outside the university, should be limited to questions falling within their own specialties. ...

It is, it will be seen, in no sense the contention of this committee that academic freedom implies that individual teachers should be exempt from all restraints as to the matter or manner of their utterances, either within or without the university. Such restraints as are necessary should in the main, your committee holds, be self-imposed, or enforced by the public opinion of the profession. But there may, undoubtedly, arise occasional cases in which the aberrations of individuals may require to be checked by definite disciplinary action. What this report chiefly maintains is that such action cannot with safety be taken by bodies not composed of members of the academic profession. Lay governing boards are competent to judge concerning charges of habitual neglect of assigned duties, on the part of individual teachers, and concerning charges of grave moral delinquency. But in matters of opinion, and of the utterance of opinion, such boards cannot intervene without destroying, to the extent of their intervention, the essential nature of a university—without converting it from a place dedicated to openness of mind, in which the conclusions expressed are the tested conclusions of trained scholars, into a place barred against the access of new light, and precommitted to the opinions or prejudices of men who have not been set apart or expressly trained for the scholar's duties. It is, in short, not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion and of teaching, of the academic profession, that is asserted by this declaration of principles. It is conceivable that our profession may prove unworthy of its high calling, and unfit to exercise the responsibilities that belong to it. But it will scarcely be said as yet to have given evidence of such unfitness. And the existence of this Association, as it seems to your committee, must be construed as a pledge, not only that the profession will earnestly guard those liberties without which it cannot rightly render its distinctive and indispensable service to society, but also that it will with equal earnestness seek to maintain such standards of professional character, and of scientific integrity and competency, as shall make it a fit instrument for that service. ...

For the full text of the statement, see: http://www.aaup.org/file/1915-Declaration-of-Principles-o-nAcademic-Freedom-and-Academic-Tenure.pdf.

COMMENTARY

Lawrence Summers

Charles W. Eliot University Professor and President Emeritus, Harvard University

NO ONE IS AGAINST academic freedom. Yet it remains the source of much controversy because there is so wide a range of views as to what it means. The AAUP *Statement* of 1915 says sensible things about many of the issues—albeit with a commitment to the proposition that only professors can evaluate professors—that might be surprising to outsiders.

What are the main academic freedom issues facing leading United States universities today and how have they evolved? As the AAUP 1915 *Statement* makes clear, ideas about academic freedom have their roots in concerns about trustees or funders using their leverage to dictate what students are taught or what ideas professors propound. These have surely been valid concerns in the past. Serious efforts by alumni and some involved in governance to prevent the teaching of Keynesian economics in the early 1950s were and should have been resisted. In retrospect, the degree to which professors were persecuted because of past or present communist sympathies during the McCarthy period stands out as an example of inappropriate interference with academic freedom.

These cases have a musty feel, however. It is hard to credit the argument that today extramural forces of any scale prevent faculty from teaching or publishing ideas that are hostile to capitalism or more generally that resonate on the left side of the political spectrum. Instead the evidence is that the vast majority of American academics have views on questions of national security, economic and social policy, and human nature that are well to the left of the central tendency in the population. Their teaching and writing, as well as that of those they invite to campus, reflect their views. As just one example, it is hard to think of anyone so frequently invited to campuses as Noam Chomsky, who, in recent years, has focused his speaking and writing on a quite virulently anti-American set of views.

What, then, are pressing academic freedom issues today? From my experience of twenty years as a professor and five as a university president, there are areas where there is a need for more academic freedom and areas where academic freedom is invoked in support of practices that are dysfunctional.

On the side of insufficient academic freedom, the threat today is less from overreaching administrations and trustees than it is from prevailing faculty orthodoxies that make it very difficult for scholars holding certain views to advance in certain fields. A classic example is Middle Eastern studies, where those holding strongly pro-Israel views often find it very difficult to advance their careers. Another example is the unwillingness in many quarters to accept research emphasizing genetic interpretations of human nature and human difference. Then there is the field of American studies which frequently produces scholarship that condemns American traditions and history, seeming to leave little room for scholarship that celebrates aspects of the American past.

Of course there is an element of judgment here. As an economist I am relatively untroubled by the absence of Marxists from most major economic departments. I attribute this to the overall lack of quality scholarship, not to some imposed orthodoxy. Others would, I am sure, disagree. The overall point, though, is the danger that prevailing orthodoxies tend to preclude full diversity of thought and expression and that this may threaten the values that academic freedom is designed to serve as much as administrative overreach. Academic freedom is invoked to explain why it is standard in American universities for the faculty in a particular field to have unquestioned power to block appointments in that field. Yet, this decision making structure has often the effect of limiting new thought and entrenching existing orthodoxy.

There is also the role money plays in shaping what subjects are taught and researched and what perspective is brought to bear. Just as freedom of speech may mean little to those who cannot afford a megaphone, academic freedom is not fully realized when financial considerations are too salient in academic decision making. This is most obvious when donors dictate who is to be hired for chairs or centers that they endow. But it can take subtler forms as well. Typically the most plausible future donors for a university are its past donors. And so there is an inevitable desire to make choices that will make those donors happy. Conflicts can also arise when faculty members derive outside income from entities with an interest in the outcome of their research. And there is the fact that students and faculty at leading universities tend to belong to the upper-middle and upper classes, perhaps skewing the perspective they have on many questions.

It's not clear what can be done about the influence of money. Transparency is a good first step, as we have seen with medical faculty disclosing their relations to pharmaceutical companies. Much more can and should be done in this area. Universities should be more transparent about those who fund their work and should expect professors working in controversial areas to acknowledge their funding sources as well. Universities should also explain to donors that they will not control the academic programs they fund, and reject money that comes with too many strings attached.

These are important issues. However, my instinct is that insufficient academic freedom is a lesser problem than situations where it is invoked in support of dysfunctional practices. I say this because the existence of a large number of competing institutions means that even if a perspective is discriminated against in one place, it has a good chance of being supported in another place and so all views are in the end likely to be heard even if not from within all institutions. In contrast, where prevailing norms are dysfunctional, the problem is less likely to be mitigated by competition.

Two areas stand out for me.

First, there is the question of academic tenure, which is usually justified on academic freedom grounds. Tenure protects scholars against unreasonable punishment by trustees or other administrators. It also makes it almost impossible to remove professors for cause except in the most extraordinary cases. Combined with the prohibition on mandatory retirement or any kind of age based policy, tenure threatens the dynamism of the American university. The average age of Harvard's permanent faculty is now approaching 60, and there are far more professors over 70 than under 40. At one point during my presidency, the average age of the faculty in molecular and cellular biology was 63, and this was the group in charge of choosing the next generation of faculty!

Harvard is in no way atypical. Other than the Vatican, can one think of any other institution where the age structure is so skewed? The aspects of universities that are special—the emphasis on inspiring the young, and the importance of generating new ideas and conceptions—would naturally lead one to expect

that university faculties should be younger, not older, than leaders in businesses, hospitals, law firms, or even Congress. But this is manifestly not the case. The question of whether academic freedom can be protected without tenure as it is currently understood is worthy of serious consideration.

Second, there is the question of just what it is that academic freedom protects. It surely should protect the right to put forth unfashionable opinions or even opinions that are offensive to most members of a community. But, to assert that professors have the right to assert any opinion, perform any analysis, or tackle any subject is very different from claiming that all acts are equivalent. Academic freedom does not and should not include freedom from judgment or criticism, even harsh criticism. For example, one hopes that those who embrace creationist doctrines will be vigorously challenged by their colleagues.

More to the point: When professors seek to use the university to advance their ideological agenda, administrators and trustees must respond vigorously. This is what I attempted to do when a group of Harvard professors called on the University to divest stock in any company doing business with Israel. Faculty's right to express any point of view should not include the right to harness the prestige of one's academic affiliation to any particular viewpoint.

All of this is to say that academic freedom is a concept that must evolve.

A colleague of mine once remarked that students have a four-year perspective on universities, faculties have a "rest of a career" perspective, and presidents and trustees have—or should have—an even longer view. So it is with academic freedom. The United States is fortunate to have the vast majority of the world's really great universities. The tradition of academic freedom—of vigorous competition, of respect for the authority of ideas rather than the idea of authority—has much to do with this. If we are to maintain our leadership going forward, a wise definition of academic freedom will be essential.

“Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.”

— American Association of University Professors
1940 *Statement of Principles on Academic Freedom and Tenure*

KEY DOCUMENT #2

American Association of University Professors

1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments (excerpts) with an excerpt from the Statement on Professional Ethics adopted in June 1987

In 1940, following a series of joint conferences begun in 1934, representatives of the American Association of University Professors and of the Association of American Colleges (now the Association of American Colleges and Universities) agreed upon a restatement of principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure. *This restatement is known to the profession as the 1940* Statement of Principles on Academic Freedom and Tenure.

The 1940 Statement *is printed below, followed by Interpretive Comments as developed by representatives of the American Association of University Professors and the Association of American Colleges in 1969. The governing bodies of the two associations, meeting respectively in November 1989 and January 1990, adopted several changes in language in order to remove gender-specific references from the original text.*

The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to ensure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole.[1] The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.[**1**][2]

Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

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1. The word "teacher" as used in this document is understood to include the investigator who is attached to an academic institution without teaching duties.

2. Boldface numbers in brackets refer to Interpretive Comments that follow.

Academic Freedom

1. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.
2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.[**2**] Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.[**3**]
3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.[**4**]

Academic Tenure

After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

1. The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.
2. Beginning with appointment to the rank of full-time instructor or a higher rank,[**5**] the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution, it may be agreed in writing that the new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years.[**6**] Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period.[**7**]
3. During the probationary period a teacher should have the academic freedom that all other members of the faculty have.[**8**]
4. Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges and should have the opportunity to be heard in his or her own defense by all bodies that pass judgment upon the case. The teacher should be permitted to be accompanied by an advisor of

his or her own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from the teacher's own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution.[**9**]

5. Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.

1940 Interpretations

At the conference of representatives of the American Association of University Professors and of the Association of American Colleges on November 7–8, 1940, the following interpretations of the 1940 *Statement of Principles on Academic Freedom and Tenure* were agreed upon:

1. That its operation should not be retroactive.
2. That all tenure claims of teachers appointed prior to the endorsement should be determined in accordance with the principles set forth in the 1925 *Conference Statement on Academic Freedom and Tenure*.
3. If the administration of a college or university feels that a teacher has not observed the admonitions of paragraph 3 of the section on Academic Freedom and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning the teacher's fitness for his or her position, it may proceed to file charges under paragraph 4 of the section on Academic Tenure. In pressing such charges, the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility, and the American Association of University Professors and the Association of American Colleges are free to make an investigation.

1970 Interpretive Comments

Following extensive discussions on the 1940 Statement of Principles on Academic Freedom and Tenure *with leading educational associations and with individual faculty members and administrators, a joint committee of the AAUP and the Association of American Colleges met during 1969 to reevaluate this key policy statement. On the basis of the comments received, and the discussions that ensued, the joint committee felt the preferable approach was to formulate interpretations of the* Statement *in terms of the experience gained in implementing and applying the* Statement *for over thirty years and of adapting it to current needs.*

The committee submitted to the two associations for their consideration the following "Interpretive Comments." These interpretations were adopted by the Council of the American Association of University Professors in April 1970 and endorsed by the Fifty-sixth Annual Meeting as Association policy.

In the thirty years since their promulgation, the principles of the 1940 *Statement of Principles on Academic Freedom and Tenure* have undergone a substantial amount of refinement. This has evolved through a variety of processes, including customary acceptance, understandings mutually arrived at between institutions and professors or their representatives, investigations and reports by the American Association of University Professors, and formulations of statements by that association either alone or

in conjunction with the Association of American Colleges. These comments represent the attempt of the two associations, as the original sponsors of the 1940 *Statement*, to formulate the most important of these refinements. Their incorporation here as Interpretive Comments is based upon the premise that the 1940 *Statement* is not a static code but a fundamental document designed to set a framework of norms to guide adaptations to changing times and circumstances.

Also, there have been relevant developments in the law itself reflecting a growing insistence by the courts on due process within the academic community which parallels the essential concepts of the 1940 *Statement*; particularly relevant is the identification by the Supreme Court of academic freedom as a right protected by the First Amendment. As the Supreme Court said in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

The numbers refer to the designated portion of the 1940 *Statement* on which interpretive comment is made.

1. The Association of American Colleges and the American Association of University Professors have long recognized that membership in the academic profession carries with it special responsibilities. Both associations either separately or jointly have consistently affirmed these responsibilities in major policy statements, providing guidance to professors in their utterances as citizens, in the exercise of their responsibilities to the institution and to students, and in their conduct when resigning from their institution or when undertaking government-sponsored research. Of particular relevance is the *Statement on Professional Ethics*, adopted in 1966 as Association policy. (A revision, adopted in 1987, may be found in AAUP, *Policy Documents and Reports*, 10th ed. [Washington, D.C., 2006], 171–72.)
2. The intent of this statement is not to discourage what is "controversial." Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject.
3. Most church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 *Statement*, and we do not now endorse such a departure.
4. This paragraph is the subject of an interpretation adopted by the sponsors of the 1940 *Statement* immediately following its endorsement which reads as follows:

   > If the administration of a college or university feels that a teacher has not observed the admonitions of paragraph 3 of the section on Academic Freedom and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning the teacher's fitness for his or her position, it may proceed to file charges under paragraph 4 of the section on Academic Tenure. In pressing such charges, the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility, and the American Association of University Professors and the Association of American Colleges are free to make an investigation.

Paragraph 3 of the section on Academic Freedom in the 1940 *Statement* should also be interpreted in keeping with the 1964 *Committee A Statement on Extramural Utterances*, which states inter alia: "The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his or her position. Extramural utterances rarely bear upon the faculty member's fitness for the position. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar."

Paragraph 5 of the *Statement on Professional Ethics* also deals with the nature of the "special obligations" of the teacher. The paragraph reads as follows:

> As members of their community, professors have the rights and obligations of other citizens. Professors measure the urgency of these obligations in the light of their responsibilities to their subject, to their students, to their profession, and to their institution. When they speak or act as private persons, they avoid creating the impression of speaking or acting for their college or university. As citizens engaged in a profession that depends upon freedom for its health and integrity, professors have a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom.

Both the protection of academic freedom and the requirements of academic responsibility apply not only to the full-time probationary and the tenured teacher, but also to all others, such as part-time faculty and teaching assistants, who exercise teaching responsibilities. ...

8. The freedom of probationary teachers is enhanced by the establishment of a regular procedure for the periodic evaluation and assessment of the teacher's academic performance during probationary status. Provision should be made for regularized procedures for the consideration of complaints by probationary teachers that their academic freedom has been violated. One suggested procedure to serve these purposes is contained in the *Recommended Institutional Regulations on Academic Freedom and Tenure*, prepared by the American Association of University Professors.

9. A further specification of the academic due process to which the teacher is entitled under this paragraph is contained in the *Statement on Procedural Standards in Faculty Dismissal Proceedings*, jointly approved by the American Association of University Professors and the Association of American Colleges in 1958. This interpretive document deals with the issue of suspension, about which the 1940 *Statement* is silent.

   The 1958 *Statement* provides: "Suspension of the faculty member during the proceedings is justified only if immediate harm to the faculty member or others is threatened by the faculty member's continuance. Unless legal considerations forbid, any such suspension should be with pay." A suspension which is not followed by either reinstatement or the opportunity for a hearing is in effect a summary dismissal in violation of academic due process.

   The concept of "moral turpitude" identifies the exceptional case in which the professor may be denied a year's teaching or pay in whole or in part. The statement applies to that kind of behavior which goes beyond simply warranting discharge and is so utterly blameworthy as to make it inappropriate to require the offering of a year's teaching or pay. The standard is not that the moral sensibilities of persons in the particular community have been affronted. The standard is behavior that would evoke condemnation by the academic community generally. ...

Statement on Professional Ethics

The statement that follows, a revision of a statement originally adopted in 1966, was approved by the Association's Committee on Professional Ethics, adopted by the Association's Council in June 1987, and endorsed by the Seventy-third Annual Meeting. ...

2. As teachers, professors encourage the free pursuit of learning in their students. They hold before them the best scholarly and ethical standards of their discipline. Professors demonstrate respect for students as individuals and adhere to their proper roles as intellectual guides and counselors. Professors make every reasonable effort to foster honest academic conduct and to ensure that their evaluations of students reflect each student's true merit. They respect the confidential nature of the relationship between professor and student. They avoid any exploitation, harassment, or discriminatory treatment of students. They acknowledge significant academic or scholarly assistance from them. They protect their academic freedom.

3. As colleagues, professors have obligations that derive from common membership in the community of scholars. Professors do not discriminate against or harass colleagues. They respect and defend the free inquiry of associates. In the exchange of criticism and ideas professors show due respect for the opinions of others. Professors acknowledge academic debt and strive to be objective in their professional judgment of colleagues. Professors accept their share of faculty responsibilities for the governance of their institution.

For the full text of the AAUP 1940 Statement of Principles on Academic Freedom and Tenure *with 1970 Interpretive Comments, see:* http://www.aaup.org/file/principles-academic-freedom-tenure.pdf.

For the full text of the AAUP Statement on Professional Ethics, *see:* http://www.aaup.org/file/professional-ethics.pdf.

COMMENTARY

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THE CONCEPTS OF ACADEMIC FREEDOM and tenure articulated in the 1940 *Statement* are best understood as part of an ongoing tradition where university employers, serving the university's unique mission of creating and disseminating knowledge, have agreed to grant rights of exceptional vocational freedom of speech to professors in teaching, research, and extramural utterance without interference by the employer on the condition that individual professors meet the correlative duties of professional competence and ethical conduct. The faculty as a collegial body also has correlative duties both to enforce the obligations of individual professors and to defend the academic freedom of colleagues.

A brief history will put these concepts and the 1940 *Statement* into a clearer context. For several hundred years after the founding in the mid-1600s of institutions of higher education in the United States, professors labored under employment doctrine holding that private and public employees had no right to object to conditions placed on the terms of employment including restrictions on the free expression of ideas. As the modern university and its research mission developed in the late 1800s, and as professors increasingly questioned and challenged the cherished beliefs of the time, the lack of any employment protection for academic speech became a critical problem for the professoriate. University boards and administrators because of political, financial, moral or religious concerns tended to distort intellectual inquiry by imposing constraints on the offering of new hypotheses or the criticizing of accepted ones. With the founding of the AAUP and the 1915 *Declaration of Principles*, the professoriate sought as an organized group to negotiate employment protection for academic speech.

The mechanics of this employment protection for academic speech have been the subject of continuing negotiations between university employers and the academic profession. While the 1915 *Declaration* articulated the professoriate's understanding of academic freedom, the 1940 *Statement of Principles on Academic Freedom and Tenure* marked an agreement, negotiated over a number of years, between the AAUP and the Association of American Colleges (speaking for university employers). The 1940 *Statement* has been incorporated into employment contracts with professors at many universities and colleges, and individual professors' rights of academic freedom are protected by the AAUP itself and to some degree by associations of professors in the various disciplines. Accrediting agencies also give attention to academic freedom as articulated in the 1940 *Statement*.

It is the tradition of faculty self-governance that makes academic freedom unique, not tenure, as is often assumed. Effective peer review is therefore the key to justifying the university employer's grant of the rights of academic freedom.

The 1940 *Statement* reasons that universities are established for the common good, and that the common good depends upon the unfettered search for

truth and its free exposition. To ensure these things, the *Statement* provides that 1) "teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties"; and that 2) "teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial material which has no relation to their subject."

Such liberty requires responsibility, and the 1940 *Statement* duly notes that academic freedom "carries with it duties correlative with rights." The *Statement* goes on to list several specific duties and two more general duties (without suggesting that this listing is at all exhaustive). They include:

1. Duties relating to research and teaching
    a. Specific duties
        i. Professors must provide "adequate performance of their other academic duties" (meaning that professors cannot neglect assigned duties of teaching and service to the employer).
        ii. Research for pecuniary gain should be based upon an understanding with the authorities of the institution.
        iii. Teachers should be careful not to introduce into their teaching controversial matter that has no relation to their subject.
    b. General duties
        i. Professional competence
        ii. Ethical conduct
2. Duties relating to extramural utterance. Speech as a citizen is to be free of institutional censorship of discipline but subject to "special obligations." Teachers speaking as citizens should:
    a. at all times be accurate;
    b. exercise appropriate restraint;
    c. show respect for the opinions of others; and
    d. make every effort to indicate that they are not speaking for the institution.

The 1940 *Statement* also imposes two correlative duties on the faculty as a collegial body: 1) the duty to determine when individual professors inadequately meet their responsibilities as outlined above; and 2) the duty to foster and defend the academic freedom rights and duties of colleagues.

How does the professoriate do in terms of meeting the correlative duties outlined in the 1940 *Statement*? In contrast to the sister peer-review professions of law and medicine, the professoriate tends not to study its own ethics and makes almost no effort to acculturate graduate students and new professors into the duties of the profession. The data show that many faculty members have a poor understanding of academic freedom's duties. Without proper acculturation on duties to counterbalance self-interest, many faculty members tend strongly toward self-interest—hence their recurrent emphasis on protecting autonomy, job security, or personal advantage. Hence, too, a profession-wide tendency to avoid the difficult duties of peer review.

Professor Hamilton borrowed material from two sources for this commentary:

Neil Hamilton, *Academic Ethics* (ACE/Praeger 2002).

Neil Hamilton, "Peer Review: The Linchpin of Academic Freedom and Tenure," *Academe* (May-June 1997).

KEY DOCUMENT #3

C. Vann Woodward, Chairman
Report of the Committee to the Fellows of the Yale Corporation, 1974 (excerpts)

I

Of Values and Priorities

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter.
>
> John Milton, *Areopagitica*, 1644

> If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.
>
> Oliver Wendell Holmes, Jr.,
> *U.S. v. Schwimmer*, 1928

The primary function of a university is to discover and disseminate knowledge by means of research and teaching. To fulfill this function a free interchange of ideas is necessary not only within its walls but with the world beyond as well. It follows that the university must do everything possible to ensure within it the fullest degree of intellectual freedom. The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable. To curtail free expression strikes twice at intellectual freedom, for whoever deprives another of the right to state unpopular views necessarily also deprives others of the right to listen to those views.

We take a chance, as the First Amendment takes a chance, when we commit ourselves to the idea that the results of free expression are to the general benefit in the long run, however unpleasant they may appear at the time. The validity of such a belief cannot be demonstrated conclusively. It is a belief of recent historical development, even within universities, one embodied in American constitutional doctrine but not widely shared outside the academic world, and denied in theory and in practice by much of the world most of the time.

Because few other institutions in our society have the same central function, few assign such high priority to freedom of expression. Few are expected to. Because no other kind of institution combines the discovery and dissemination of basic knowledge with teaching, none confronts quite the same problems as a university.

For if a university is a place for knowledge, it is also a special kind of small society. Yet it is not primarily a fellowship, a club, a circle of friends, a replica of the civil society outside it. Without sacrificing its central purpose, it cannot make its primary and dominant value the fostering of friendship, solidarity, harmony, civility, or mutual respect. To be sure, these are important values; other institutions may properly assign them the highest, and not merely a subordinate priority; and a good university will seek and may in some significant measure attain these ends. But it will never let these values, important as they are, override its central purpose. We value freedom of expression precisely because it provides a forum for the new, the provocative, the disturbing, and the unorthodox. Free speech is a barrier to the tyranny of authoritarian or even majority opinion as to the rightness or wrongness of particular doctrines or thoughts.

If the priority assigned to free expression by the nature of a university is to be maintained in practice, clearly the responsibility for maintaining that priority rests with its members. By voluntarily taking up membership in a university and thereby asserting a claim to its rights and privileges, members also acknowledge the existence of certain obligations upon themselves and their fellows. Above all, every member of the university has an obligation to permit free expression in the university. No member has a right to prevent such expression. Every official of the university, moreover, has a special obligation to foster free expression and to ensure that it is not obstructed.

The strength of these obligations, and the willingness to respect and comply with them, probably depend less on the expectation of punishment for violation than they do on the presence of a widely shared belief in the primacy of free expression. Nonetheless, we believe that the positive obligation to protect and respect free expression shared by all members of the university should be enforced by appropriate formal sanctions, because obstruction of such expression threatens the central function of the university. We further believe that such sanctions should be made explicit, so that potential violators will be aware of the consequences of their intended acts.

In addition to the university's primary obligation to protect free expression there are also ethical responsibilities assumed by each member of the university community, along with the right to enjoy free expression. Though these are much more difficult to state clearly, they are of great importance. If freedom of expression is to serve its purpose, and thus the purpose of the university, it should seek to enhance understanding. Shock, hurt, and anger are not consequences to be weighed lightly. No member of the community with a decent respect for others should use, or encourage others to use, slurs and epithets intended to discredit another's race, ethnic group, religion, or sex. It may sometimes be necessary in a university for civility and mutual respect to be superseded by the need to guarantee free expression. The values superseded are nevertheless important, and every member of the university community should consider them in exercising the fundamental right to free expression.

We have considered the opposing argument that behavior which violates these social and ethical considerations should be made subject to formal sanctions, and the argument that such behavior entitles others to prevent speech they might regard as offensive. Our conviction that the central purpose of the university is to foster the free access of knowledge compels us to reject both of these arguments. They assert a right to prevent free expression. They rest upon the assumption that speech can be suppressed by anyone who deems it false or offensive. They deny what Justice Holmes termed "freedom for the thought

that we hate." They make the majority, or any willful minority, the arbiters of truth for all. If expression may be prevented, censored or punished, because of its content or because of the motives attributed to those who promote it, then it is no longer free. It will be subordinated to other values that we believe to be of lower priority in a university.

The conclusions we draw, then, are these: even when some members of the university community fail to meet their social and ethical responsibilities, the paramount obligation of the university is to protect their right to free expression. This obligation can and should be enforced by appropriate formal sanctions. If the university's overriding commitment to free expression is to be sustained, secondary social and ethical responsibilities must be left to the informal processes of suasion, example, and argument.

II

Of Trials and Errors

Part of the Committee's charge was to assess the condition of freedom of expression at Yale. This requires some search of the University's record, good, bad, and indifferent, in defending its principles. The full history is too long and complicated to unfold here, but there are more reasons for concentrating on the recent past than lack of space and time. It is not clear, for one thing, how early in its history Yale's commitment to these principles became firm. Nor is it clear how much is to be gained by comparing in this respect the old Yale with the new Yale of recent years.

While the old Yale laid valid claim to being a national institution with representatives in its student body and faculty from all parts of the country and many parts of the world, in significant ways it was more homogeneous than the new Yale. One consequence of that homogeneity was the absence of some divisions that would plague the future. Changes in policies of recruitment, admission, and grants of assistance replaced the relative homogeneity of old Yale with the heterogeneity of new Yale. The decade of the sixties brought larger delegations of classes, races, and ethnic groups that had been underrepresented before or not present at all. The new groups were more self-conscious as minorities and others were more conscious of them. Reactions ranged from insensitivity for minority points of view to paternalistic solicitude for minority welfare and feelings. And sometimes insensitivity and solicitude commingled.

The new heterogeneity did not prevent the forging of a strongly held consensus on certain issues. One of them was civil rights, and especially the rights of black people. Another was opposition to the Vietnam War and a multitude of policies associated with it. Yale shared in full the spirit of political activism and radical protest that swept the major campuses in the sixties. Storms of controversy and crises of confrontation broke over the campus with a force comparable to that which crippled some of the country's strongest universities. Yale was generally regarded as exceptionally fortunate in its ability to weather the years of crisis. Some thought the University led a charmed life, and while President Brewster had numerous critics, others attributed Yale's comparative stability to the quality of leadership provided by his administration. A complete account of those years, even a full study of free speech during the sixties would contain much in which Yale could take pride. Placed in the context of failures elsewhere, the failures at home—and they are serious enough to cause concern—would loom less large.

The University's commitment to the principle of freedom of expression was put to severe tests during the years of campus upheaval. It should be noted, however, that the main incidents of equivocation and failure with which this report is concerned did not coincide with the years of storm and stress. The first incident, that of the invitation to Governor George C. Wallace, occurred in 1963, before the

full onset of the critical period. The others came in 1972, after the tumult had subsided, and in 1974, a year of relative tranquillity. The latter incidents are those involving General William Westmoreland, Secretary of State William Rogers, and Professor William Shockley. Only the last of them culminated in actions that physically prevented a speaker from being heard when he appeared before an audience. The other scheduled speakers did not actually appear before an audience for various reasons, including the withdrawal of an invitation, decisions by invitees not to appear, and threats of disruption and possible violence. But failure or equivocation in defense of free speech was fairly attributable to the University community in some degree in at least three and possibly all four incidents.

It should be recalled that the record of the University includes successes as well as failures, and that the successes in defense of principle were not all on the side of speakers who supported the University consensus on the war and racial issues. In spite of prevailing hostility to their views on the part of a large campus majority, General Curtis LeMay, Governor Ronald Reagan, Senator Barry Goldwater, and Professor Richard Herrnstein were invited, received, and heard during these years. ...

* * *

This committee's account has revealed instances of faltering, uncertainty, and failure in the defense of principle on the part of various elements in the University community. Within the community has appeared from time to time a willingness to compromise standards, to give priority to peace and order and amicable relations over the principle of free speech when it threatens these other values. Elements within the University community have shown since the time of the Wallace incident signs of declining commitment to the defense of freedom of expression in the University.

A significant number of students and some faculty members appear to believe that when speakers are offensive to majority opinion, especially on such issues as war and race, it is permissible and even desirable to disrupt them; that there is small chance of being caught, particularly among a mass of offenders; that if caught there is a relatively good chance of not being found guilty; and that if found guilty no serious punishment is to be expected. In the only instance of massive infraction of free speech in which offenders were subject to disciplinary action, that of the Shockley case, experience lent support to some of these assumptions.

From the administration have come promptings that have at times been mixed and contradictory. It is true that in each of the crises reviewed and in many other critical situations during the troubled decade just ended President Brewster has voiced the University's commitment to freedom of expression, "to untrammelled individual initiative in preference to conformity," and to academic freedom generally. It is also true that the administration has never barred outright an invitation to speak; it has assigned halls on request, and has warned against disruption. In specific instances, however, statements by the President and the Corporation have been interpreted as assigning equal if not higher value to law and order, to town-gown relations, to proper motives, to the sensitivity of those who feel threatened or offended, and to majority attitudes. Some of the statements have placed blame for failure not only on the disrupters and their lawlessness, but also upon the inviters of the speakers and their motives, and on the views of the proposed speakers as well. Moreover, the University's physical arrangements for deterring and detecting disrupters have proved inadequate. And finally, the faculty has not been as alert as it might have been to these problems.

This committee, therefore, finds a need for Yale to reaffirm a commitment to the principle of freedom of expression and its superior importance to other laudable principles and values, to the duty

of all members of the University community to defend the right to speak and refrain from disruptive interference, and to the sanctions that should be imposed upon those who offend.

We agree with President Brewster's statement in his baccalaureate address of 1974, that "the prospects and processes of punishment" and the "lust for retribution" constitute no adequate solution—though we would urge clearer definition and more vigorous enforcement of rules. Rules and their enforcement must rest upon a consensus of the whole community on the principle of freedom of expression and a genuine concern over violations….

III

Of Ways and Means

The foregoing review has persuaded this committee that the time has come to revitalize our principles, to reaffirm and renew our commitment, and to find ways and means for the effective and vigorous defense of our values. To promote these ends we propose:

First, that a program of reeducation is required. Some members of the university do not fully appreciate the value of the principle of freedom of expression. Nor is this surprising. In one of his most famous dissents, Mr. Justice Holmes spoke to the question:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas...
>
> *Abrams v. U.S.,* 1919

Education in the value of free expression at Yale is the business of all sectors of the University. Much needs to be done. The first need is for effective and continuing publication of the University's commitment to freedom of expression. At present, only two readily available documents address the subject and suggest standards of conduct: the Yale College "Undergraduate Regulations" and the "Rights and Duties of Members of the Yale Law School." We urge that all University catalogues, as well as the faculty and staff handbooks, include explicit statements on freedom of expression and the right to dissent, and that the attention of students should be directed to these statements each year at registration. We also urge that each school—its dean, its faculty, and its students—consider the most effective ways to clarify and discuss the relation of free expression to the mission of the University. These might include addresses to entering students, discussions in informal settings such as the residential colleges, and special attention to the subject in student publications.

Second, that individuals and groups who object to a controversial speaker should understand the limits of protest in a community committed to the principles of free speech. Let us therefore be clear about those limits.

1) It is desirable that individuals and groups register in a wide-open and robust fashion their opposition to the views of a speaker with whom they disagree or whom they find offensive. When such a speaker has been invited to the campus by one group, other groups may seek to dissuade the inviters from proceeding. But it is a punishable offense against the principles of the University for the objectors to coerce others physically or to threaten violence.

2) The permissible registration of opposition includes all forms of peaceful speech, such as letters to newspaper editors, peaceful assembly, and counter-speeches in appropriate locations. Furthermore, picketing is permissible outside of a building so long as it is peaceful and does not interfere with entrance to or exit from the building or with pedestrian or vehicular traffic outside of a building. It is important to understand, however, that picketing is more than expression. It is expression joined to action. Accordingly, it is entitled to no protection when its effect is coercive.

3) There is no right to protest within a university building in such a way that any university activity is disrupted. The administration, however, may wish to permit some symbolic dissent within a building but outside the meeting room, for example, a single picket or a distributor of handbills.

4) In the room where the invited speaker is to talk, all members of the audience are under an obligation to comply with a general standard of civility. This means that any registration of dissent that materially interferes with the speaker's right to proceed is a punishable offense. Of course a member of the audience may protest in a silent, symbolic fashion, for example, by wearing a black arm band. More active forms of protest may be tolerated such as briefly booing, clapping hands, or heckling. But any disruptive activity must stop when the chair or an appropriate university official requests silence. Failure to quit in response to a reasonable request for order is a punishable offense.

5) Nor does the content of the speech, even parts deemed defamatory or insulting, entitle any member of the audience to engage in disruption. While untruthful and defamatory speech may give rise to civil liability it is neither a justification nor an excuse for disruption, and it may not be considered in any subsequent proceeding against offenders as a mitigating factor. Nor are racial insults or other "fighting words" a valid ground for disruption or physical attack—certainly not from a voluntary audience invited but in no way compelled to be present. Only if speech advocates immediate and serious illegal action, such as burning down a library, and there is danger that the audience will proceed to follow such an exhortation, may it be stopped, and then only by an authorized university official or law enforcement officer.

6) The banning or obstruction of lawful speech can never be justified on such grounds as that the speech or the speaker is deemed irresponsible, offensive, unscholarly, or untrue.

Third, the University could be more effective in discharging its obligation to use all reasonable effort to protect free expression on campus. We submit that this obligation can be discharged most effectively in the following ways:

1) The University and its schools should retain an open and flexible system of registering campus groups, arranging for the reservation of rooms, and permitting groups freely to invite speakers.

2) It is entirely appropriate, however, for the President and other members of the administration to attempt to persuade a group not to invite a speaker who may cause serious tension on campus. This is best done by communicating directly with the inviting group. It is appropriate for the University official to explain to the group its moral obligations to other members of the community. It is important, however,

for the official to make it clear that these are moral obligations for the inviters to weigh along with other considerations in deciding whether to go forward, and that a decision to go forward is one which carries no legal or disciplinary consequences nor risks of more subtle University reprisals.

3) Once an invitation is accepted and the event is publicly announced, there are high risks involved if a University official—especially the President—attempts by public or private persuasion to have the invitation rescinded. There is a risk that the public or private attempt will appear as an effort to suppress free speech, and also a risk that a public attempt will lend "legitimacy" to obstructive action by those who take offense at the speaker. Should the President or any other University official think it necessary to make such an attempt, however, it is important that he also make it plain that if his appeal is disregarded, (a) no disciplinary jeopardy will attach to the inviting group, and (b) the University will make every effort to insure that the speech takes place.

4) Generally the inviting group should be free to decide whether the speech will be open to the public. However, if the administration has reasonable cause to believe that outsiders will be disruptive, it may appropriately limit attendance to members of the University. The duty of the administration is to uphold free speech within the university community and to insure that a speaker be heard. To discharge this duty it must have the power to impose sanctions against disrupters. It has little power against outside offenders against its rules.

5) The administration's obligation to protect freedom of expression also means that when it has reasonable cause to anticipate disruption, it may require that individuals produce University I.D. cards to gain admission. We suggest that such cards be issued to all members of the University and that they include a photograph.

6) Much can be done to forestall disruption if sufficient notice is given of the impending event. The administration and others can meet with protesting groups, make clear the University's obligations to free expression, and indicate forms of dissent that do not interfere with the right to listen. The inviting group can work closely with the administration to devise the time, place, and arrangements for admitting the audience (if there are any limits on who may attend) that will best promote order.

7) When the administration has reasonable cause to anticipate disruption, it should designate a particular hall as one best suited to protect a speaker from disruption and make that hall as secure as is reasonably possible. Effective arrangements for identifying offenders such as the use of cameras can serve as a deterrent.

8) A group inviting a speaker may close the meeting to the press. It also may invite the press. In either case, the administration should cooperate.

If a group wishes to arrange for television coverage, it should discuss the matter with an appropriate University official. Television should be permitted if the inviting group desires, unless the President or a person designated by him determines that the presence of television will itself make it substantially more likely that serious disruption will occur. If such a determination is made, it is the obligation of the administration to forbid television and to declare that the presence of television increases the risk of thwarting free expression and puts individuals and the property of the University at high risk.

9) The administration's responsibility for assuring free expression imposes further obligations: it must act firmly when a speech is disrupted or when disruption is attempted; it must undertake to identify disrupters, and it must make known its intentions to do so beforehand.

These obligations can be discharged in two ways. One, the administration may call the city police and the criminal law. This is undesirable except where deemed absolutely necessary to protect individuals and property, for police presence can itself lead to injury and violence. Two, the administration can make clear in advance that serious sanctions will be imposed upon those who transgress the limits of legitimate protest and engage in disruption. It is plain, however, that if sanctions are to work as a deterrent to subsequent disruption, they must be imposed whenever disruption occurs. They must be imposed and not suspended. They must stick.

10) Disruption of a speech is a very serious offense against the entire University and may appropriately result in suspension or expulsion. Accordingly, one who is alleged to have committed such an offense should be tried before the University-Wide Tribunal. The Tribunal's jurisdiction should vest upon complaint by the President or Provost. The collective assent of the deans should not be required in cases of this sort.

We believe that the procedures established in the charter of the University-Wide Tribunal and the sanctions that the Tribunal may impose are well suited to so serious an offense as the disruption of free expression. ...

For the full text of the report, *see:* http://yalecollege.yale.edu/sites/default/files/woodward_report.pdf.

COMMENTARY

José A. Cabranes

United States Circuit Judge for the Second Circuit

Kate Stith-Cabranes

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C. VANN WOODWARD (1908-1999) was a preeminent student of American history (notably the history of the American South and race relations) whose career and work won every mark of professional and personal distinction, including the presidency of the American Historical Association, the Jefferson Lecture of the National Endowment for the Humanities, the Pulitzer and Bancroft Prizes, and a Sterling professorship, Yale's highest academic chair. His mild and courteous manner, and his reputation for rectitude and fearlessness in academic affairs, led President Kingman Brewster, Jr., and the Fellows of the Yale Corporation, the University's board of trustees, to call upon him in 1974 to chair a committee of Yale faculty, administrators, students, and alumni to "examine the condition of free expression, peaceful dissent, mutual respect, and tolerance at Yale, [and] to draft recommendations for any measures it may deem necessary for the maintenance of these principles[.]"

The Woodward Committee was appointed at the request of the Yale faculty in the aftermath of several high-profile efforts to obstruct or prevent the appearance of controversial figures on the campus. Its January 8, 1975, report—ever afterward known as "the Woodward Report"—was a milestone in the history of free expression at Yale and all of higher education. At Yale it was accorded something akin to constitutional status, printed by the Corporation in a "Yale blue" booklet with a dignity and imprimatur accorded otherwise only to the University's charter and by-laws. The Woodward Report has been implemented in various official Yale policies, and its recommended procedures for dealing with unanticipated disruptions of campus life have frequently served as a kind of handbook for administrators dealing with, for example, the occupation of academic spaces or buildings.

Written in the unornamented and graceful prose characteristic of Woodward's work, the Report accorded free expression at Yale a degree of protection close to that accorded by the First Amendment in the public sphere. Indeed, the Woodward Report begins by quoting Justice Oliver Wendell Holmes's famous dissent in *United States v. Schwimmer* (1929): "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."

That this principle of constitutional law should also be a principle of university administration is explained by a simple syllogism. First, "[t]he primary function of a university is to discover and disseminate knowledge." Second, "[t]o fulfill this function a free interchange of ideas is necessary." Therefore, "the university must do everything possible to ensure within it the fullest degree of intellectual freedom." Because "the paramount obligation of the university is to protect the... right to free expression," values other than free speech are "of lower priority in a university."

The Woodward Report proposes three "ways and means for the effective and vigorous defense of our values." First, the trustees and administrators of a university should re-educate members of the university, by, among other things, publishing explicit support for free speech values in handbooks and catalogues; second, they should clarify the "limits of protest"; and, third, they should outline steps to take when a group invites a controversial speaker. The Woodward Report notes competing forces that might present persistent challenges to a community in which free expression is accorded the highest value: "the fostering of friendship, solidarity, harmony, civility, or mutual respect," egalitarianism, sensitivity to offending racial minorities, security of controversial speakers, and town-gown relations (especially with respect to racist speech). Subsequent events add to this list sensitivity to sexual minorities, rights to privacy, the elimination of hostility to women, and security of members of the university.

While the AAUP restricts its recent focus to the academic freedom of faculty, the Woodward Report articulates a much broader and comprehensive vision of freedom of speech and thought in the academy. The Report distinguishes between academic freedom and *intellectual* freedom. *Academic* freedom is a prescriptive right: the right of tenured faculty to teach and research what they choose without outside influence; and it is the right of students to learn. Intellectual freedom is broader than academic freedom. In particular, *intellectual* freedom protects speech and expression, including obnoxious speech, of all on campus, not only the mandarin class of tenured professors. It shelters the student lounge as well as the faculty lounge.

Since the mid-1970s, a variety of social forces have challenged Yale's commitment to free speech values. Two developments in particular are worthy of mention. First, some government agencies have developed broad conceptions of their charge to enforce anti-discrimination laws to include review of whether a school "inadequate[ly] respon[ded]" to an alleged "trend of public sexual harassment" on the campus. Second, universities, including Yale, have declared a commitment to "civility"; in Yale's case, this includes a decree that students at Yale College shall "value civility in all their interactions and [] maintain a sensitivity to the circumstances and feelings that inform their ideas." The result is curious indeed: those on campus may have less freedom of speech than those from outside the university community who are invited on an *ad hoc* basis to speak on campus.

The challenges to free speech at Yale, as at other universities, have come especially from groups declaring, in the undisputed exercise of their own speech rights, a sensitivity to satiric, uncivil, disrespectful, or simply hateful, speech, and sometimes also proclaiming themselves to be the victims of a "hostile" or offensive "environment" and "climate"—created by insensitive students and others who must therefore be punished. The daily defense of freedom of expression necessarily falls, at Yale as elsewhere, on the shoulders of administrators, some tenured but most not, who themselves may feel beleaguered by the offended groups, but are nevertheless intent on avoiding offense.

In these contests between wounded, sensitive victims and "uncivil" or "hateful" speakers, freedom of speech, as Woodward predicted, is on the line. The offended purport to speak for large numbers, through the megaphones provided by national constituencies. The putative offenders, meanwhile, find themselves vulnerable because their politically volatile speech runs afoul of a mobilized public opinion. Under stress, administrators clutch the talisman of "civil and respectful community" and morph into campus monitors of acceptable speech, threatening possible disciplinary sanctions in their unhappy role as Civility Police. Meanwhile, government agencies enter the fray, responding to complaints from the aggrieved, and often stimulating and encouraging the administrators. In these cases, administrators at universities like Yale cannot feel good or look good. Following agency rules, and fearful of more harmful publicity, they submit to investigations which are often prolonged and allegedly

"confidential" but where the complaining parties freely avail themselves of access to a delighted media, on and off campus, to describe their grievances to the nation.

The denouement of these theatrical dramas—after many months of negative publicity for the university, and much welcome publicity for the individuals leading the campaign of complaint—is often simple: an announcement that the agency has completed its "investigation" and has reached an "agreement" with the university. In the agreement, the university artfully avoids any suggestion of legal liability but nevertheless effectively confesses to some ambiguously-described error by penalizing the organization associated with, or individuals who engaged in, the offensive speech and by adopting still another set of "procedures" meant to handle grievances of this sort in the future without recourse to an antidiscrimination agency. In turn, the agency, which seldom actually litigates and whose settlements are not subject to judicial review, is satisfied to proclaim itself victorious, without any public adjudication of the facts or the applicable law.

Even when the aggrieved do not have recourse to a government agency, universities like Yale may be inclined to proclaim "mea culpa" in the face of an incident of incivility. The confession takes several forms: for example, letters from university officials condemning offensive speech and objectionable speakers, or public fora at which students and staff can engage in criticism and self-criticism. The impulse of university administrators is to proclaim that although racism, sexism, homophobia, and obnoxiousness afflict the culture at large, the university's administration does not favor any of those vices, and in fact condemns them entirely. Of course, the Woodward Report itself allows administrators to voice "other values," so long as they do not censor speech. But when administrators repeatedly condemn uncivil speakers, they blur the lines between endorsing "other values," "educating" the community, and viewpoint censorship. Free speech is the loser.

The principles of free expression pronounced and codified in the Woodward Report will always be at risk when the values of "community," "civility," and "respect" compete for primacy in the hearts and minds of those charged with defending free speech on campus. That is why trustees, who hold fiduciary responsibility for the policies of their institutions, must be ever-vigilant to uphold and preserve the principles of free speech on which the integrity of higher education ultimately rests. ◑

José A. Cabranes was General Counsel of Yale University when appointed to the federal bench in 1979 and thereafter served long terms as a trustee of Yale, Colgate University, and, most recently, his undergraduate alma mater, Columbia University. Kate Stith-Cabranes served as a trustee (and as Vice Chair of the Board of Trustees) of her alma mater, Dartmouth College. They thank Michael Leo Pomeranz, a graduate of Yale College and a student at Yale Law School, for his research assistance.

“The U.S. Supreme Court has called America’s colleges and universities ‘vital centers for the Nation’s intellectual life,’ but the reality today is that many of these institutions severely restrict free speech and open debate.”

— The Foundation for Individual Rights in Education
Spotlight on Speech Codes 2013

KEY DOCUMENT #4

The Foundation for Individual Rights in Education
Spotlight on Speech Codes 2013: The State of Free Speech on Our Nation's Campuses (excerpts)

The U.S. Supreme Court has called America's colleges and universities "vital centers for the Nation's intellectual life," but the reality today is that many of these institutions severely restrict free speech and open debate. Speech codes—policies prohibiting student and faculty speech that would, outside the bounds of campus, be protected by the First Amendment—have repeatedly been struck down by federal and state courts. Yet they persist, even in the very jurisdictions where they have been ruled unconstitutional; the majority of American colleges and universities have speech codes. …

Speech codes … gained popularity with college administrators in the 1980s and 1990s. As discriminatory barriers to education declined, female and minority enrollment increased. Concerned that these changes would cause tension and that students who finally had full educational access would arrive at institutions only to be hurt and offended by other students, college administrators enacted speech codes.

In doing so, however, administrators ignored or did not fully consider the legal ramifications of placing such restrictions on speech, particularly at public universities. …

Public Universities vs. Private Universities

The First Amendment prohibits the government—including governmental entities such as state universities—from interfering with the freedom of speech. A good rule of thumb is that if a state law would be declared unconstitutional for violating the First Amendment, a similar regulation at a state college or university is likewise unconstitutional.

The guarantees of the First Amendment generally do not apply to students at private colleges because the First Amendment regulates only government—not private—conduct. Moreover, although acceptance of federal funding does confer some obligations upon private colleges (such as compliance with federal anti-discrimination laws), compliance with the First Amendment is not one of them.

This does not mean, however, that students and faculty at private schools are not entitled to free expression. In fact, most private universities explicitly promise freedom of speech and academic freedom, presumably to lure the most talented students and faculty, since most people would not want to study or teach where they could not speak and write freely.

Georgetown University's "Speech and Expression Policy," for example, asserts: "[A]ll members of the Georgetown University academic community, which comprises students, faculty and administrators, enjoy the right to freedom of speech and expression. This freedom includes the right to express points of view on

the widest range of public and private concerns and to engage in the robust expression of ideas." Similarly, Smith College's "Statement of Academic Freedom and Freedom of Expression" states that "[f]reedom of speech and expression is the right both of members of the Smith College community and of invited guests." Yet both of these schools prohibit a great deal of speech that the First Amendment would protect at a public university.

At private universities like Georgetown and Smith, it is this false advertising—promising free speech and then, by policy and practice, prohibiting free speech—that FIRE considers impermissible. … [U]niversities may not engage in a bait-and-switch where they advertise themselves as bastions of freedom and instead deliver censorship and repression.

What Exactly is "Free Speech" and How Do Universities Curtail It?

What does FIRE mean when we say that a university restricts "free speech"? Do people have the right to say absolutely anything, or are only certain types of speech "free"?

Simply put, the overwhelming majority of speech is protected by the First Amendment. Over the years, the Supreme Court has carved out some narrow exceptions: speech that incites reasonable people to immediate violence; so-called "fighting words" (face-to-face confrontations that lead to physical altercations); harassment; true threats and intimidation; obscenity; and defamation. If the speech in question does not fall within one of these exceptions, it most likely is protected speech.

The exceptions are often misused and abused by universities to punish constitutionally protected speech. …

FIRE surveyed 409 schools for its annual report and found that over 62 percent maintain severely restrictive, "red light" speech codes—policies that clearly and substantially prohibit protected speech. [These policies come in many forms: speech codes; time, place, and manner restrictions on speech; harassment policies; anti-bullying policies; policies on tolerance, respect, and civility; policies on bias and hate speech; and policies governing speakers, demonstrations, and rallies. The "red-light" schools are listed on the following page.] …

Unfortunately, progress [on the speech code front] continues to be threatened by new federal and state regulations on harassment and bullying. A number of universities have adopted more restrictive harassment policies threatening protected speech in response to the April 4, 2011, "Dear Colleague" letter issued by the federal Department of Education's Office for Civil Rights (OCR), the agency responsible for enforcement of federal anti-discrimination laws on campus. That letter backed away from OCR's previously robust support for students' expressive rights, and a number of universities have followed suit.

Moreover, a number of schools have adopted unconstitutionally overbroad and/or vague anti-bullying policies within the past year, under pressure from federal and state governments to address the issue of bullying on campus.

Thus … there is ongoing reason for concern about the new waves of campus censorship potentially facilitated by federal agencies and federal and state legislators.

Footnotes in the original report have been omitted from the above excerpts.

For the full text of the report, see: http://thefire.org/public/pdfs/Spotlight_on_Speech_Codes_2013.pdf.

Schools with a Red Light Rating for the 2011-2012 Academic Year:

Adams State University
Alabama A&M University
Alabama State University
Alcorn State University
American University
Angelo State University
Arkansas State University
Armstrong Atlantic State University
Athens State University
Auburn University
Auburn University Montgomery
Barnard College
Bates College
Bemidji State University
Boston College
Boston University
Brandeis University
Bridgewater State University
Brooklyn College, City University of New York
Brown University
Bryn Mawr College
Bucknell University
California Institute of Technology
California Maritime Academy
California State Polytechnic University–Pomona
California State University–Channel Islands
California State University–Chico
California State University–Dominguez Hills
California State University–Fresno
California State University–Fullerton
California State University–Long Beach
California State University–Los Angeles
California State University–Monterey Bay
California State University–Sacramento
California State University–Stanislaus
California University of Pennsylvania
Cameron University
Carleton College
Case Western Reserve University
Central Connecticut State University
Central Michigan University
Central Washington University
Centre College
Cheyney University of Pennsylvania
Chicago State University
Clark University
Colby College
Colgate University
College of the Holy Cross
Colorado College
Columbia University
Connecticut College
Cornell University
Davidson College
Delaware State University
Delta State University
DePauw University
Dickinson College
East Carolina University
East Stroudsburg University of Pennsylvania
East Tennessee State University
Eastern Kentucky University
Eastern Michigan University
Edinboro University of Pennsylvania
Emory University
Evergreen State College
Fitchburg State University
Florida Gulf Coast University
Florida International University
Florida State University
Fordham University
Fort Lewis College
Franklin & Marshall College
Frostburg State University
Georgetown University
Georgia Institute of Technology
Georgia State University
Gettysburg College
Governors State University
Grambling State University
Grand Valley State University
Harvard University
Howard University
Humboldt State University
Illinois State University
Indiana State University
Indiana University of Pennsylvania
Indiana University, Southeast
Iowa State University
Jackson State University
Jacksonville State University
Johns Hopkins University
Kansas State University
Kean University
Kenyon College
Lafayette College
Lake Superior State University
Lehigh University
Lincoln University
Louisiana State University–Baton Rouge
Macalester College
Mansfield University of Pennsylvania
Marquette University
Marshall University
Massachusetts College of Liberal Arts
McNeese State University
Michigan Technological University
Middle Tennessee State University
Middlebury College
Missouri State University
Missouri University of Science and Technology
Montana State University–Bozeman
Montana Tech of the University of Montana
Morehead State University
Mount Holyoke College
Murray State University
New York University
Nicholls State University
North Carolina Central University
Northeastern Illinois University
Northeastern University
Northern Arizona University
Northern Illinois University
Northern Kentucky University

Northwestern Oklahoma State University
Northwestern University
Oakland University
Oberlin College
Ohio University
Oregon State University
Princeton University
Purdue University
Purdue University Calumet
Rensselaer Polytechnic Institute
Rice University
Sam Houston State University
San Francisco State University
Sewanee,The University of the South
Shawnee State University
Smith College
Southeastern Louisiana University
Southern Illinois University at Carbondale
Southwest Minnesota State University
St. Olaf College
State University of New York–Brockport
State University of New York–Fredonia
State University of New York–New Paltz
State University of New York–University at Buffalo
State University of New York College of Environmental Science and Forestry
Stevens Institute of Technology
Stony Brook University
Swarthmore College
Syracuse University
Tarleton State University
Tennessee State University
Texas A&M University–College Station
Texas Southern University
Texas Tech University
Texas Woman's University
The College of New Jersey
The Ohio State University
Trinity College
Troy University
Tufts University
Tulane University
Union College
University of Alabama
University of Alabama at Birmingham
University of Alaska–Anchorage
University of Alaska–Southeast
University of Arkansas–Fayetteville
University of California, Irvine
University of California, San Diego
University of California, Santa Cruz
University of Central Arkansas
University of Chicago
University of Cincinnati
University of Connecticut
University of Delaware
University of Florida
University of Hawaii at Hilo
University of Houston
University of Idaho
University of Illinois at Chicago
University of Illinois at Springfield
University of Illinois at Urbana-Champaign
University of Iowa
University of Kansas
University of Louisville
University of Maine–Presque Isle
University of Massachusetts–Amherst
University of Massachusetts at Lowell
University of Miami
University of Michigan–Ann Arbor
University of Minnesota–Morris
University of Minnesota–Twin Cities
University of Missouri–Columbia
University of Missouri at St. Louis
University of Nevada–Las Vegas
University of Nevada–Reno
University of New Hampshire
University of New Mexico
University of New Orleans
University of North Carolina–Chapel Hill
University of North Carolina–Greensboro
University of North Carolina School of the Arts
University of North Dakota
University of North Texas
University of Northern Colorado
University of Northern Iowa
University of Notre Dame
University of Oregon
University of Richmond
University of South Alabama
University of South Carolina–Columbia
University of South Florida
University of Southern California
University of Southern Indiana
University of Southern Mississippi
University of Texas at Arlington
University of Texas at Austin
University of Texas at El Paso
University of Texas at San Antonio
University of Toledo
University of Tulsa
University of Wisconsin–Eau Claire
University of Wisconsin–Green Bay
University of Wisconsin–La Crosse
University of Wisconsin–Madison
University of Wisconsin–Oshkosh
University of Wisconsin–Stout
University of Wyoming
Utah State University
Utah Valley University
Valdosta State University
Vanderbilt University
Virginia Commonwealth University
Wake Forest University
Washington State University
Washington University in St. Louis
Wayne State University
Wesleyan University
West Chester University of Pennsylvania
West Virginia University
Western Illinois University
Western Kentucky University
Western Michigan University
Western State College of Colorado
Westfield State University
William Paterson University
Winston Salem State University
Worcester State University
Wright State University
Youngstown State University

COMMENTARY

Alan Charles Kors

Henry Charles Lea Professor of History, University of Pennsylvania
Co-founder, The Foundation for Individual Rights in Education

AS THE HEIRS OF "THE SIXTIES" and their admirers gained power at our colleges and universities, campuses have moved from the Free Speech Movement to speech codes. Ideologues in higher education want to show that they control the symbolic and judicial environment. In what should be a national scandal, given the crucial importance of an education in freedom to America, universities are too often the scene of a ferocious assault upon free speech.

Of course, a private, voluntary association may adopt whatever rules, within the law, it chooses. It is part of our pluralism and liberty that America may have Catholic seminaries or neo-Marxist institutes. Most universities, however, promise academic freedom and legal equality but deliver selective repression and censorship. We have names for that in civil society: fraudulent inducement, false advertising, and breach of contract.

Even at public institutions, ensuring the basic rights of a free society too often requires litigation and political action. Speech codes fall when students are courageous enough to challenge them (but typically only then).

Speech codes of the past ten to fifteen years (some since overturned) must be heard to be believed: Bowdoin College banned jokes and stories "experienced" by others as "harassing." Brown University banned "verbal behavior" that produces "feelings of impotence, anger, or disenfranchisement," whether "intentional or unintentional." Colby College outlawed speech that causes "a vague sense of danger" or a loss of "self-esteem." The University of Connecticut outlawed "inconsiderate jokes," "stereotyping," and even "inappropriately directed laughter." Syracuse University outlawed "offensive remarks...sexually suggestive staring... [and] sexual, sexist, or heterosexist remarks or jokes." The University of Maryland criminalized "idle chatter of a sexual nature...pseudo-medical advice [about sex]... and holding or eating food provocatively."

Speech codes deny the dignity and strength of meeting speech and expression that one abhors with further speech, reason, evidence, contempt, moral outrage, and moral witness. Sunlight, as Justice Brandeis observed, not coercion, is the best disinfectant.

Speech codes become yet more insufferable by their intended double standards in practice, without which they could not last a nanosecond. The first time that a feminist professor is tried on charges of offending evangelical or conservative students, let alone sentenced to mandatory Christian or free-market sensitivity training, the whole system would fall. In the current climate, however, Christian students are asked to bear the insults of Serrano's "Piss Christ" (a crucifix immersed in the artist's own urine). That is protected expression. Immerse a portrait of Martin Luther King, Jr., or the Prophet Mohammed, however, and the university would close for days of conscience, jobs would

be lost, sensitivity training would be made mandatory, and there would be an annual week of shame on the campus calendar. Indeed, the most common terms of racial abuse on campuses are not the crude epithets of the KKK, but the hurtful and hateful terms "Uncle Tom," "Oreo" (black on the outside, white on the inside) directed against blacks who have chosen to have white friends. No one, however, has ever been prosecuted for *those* hostile terms. Our campuses have neither individual liberty nor legal equality, and they cruelly tell whole groups that they are too weak to live with freedom and the Bill of Rights.

KEY DOCUMENT #5

Edward Shils

"Do We Still Need Academic Freedom?" from *The American Scholar*, 1993 (excerpts)

I

Sidney Hook once told me of an observation made by John Dewey in his last years. Dewey, according to Hook, remarked rather wryly that, when the American Association of University Professors was formed in 1916, a committee A and a committee B were established. One was intended to deal with academic freedom and tenure and the other with academic obligation. The activities of the committee on academic freedom and tenure made up most of the agenda of activities of the Association; the committee on academic obligations had never once met, according to Dewey's recollection. The American Association of University Professors was a product of the situation in which some of the leading university teachers in the country thought that, because the academic profession was entitled to respect as a calling, they were entitled to academic freedom. Even in the second decade of the twentieth century, powerful persons outside the universities, and within the universities—trustees, presidents, and deans, or heads of departments—still regarded their academic staffs as hired hands to be appointed and dismissed at will. Such persons were regarded as the enemies of academic freedom. Although there are still some rough-handed presidents and deans in back-country colleges and state universities, on the whole these traditional enemies of academic freedom are seldom any longer to be seen.

In the minds of the American academics who were active in the early years of the Association, academic freedom and permanence of tenure were indissolubly associated with each other. At that time, it was said that the latter was needed to guarantee the former.

Academic freedom was declared to be an assurance that new ideas would be discovered, that sound old ideas would be appreciated in a more critical way, and that unsound ones would be discarded. The argument for academic freedom was roughly the argument for liberty in general put forth by John Stuart Mill in *On Liberty*. It was also assumed by their proponents that academics, even if they did not discover new ideas, should be free, in their teaching and writing, to say what they believed. It was further assumed that they would not be arbitrary in what they believed and taught; it was accepted that they would try to tell the truth as it was understood by them from their study and rational reflection.

Since the chief sanction against academics who honestly spoke their beliefs in teaching was dismissal, the best protection for their academic freedom seemed to be the guarantee that such a sanction would not be exercised against them. Permanent tenure seemed to be that guarantee.

Permanent tenure now has gone off on a career of its own. It has become a self-evident good in itself; it has become "job security." Permanent tenure—or plain "tenure," as it is now called—is an object of great desire among academics, especially the younger generation who are preoccupied by it. I seldom hear it mentioned as an assurance of freedom. Yet whenever some modification of the current practice of providing permanent tenure after a probationary period or on the attainment of a particular rank is proposed, the argument that it is necessary for academic freedom is brought to life again. In those circumstances it is restored to its former status as the main argument for permanent tenure. This, however, is rather infrequent since the institution of permanent tenure is nowadays rather firmly established in American universities and colleges.

Academic freedom, too, has taken a path of its own. It is no longer thought that it has any close relationship to the search for or the affirmation of truths discovered by study and reflection. It has become part of the more general right of the freedom of expression. Expression is not confined to the expression of reasoned and logically and empirically supported statements; it now pretty much extends to the expression of any desire, any sentiment, any impulse.

II

University teachers in American society, since the Second World War, have become privileged persons. In the leading universities at least, they have a rather light stint of teaching. They have long vacations, they often have interesting young persons as students and friends, they sometimes have interesting colleagues. They can usually, in most universities much of the time, teach courses in which they are interested and not teach courses in which they are not interested. They are usually allowed, with or without the consent of their colleagues and administrators, to shift their academic interests within their fields, and they can vary their teaching and research accordingly. They are generally free to choose their subjects or research in accordance with their intellectual interests, within the limits imposed by financial resources, equipment, and the like. Compared with persons in many other occupations, they have immense privileges. Academic freedom is one of these privileges.

Academic freedom is not a universal or human right, enjoyed in consequence of being a member of the human race. It is not entirely a civil right of participation in the political activities of a liberal democratic society. It is not identical with the freedom of the citizen to act in the political sphere. The American university is an institution of the civil sphere; whether a private or state university, it is an autonomous institution with its own rules and standards of decision with respect to its characteristic activities—namely, academic activities. Academic freedom is a qualified right; it is a privilege enjoyed in consequence of incumbency in a special role, an academic role, and it is enjoyed conditionally on conformity with certain obligations to the academic institution and its rules and standards. It is an immunity from decisions about academic matters taken on other than academic or intellectual grounds, by academic, governmental, ecclesiastical, or political authorities.

Academic freedom has two parts. One, the most important, is the freedom to do academic things without the threat of sanctions for doing them. The sanctions may range from arrest, imprisonment, torture, dismissal, withdrawal of the right to teach, expulsion from learned societies or refusal of admission to learned societies, censure by academic administrators, refusal of due promotion, and imposition of exceptional or onerous tasks, to personal abuse and the disruption of classes.

Academic freedom, in this first sense, is the freedom to do academic things, to express beliefs which have been arrived at by the prolonged and intensive study of nature, human beings, and societies and of

the best works of art, literature, etc., created by human beings, and by the reasoned analysis of the results of those prolonged and intensive studies. These beliefs, arrived at by careful study and reflection, must be made as true as they can be. Thus, academic freedom is the freedom to seek and transmit the truth. Academic freedom postulates the possibility of arriving at truthful statements and of discriminating among statements as to their truthfulness in the light of the evidence which is available to assess them.

The criterion of truthfulness is inherent in the activities of teaching and research. This means the freedom to teach according to the teacher's convictions about the matter taught, arrived at by careful study and with due respect to what is thought by qualified colleagues, without any of the sanctions mentioned above or others. It certainly includes the freedom to disagree with colleagues about matters of substance and to do so in accordance with reasonable evidence and arguments. It means the freedom to teach in ways which the teacher regards as effective as long as respect is shown for the rules of reasonable discourse, for the dignity of the student, and for general rules of propriety. It means the freedom to choose one's problems for research, to use the methods one thinks best, to analyze one's data by the methods and theories one thinks best, and to publish one's results. Academic freedom, in its specific sense, is the freedom to do academic things within the university.

Academic freedom is also the right of the academic to participate in those activities within the university which affect directly the performance of academic things. The right to participate in these activities also carries with it the obligation to do so. The privilege of academic freedom confers the rights and imposes the obligations of academic citizenship. In the first instance, this includes the right and obligation of the academic to participate in the decisions regarding the appointment of teachers and research workers who will work in his or her own department. It also includes the right and obligation to participate in decisions regarding the substance and form of courses of study, examinations, the marking of examinations, and the awarding of degrees. At this point, academic freedom becomes the right and obligation to participate in academic self-government.

In all cases, this freedom is hedged about by academic and intellectual traditions. These traditions, which are difficult to delineate, include not only the substantive intellectual traditions of disciplines and of fields of study and research, but also rules of conduct toward colleagues and students. These traditions must not, however, be so interpreted that they restrict the intellectual freedom of the academic; at the same time, their imprecision is not a license according to which anything goes.

Academic freedom is thus not an unlimited freedom of teachers to do anything they want in their classrooms or in their relations with their students or to work on just anything in their research by whatever methods they wish and to assert whatever they wish in their publications. There has to be, above all, concern to teach the truth, to attain the truth, and to publish the truth.

In matters of academic appointment, the decisive and overriding criterion must be the candidate's mastery of established truths, his achievements in discovering new truths, his respect for truth in teaching. The traditions regarding what is true, what are the best methods, and the rest, are not absolutely and unquestionably precise. They have to be interpreted, but they must be interpreted with respect for truth—and reliability—as the chief value of academic life.

The provision of academic freedom does not provide for the right to publish the results of one's research in any particular journal, regardless of the assessments of the editor and his referees about the scientific or scholarly merit of those results. Academic freedom does not include the right to obtain financial support for one's research regardless of the assessment of the intellectual merit of the proposed investigation rendered by qualified referees or peers. At the same time, the refusal of publication or of financial support on political, sexual, racial, or religious grounds is an infringement on academic freedom.

It introduces other than intellectual criteria—that is, criteria derived from the central academic value of truthfulness—into decisions about academic matters.

The protection of the academic engaged in the performance of academic actions from sanctions imposed on him or her on the basis of political, religious, or sexual criteria is the central function or justification of the guarantee of academic freedom. ...

III

.... Academic freedom certainly extended to intellectual originality. It was for the departmental colleagues of their own university and their peers outside their own university, when one of them departed from that consensus, to decide whether the individual in question was being original, or divergent within reasonable limits, or eccentric to the point of mental incapacity, or impermissibly arbitrary, indolent, or otherwise irresponsible. Sanctions for their failure to conform with accepted intellectual standards could not be denounced on the grounds that they infringed on the right of academic freedom. Nor could frequently recurrent and unexcused absences from scheduled classes fall under the prerogatives to be assured by academic freedom.

Academic freedom did not include freedom to substitute a subject or topic for another subject or topic which had nothing to do with the subject or topic a teacher had been appointed or assigned or had agreed to teach. If a teacher were not reappointed—tantamount to dismissal—or not promoted on grounds of intellectual eccentricity, mental incapacity, or intellectual irresponsibility, that was not to be regarded as an infringement on academic freedom.

In other words, the protection afforded by academic freedom did not extend to the point of protecting the teachers in their derelictions from their obligation to seek and respect the truth in their teaching and research, according to their best lights and capacities. Similarly, if teachers fabricated, falsified, or plagiarized the results of their research, they could not claim the protection of academic freedom. Nor could they claim the protection of academic freedom for statements for which they had no evidence or which were flagrantly and arbitrarily contrary to the prevailing interpretation of the available evidence. ...

For the full text, see The American Scholar *LXII (Spring 1993): 187-209.*

COMMENTARY

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IN "DO WE STILL NEED ACADEMIC FREEDOM?" Edward Shils reminds us of an often-neglected fact: that academic freedom—as a concept, principle, and historical fact—is premised on a reciprocal relationship with academic duty. Such a relationship should not surprise us. After all, philosophers have consistently held that rights often logically and empirically entail the commitment to certain duties.

Shils also points to an interesting and important historical fact: when it was formed in 1916, the American Association of University Professors established two primary committees: Committee A, concerned with academic freedom and tenure; and Committee B, which was dedicated to fostering academic responsibility, or what Shils calls "academic obligation." Academic freedom "is a privilege enjoyed in consequence of incumbency in a special role, an academic role, and it is enjoyed conditionally on conformity with certain obligations to the academic institution and its rules and standards."

Academic freedom consists of the right to pursue the truth in scholarship and teaching, and to enjoy authority regarding such academic matters as the nature of the curriculum, faculty governance, and who shall be entitled to join the faculty (Shils speaks of "the freedom to do academic things"). Academic obligation requires that academics pursue academic freedom with the skills and frame of mind requisite to the task. Obligation includes such things as maintaining respect for the truth (which means avoiding bias in its various forms); exercising professional and fair judgment; and maintaining professional competence.

Obligation also includes something about which Shils could have been more explicit: the obligation to protect academic freedom itself when it comes under attack from sources inside or outside the academic institution's gates.

So academic freedom and academic obligation are two sides of the same coin. But Shils also reminds us of another historical fact that many have either not known or have forgotten. Committee A has thrived in the decades since its inception (to be sure, it has not always lived up to its obligations, as when it was less than vigilant during the McCarthy era and during the later era of speech codes and political correctness); but Committee B died soon after its birth. In fact, it never even met. Shils provides many reasons why this omission violates the social contract that supports academic freedom in the first place.

Shils does not provide specific reasons for why this omission happened, but two come readily to mind. First, as many scholars and observers have shown, academic freedom has found itself under serious attack from external and internal sources many times over the course of American history. Such attacks constitute a danger that is clear and present, creating an obvious obligation to rise to the occasion. Indeed, the "Red Scare" and other threats to academic freedom arose during the AAUP's formative years,

so the organization had immediate threats to attend to. Academic "obligations," on the other hand, are often less discernible or more nebulous (except in clear cases), and less likely to ignite fire in the belly. In America, it is easier to rally the troops in support of freedom than in support of responsibility.

A second reason is more subtle, but definitely implied by Shils' analysis. Shils speaks of the special "privileges" that academics enjoy, which many have come to construe as inalienable rights. Academic freedom is such a privilege, for it includes job-related freedoms and protections (such as tenure for the fortunate elite) that are unavailable to most citizens. Picking up where Shils left off, Walter Russell Mead has recently written on his blog for *The American Interest* that higher education and the professoriate now resemble medieval and early modern "guilds." Guilds and later professional groups received special privileges and freedoms in the first place because society believed that such groups (e.g., the medical profession, the legal profession, the professoriate in our times, various trades) would use these grants to further the public good. At their origin, guilds' rights were derived from a *quid pro quo* balance of rights and obligations.

Unfortunately, like guilds, professional groups often come to forget or downplay the obligations that legitimated their grants of privilege. Society has tolerated this shift until social and economic forces have compelled reconsideration. For example, the high cost of legal services today is compelling more states to question some laws that granted special monopoly privileges to licensed attorneys. Many states now authorize legal services by non-lawyers in suitable situations, though bar associations fight such laws like the plague. Likewise, well-known problems in higher education—the shocking escalating costs and concomitant student debt; administrative bloat that defies logic; the indefensible lack of intellectual diversity on many campuses, which is associated with political bias; the shrinking teaching loads at many major research universities; the prevalence of restrictions on free speech and academic freedom in the name of other preferred campus causes—have caused society to question how higher education has been using the privileges it has been granted.

Academic freedom is a right because American society correctly assumed that it is necessary in order to attain an enlightened polity dedicated to truth and intellectual progress. As Jonathan Rauch brilliantly delineated in his 1993 book, *Kindly Inquisitors: The New Attacks on Free Thought*, the system of free thought in America is as important to our national destiny as the constitutional system itself and the economic market place. Rauch wrote that intellectual freedom and the promotion of knowledge constitute the "moral charter" of higher education.

Academic freedom is a sacred right that must not be lost. So in response to Shils, "Yes, we do still need academic freedom!" But, as Shils reminds us, it can prevail only if the denizens of higher education understand the important obligations that are part and parcel of its legitimacy. If higher education loses control over its destiny to outsiders and politicians who are often obedient to their own questionable agendas, part of the fault will be their own because they did not live up to their side of the academic bargain. Both they and the country will be the losers if that happens. As Abraham Lincoln observed in 1838, "If destruction be our lot, we must ourselves be its author and finisher."

KEY DOCUMENT #6

American Association of University Professors
Statement on Corporate Funding of Academic Research, 2004 (excerpts)

This report was prepared by a subcommittee of the Association's Committee A on Academic Freedom and Tenure. It was approved by Committee A and adopted by the Association's Council in November 2004.

Research universities have long collaborated with industry to their mutual benefit. The relationship has been the most productive for both parties when scholars are free to pursue and transmit basic knowledge through research and teaching. Learning, intellectual development, and progress—material, scientific, and technological—require freedom of thought and expression, and the right of the researcher to convey the results of inquiry beyond the classroom, laboratory, or institution.

The relationship, however, has never been free of concerns that the financial ties of researchers or their institutions to industry may exert improper pressure on the design and outcome of research. This is especially true of research that has as its goal commercially valuable innovations, which is the most common type of industry-sponsored research. Although corporate funding of academic research accounts for a relatively small percentage of all university research funds—approximately 7 percent of the total—that percentage has grown more rapidly than support from all other sources over the past two decades.[1] It may be expected to continue to grow absent an expansion of federal monies on a scale comparable to 1953–68, the halcyon years of federal funding. Moreover, the impact of corporate funding of university research has greater influence where it is most heavily focused, primarily in the fields of medicine, biology, chemistry, and engineering. ...

Perhaps the most striking example of a new form of university-industry partnership and a possible harbinger of future developments is the 1998 agreement between the Department of Plant and Microbial Biology at the University of California, Berkeley, and the Novartis Corporation, a Swiss pharmaceutical company.[2] Under a five-year, $25-million arrangement, Novartis is funding research in the department and will receive licensing rights to a proportion of the number of discoveries by the department's researchers equal to the company's share of the department's total research budget, whether or not the discoveries result directly from company-sponsored research. Where the financial resources of an academic department are dominated by a corporation there is the potential, no matter how elaborate the safeguards for respecting academic freedom and the independence of researchers, for weakening peer review both in research and in promotion and tenure decisions, for distorting the priorities of undergraduate and graduate education, and for compromising scientific openness.

An additional concern focuses less on research and teaching in a single department than on the ethos of the entire university. President George Rupp of Columbia University has observed that research may become somewhat too domesticated, aimed at short-term objectives dictated by corporate sponsors, or even our own faculty, as their entrepreneurial instincts lead them to try to identify and patent discoveries that will have a payoff. That is a risk that the university as a whole faces. It can involve not only the sciences and engineering, but the humanities and social sciences as well. For example, consider the impact of some of the new media capabilities. There are current commercial attempts to harness the ideas, even the lectures and presentations, of faculty members. The danger exists that universities will be so assimilated into society that we will no longer be the kind of collectors of talent that allow creativity to blossom. We must guard against being harnessed directly to social purposes in any way that undermines the fundamental character of the university.[3]

The increasingly complex and controversial relationships among universities, researchers, and corporations led the federal government in 1995 to require researchers who receive grants from the National Science Foundation or the Public Health Service (the latter includes the National Institutes of Health) to disclose to their institutions any "significant financial interests . . . that would reasonably appear to be affected by [their] research." Specifically, researchers must report any income ("when aggregated for the investigator and the investigator's spouse and dependent children") greater than $10,000 that they receive from a corporation that could benefit from their research, or any equity interest greater than $10,000 that exceeds 5 percent ownership interest in such a corporation. The government also requires universities to have "adequate enforcement mechanisms," and, as appropriate, to impose sanctions.[4]

Most research universities have adopted policies, with varying degrees of specificity, that reflect the government's requirements. Some have adopted more stringent regulations. At Washington University in St. Louis, for example, there is no monetary minimum for reporting financial ties with a corporation that sponsors research, while researchers at Johns Hopkins University must have the approval of the institution before they accept a fiduciary role with a company, if such a position is related to their academic duties. In addition, at least two professional organizations—the American Society for Gene Therapy and the American Society for Human Genetics—have called on their members not to own stock in any company that funds their research.

These various initiatives rest on the premise that conflicts of interest generated by university-industry ties can thrive if researchers do not know what standards of professional conduct are expected of them.[5] It is safe to say, however, that the pressures that brought these government and university requirements into being are not likely to diminish for the foreseeable future, and that there will be a continuing need to ensure that conflict-of-interest policies are properly implemented. The primary responsibility for such efforts resides within the academic community and especially with the faculty. The possible efforts are several:

1. Consistent with principles of sound academic governance, the faculty should have a major role not only in formulating the institution's policy with respect to research undertaken in collaboration with industry, but also in developing the institution's plan for assessing the effectiveness of the policy.[6] The policy and the plan should be distributed regularly to all faculty, who should inform students and staff members associated with them of their contents.
2. The faculty should work to ensure that the university's plan for monitoring the institution's conflict-of-interest policy is consistent with the principles of academic freedom. There should be

emphasis on ensuring that the source and purpose of all corporate-funded research contracts can be publicly disclosed. Such contracts should explicitly provide for the open communication of research results, not subject to the sponsor's permission for publication.

3. The faculty should call for, and participate in, the periodic review of the impact of industrially sponsored research on the education of students, and on the recruitment and evaluation of researchers (whether or not they hold regular faculty appointments) and postdoctoral fellows.
4. The faculty should insist that regular procedures be in place to deal with alleged violations by an individual of the university's conflict-of-interest policy. Should disciplinary action be contemplated, it is essential that safeguards of academic due process be respected.[7]
5. Because research relationships with industry are not static, the faculty, in order to ensure that the assessment of conflict-of-interest policies is responsive to changing needs, should regularly review the policies themselves as well as the instruments for conducting the assessment.

Notes

1. National Science Board, *Science & Engineering Indicators–1998* (Arlington, Va.: National Science Foundation, 1998), 2.

2. A somewhat similar arrangement in 1982 between Monsanto and the medical school at Washington University in St. Louis produced about $150 million in basic-research money for the university. See Goldie Blumenstyk, "Berkeley Pact with a Swiss Company Takes Technology Transfer to a New Level," *Chronicle of Higher Education*, December 11, 1998, A56.

3. Government-University-Industry Research Roundtable, *A Dialogue on University Stewardship: New Responsibilities and Opportunities. Proceedings of a Roundtable Discussion* (Washington, D.C.: The National Academies, 1998), 22.

4. In 1999, the National Institutes of Health (NIH) issued principles and guidelines to discourage researchers from entering into unduly restrictive agreements with corporations about sharing their work with others. The NIH's remarks about "academic freedom and publication" merit full citation: "Academic research freedom based upon collaboration, and the scrutiny of research findings within the scientific community, are at the heart of the scientific enterprise. Institutions that receive NIH research funding through grants, cooperative agreements, or contracts ("Recipients") have an obligation to preserve research freedom, safeguard appropriate authorship, and ensure timely disclosure of their scientists' research findings through, for example, publications and presentations at scientific meetings. Recipients are expected to avoid signing agreements that unduly limit the freedom of investigators to collaborate and publish, or that automatically grant coauthorship or copyright to the provider of a material.

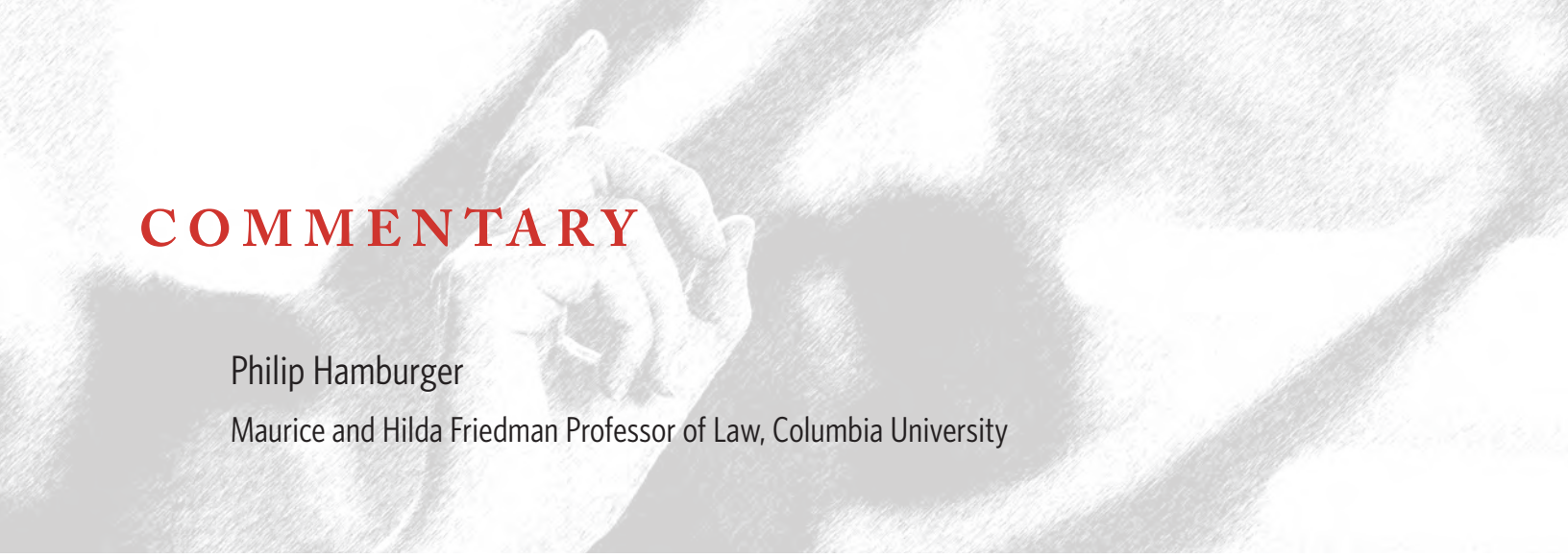
"Reasonable restrictions on collaboration by academic researchers involved in sponsored-research agreements with an industrial partner that avoid conflicting obligations to other industrial partners are understood and accepted. Similarly, brief delays in publication may be appropriate to permit the filing of patent applications and to ensure that confidential information obtained from a sponsor or the provider of a research tool is not inadvertently disclosed. However, excessive publication delays or requirements for editorial control, approval of publications, or withholding of data all undermine the credibility of research results and are unacceptable." 64 *Federal Register* 72090 (December 23, 1999).

5. See, for example, "On Preventing Conflicts of Interest in Government-Sponsored Research at Universities," issued jointly by the AAUP and the American Council on Education, *Policy Documents and Reports*, 10th ed. (Washington, D.C.: AAUP, 2006), 182–84.

6. See "Statement on Government of Colleges and Universities," *Policy Documents and Reports*, 135–40.

7. See Regulations 5 and 7 of the Association's "Recommended Institutional Regulations on Academic Freedom and Tenure," *Policy Documents and Reports*, 26–28.

For the full text of the statement, see: http://www.aaup.org/file/corporate-funding.pdf.



COMMENTARY

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CONFLICTS OF INTEREST are a serious matter. Yet, as exemplified by the AAUP's *Statement on Corporate Funding of Academic Research*, conflicts tend to be misunderstood, and the cures can be worse than the disease. Universities therefore should act with caution—along the lines summarized here in ten basic points.

1. *Conflicts Pervasive & Not a Sign of Lack of Integrity.* All individuals have complex and often conflicting interests, duties, and other goals. Especially in modern society, in which most individuals work for employers, individuals tend to have personal interests and duties that conflict with their interests or duties as employees. Such conflicts can be worrisome from an employer's point of view, but the very pervasiveness of such conflicts suggests that they are not, by themselves, indications of any lack of integrity. Conflicts therefore require attention, not necessarily regulation.

2. *Conflicts Themselves Not Ordinarily Harms.* Conflicts of interest, standing alone, do not ordinarily amount to harms. Of course, conflicts can result in harm, but the harm arises not so much from the conflicts as from failures to recognize and resolve them.

3. *Regulation of Conflicts.* Where a person has an underlying legal duty to another person and an interest that violates the duty, and where the first person fails to give notice of the conflict to the second and get his consent, there is a legally significant conflict, without regard to ensuing harm. Where, however, a person's interests do not violate his underlying legal duty to another person, regulatory intrusions ordinarily should wait until actual harm occurs and should intrude merely on account of the harm, lest the regulation burden and stigmatize mostly harmless conflicts. This becomes particularly important in academia, where a faculty member's collaboration with governmental or private entities, and thus his conflicts of interest, will often be an essential part of his research and even his exercise of freedom of speech.

4. *Agents.* Universities need to worry about conflicts where administrators and others act as agents for the university. From janitors up to the president, these agents have duties to serve the university's interests rather than any legally significant competing interest. A university therefore should bar such individuals from having any such competing interest, unless they notify the university and get its consent. Where the agents are trustees and top administrators, however, they cannot get consent except in effect from themselves, and the bar in these instances should therefore be absolute.

5. *Faculty.* Unlike administrators, faculty are not entirely agents for their university. In the conduct of their own research, and in their other areas of academic freedom, they enjoy a rebuttable presumption that they are independent agents, who work for themselves, and who therefore do not owe any special duty to the university. Their research, indeed, is at the core of their academic freedom. Universities therefore generally should leave faculty

to decide for themselves about any conflicting interests in the conduct of their own research. Of course, when faculty falsify data or engage in other fraud, they disqualify themselves and can be fired. But where they merely have conflicts of interest in their research, their conflicts ordinarily should be left to their integrity, their desire to preserve their reputation, and the judgments of their colleagues, for they are independent agents in the conduct of their research, and whatever the occasional danger from their conflicts, the danger from university regulation is predictable and serious. For example, when a university requires its faculty to notify it of their research conflicts, it usually reduces them to its agents within the conduct of their research, thereby undermining their sphere of freedom.

Faculty ordinarily become university agents in the conduct of their research only where they are working on a university research project—for example, where they are doing their research on behalf of a university hospital. The mere use of university equipment and other resources, however, does not deprive individuals of their status as independent agents in the conduct of their research—as evident from students who use such resources and clearly do not thereby become university agents. If some equipment is notably hazardous, the university can limit use of the equipment without assailing the academic freedom of faculty.

6. *Government.* Government has interests in knowing about and sometimes barring conflicts of interest in academic research. But where government is the party in interest, universities should leave it to do its own regulation.

The federal government has used regulation and funding to corral faculty into serving its interests—notably, in developing or testing new foods, drugs, machines, and ideas—and the government therefore often has reason to seek notice of significant conflicting financial interests. But even where government is owed a legal duty by a faculty member, and thus is justified in requiring such notice, universities should leave the government to secure this information by itself, lest they turn themselves into government agents for policing research. To be sure, universities must be careful, because the government will deny funding to universities that fail to impose conflicts-of-interest policies on their faculty. But universities need to organize against such conditions, because when they submit, they become government agents for monitoring research, and they thereby not only threaten the freedom of their faculty but also undermine their own independence—usually with the effect of making themselves vulnerable to further government demands and even penalties for non-compliance.

7. *Inequality.* When a conflict-of-interest policy focuses on corporate funding of academic research, it discriminates against one type of conflict and ignores others. The most severe conflicts are probably intellectual, as evident from the way that ideology, politics, ethnicity, and religion often seem to shape projects and outcomes. Of course, ideas should not be regulated. Yet even when one focuses simply on funding, it is clear that conflicts arise not only from corporate funding but also from federal, foreign, university, and public-interest funding.

The lopsidedness of the AAUP *Statement* can be illustrated by its anxieties about corporate suppression of publication. It is true that corporations have sometimes sought to prevent publication of the research they fund. The federal government, however, systematically uses its research funding to secure the cooperation of universities and their Institutional Review Boards in licensing speech, both in research and in its publication. It therefore is odd to suggest that the primary threat comes from corporate funding.

8. *Equality as Test of Severity.* The best way to avoid excessive severity in any policy is to ensure that it applies equally. For example, a conflict-of-interest policy that applies equally to all funding will not be as easy to impose as one that applies only to corporate

funding, because the full range of relevant persons and interests will be affected. In short, equality is a structural limit on the threat to freedom.

9. *University Conflicts.* This structural point has broad implications, because not only faculty but also universities have conflicts of interest. In seeking gifts, federal grants, and other outside funds, universities regularly accept conditions on their programs, often at the cost of their academic mission. Of course, like faculty who accept outside funding, universities thereby do not ordinarily violate any underlying legal duty. Nonetheless, if outside funding is such a threat to the academic mission of faculty that they must be required to report their funding and funding conditions to their universities, then there is even greater reason to require universities to report their funding and funding conditions to their faculty.

10. *Increased Control & Increased Risk of Liability.* In defense of university regulation of conflicts in research, it often is said that such regulation is necessary to avoid liability. But the urge to control is usually a strategic error, for when universities regulate faculty, the institutions typically reduce the realm in which faculty are independent agents, and the result is less academic freedom and clearer institutional liability.

Universities therefore need to be prepared to resist demands for them to regulate their faculty. If academic freedom is to be preserved, and if universities are not to be liable for all that is done by their faculty, the institutions generally need to avoid controlling their faculty in response to popular or governmental anxieties.

> To perform its mission in the society, a university must sustain an extraordinary environment of freedom of inquiry and maintain an independence from political fashions, passions, and pressures.

— Kalven Committee, *Report on the University's Role in Political and Social Action*, University of Chicago, 1967

KEY DOCUMENT #7

Kalven Committee

Report on the University's Role in Political and Social Action, University of Chicago, 1967 (excerpts)

Report of a faculty committee, under the chairmanship of Harry Kalven, Jr. Committee appointed by President George W. Beadle. Report published in the Record, Vol. I, No. 1, November 11, 1967. © 1967, University of Chicago

The Committee was appointed in February 1967 by President George W. Beadle and requested to prepare "a statement on the University's role in political and social action." The Committee conceives its function as principally that of providing a point of departure for discussion in the University community of this important question.

The Committee has reviewed the experience of the University in such matters as its participation in neighborhood redevelopment, its defense of academic freedom in the Broyles Bill inquiry of the 1940s and again in the Jenner Committee hearings of the early 1950s, its opposition to the Disclaimer Affidavit in the National Defense Education Act of 1958, its reappraisal of the criteria by which it rents the off-campus housing it owns, and its position on furnishing the rank of male students to Selective Service. In its own discussions, the Committee has found a deep consensus on the appropriate role of the university in political and social action. It senses some popular misconceptions about that role and wishes, therefore, simply to reaffirm a few old truths and a cherished tradition.

A university has a great and unique role to play in fostering the development of social and political values in a society. The role is defined by the distinctive mission of the university and defined too by the distinctive characteristics of the university as a community. It is a role for the long term.

The mission of the university is the discovery, improvement, and dissemination of knowledge. Its domain of inquiry and scrutiny includes all aspects and all values of society. A university faithful to its mission will provide enduring challenges to social values, policies, practices, and institutions. By design and by effect, it is the institution which creates discontent with the existing social arrangements and proposes new ones. In brief, a good university, like Socrates, will be upsetting.

The instrument of dissent and criticism is the individual faculty member or the individual student. The university is the home and sponsor of critics; it is not itself the critic. It is, to go back once again to the classic phrase, a community of scholars. To perform its mission in the society, a university must sustain an extraordinary environment of freedom of inquiry and maintain an independence from political fashions, passions, and pressures. A university, if it is to be true to its faith and intellectual inquiry, must embrace, be hospitable to, and encourage the widest diversity of views within its own community. It is a community but only for the limited, albeit great, purposes of teaching and research. It is not a club, it is not a trade association, it is not a lobby.

Since the university is a community only for these limited and distinctive purposes, it is a community which cannot take collective action on the issues of the day without endangering the conditions for its existence and effectiveness. There is no mechanism by which it can reach a collective position without inhibiting that full freedom of dissent on which it thrives. It cannot insist that all of its members favor a given view of social policy; if it takes collective action, therefore, it does so at the price of censuring any minority who do not agree with the view adopted. In brief, it is a community which cannot resort to majority vote to reach positions on public issues.

The neutrality of the university as an institution arises then not from a lack of courage nor out of indifference and insensitivity. It arises out of respect for free inquiry and the obligation to cherish a diversity of viewpoints. And this neutrality as an institution has its complement in the fullest freedom for its faculty and students as individuals to participate in political action and social protest. It finds its complement, too, in the obligation of the university to provide a forum for the most searching and candid discussion of public issues.

Moreover, the sources of power of a great university should not be misconceived. Its prestige and influence are based on integrity and intellectual competence; they are not based on the circumstance that it may be wealthy, may have political contacts, and may have influential friends.

From time to time instances will arise in which the society, or segments of it, threaten the very mission of the university and its values of free inquiry. In such a crisis, it becomes the obligation of the university as an institution to oppose such measures and actively to defend its interests and its values. There is another context in which questions as to the appropriate role of the university may possibly arise, situations involving university ownership of property, its receipt of funds, its awarding of honors, its membership in other organizations. Here, of necessity, the university, however it acts, must act as an institution in its corporate capacity. In the exceptional instance, these corporate activities of the university may appear so incompatible with paramount social values as to require careful assessment of the consequences.

These extraordinary instances apart, there emerges, as we see it, a heavy presumption against the university taking collective action or expressing opinions on the political and social issues of the day, or modifying its corporate activities to foster social or political values, however compelling and appealing they may be.

These are admittedly matters of large principle, and the application of principle to an individual case will not be easy.

It must always be appropriate, therefore, for faculty or students or administration to question, through existing channels such as the Committee of the Council or the Council, whether in light of these principles the University in particular circumstances is playing its proper role.

Our basic conviction is that a great university can perform greatly for the betterment of society. It should not, therefore, permit itself to be diverted from its mission into playing the role of a second-rate political force or influence. ...

For the full text of the report, see: http://www-news.uchicago.edu/releases/07/pdf/kalverpt.pdf.

COMMENTARY

Harvey Silverglate, Attorney

Co-founder and current Chairman of the Board of Directors, The Foundation for Individual Rights in Education

IT DOES, OR SHOULD, SEEM OBVIOUS that the principles of academic freedom and institutional neutrality enunciated in the Kalven Committee Report should guide every college and university in the country. Without these principles, the university simply cannot perform the functions demanded of it in a free society. Given that the Kalven principles constitute the standard position, any university taking issue with them should announce with clarity its deviation and the reasons for deviating. This would constitute a kind of "truth-in-advertising," so that any scholar or student wanting the protections of academic freedom would know to steer clear from institutions that do not practice the virtues laid out in the Report.

Because modern university administrative bodies so often deviate from the Kalven principles, and because they do so for the most part without announcing clearly and publicly that their universities have abandoned Kalven for Orwell, it is left to the faculties to criticize their institutions for their failures. However, because at so many campuses the faculties have surrendered their essential role in keeping the university moored to these eternal guidelines for institutional, faculty and student academic freedom, the responsibility falls to governing trustees to monitor their institutions in order to assure that the torch of academic freedom and institutional neutrality, properly understood, remains lit.

This important aspect of governing boards' fiduciary duty merits repetition and emphasis, because so many boards have been relegated to doing no more than monitoring—and often contributing funds to maintain—the institution's financial stability. Typically, campus administrators establish the agendas for governing board meetings, as well as control the transmission of documents and information to the boards. It is therefore incumbent upon board members independently and individually to cultivate sources of information about their campuses, particularly sources reputed to be "dissident" or "independent," such as faculty critics of the administration, or students who have been threatened or disciplined for exercising their individual rights or for engaging in activities punished by the administration but seen by others as protected by academic freedom properly understood.

There is too often a substantial chasm between the principles enunciated in the Kalven Report and the practices on our campuses. Trustees must surely welcome the input of their administrators; but it is also important to obtain information from those who are not under administrators' control. Just as the Kalven Committee noted that the "good university, like Socrates, will be upsetting," it is likewise true that it is often only the good but upsetting professor or the good but upsetting student who will present the unofficial but likely more accurate picture of institutional and campus realities. Fiduciaries are obligated to exercise their governance responsibilities

not solely on the basis of what they are told by those over whom they have governance powers, but, rather, on the basis of truths and realities learned by personal inquiry. Curiosity and integrity are the twin pillars of a trustee's responsibilities.

In some instances, where a college or university has a truly independent student newspaper, governing board members can gather considerable accurate information as to the true state of affairs on the campus. For example, a recent Harvard initiative saw freshman dean Thomas A. Dingman insisting that each freshman dormitory post at a prominent public place a "kindness pledge," which Dean Dingman pressured students to sign. That pledge took the dubious position that "the exercise of kindness holds a place on par with intellectual attainment." Wholly aside from whether such a proposition could possibly be true at a liberal arts institution of higher learning (I doubt that it could or should), such a practice would transgress an important Kalven principle: That the university must "maintain an independence from political fashions, passions, and pressures," should "encourage the widest diversity of views within its own community," and "cannot take collective action on the issues of the day" nor "insist that all of its members favor a given view of social policy." Governing board members at Harvard who regularly read *The Harvard Crimson* would have learned of this initiative. They would then have been able to inquire as to whether the institution should commit itself to such a social proposition and whether the freshman dean should have been exerting such pressure on students' views and wills.

In sum, for trustees to exercise their fiduciary duty to steer their universities toward the virtues and verities described by the Kalven Committee, they must develop independent sources of information as to what is really going on. Those who do so likely will be shocked, and hopefully energized and re-dedicated to the task.

KEY DOCUMENT #8

Supreme Court of the United States
Garcetti v. Ceballos, 547 U.S. 410 (2006) (excerpts)

Justice Kennedy delivered the opinion of the Court.

It is well settled that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick* v. *Myers,* 461 U. S. 138, 142 (1983). The question presented by the instant case is whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties. ...

II

As the Court's decisions have noted, for many years "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick,* 461 U. S., at 143. That dogma has been qualified in important respects. See *id.,* at 144-145. The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. See, *e. g., Pickering, supra,* at 568; *Connick, supra,* at 147; *Rankin* v. *McPherson,* 483 U. S. 378, 384 (1987); *United States* v. *Treasury Employees,* 513 U. S. 454, 466 (1995).

Pickering provides a useful starting point in explaining the Court's doctrine. There the relevant speech was a teacher's letter to a local newspaper addressing issues including the funding policies of his school board. 391 U. S., at 566. "The problem in any case," the Court stated, "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.,* at 568. The Court found the teacher's speech "neither [was] shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Id.,* at 572-573 (footnote omitted). Thus, the Court concluded that "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.,* at 573.

Pickering and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. See *id.,* at 568. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. See *Connick, supra,* at 147. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. See *Pickering,* 391 U. S., at 568. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

To be sure, conducting these inquiries sometimes has proved difficult. This is the necessary product of "the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal." *Id.,* at 569. The Court's overarching objectives, though, are evident.

When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. See, *e. g., Waters* v. *Churchill,* 511 U. S. 661, 671 (1994) (plurality opinion) ("[T]he government as employer indeed has far broader powers than does the government as sovereign"). Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. Cf. *Connick, supra,* at 143 ("[G]overnment offices could not function if every employment decision became a constitutional matter"). Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

At the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. See *Perry* v. *Sindermann,* 408 U. S. 593, 597 (1972). So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. See, *e. g., Connick, supra,* at 147 ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government").

The Court's employee-speech jurisprudence protects, of course, the constitutional rights of public employees. Yet the First Amendment interests at stake extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion. *Pickering* again provides an instructive example. The Court characterized its holding as rejecting the attempt of school administrators to "limi[t] teachers' opportunities to contribute to public debate." 391 U. S., at 573. It also noted that teachers are "the members of a community most likely to have informed and definite opinions" about school expenditures. *Id.,* at 572. The Court's approach acknowledged the necessity for informed, vibrant dialogue in a democratic society. It suggested, in addition, that widespread costs may arise when dialogue is repressed. The Court's more recent cases have expressed similar concerns. See, *e. g., San Diego* v. *Roe,* 543 U. S. 77, 82 (2004) *(per curiam)* ("Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own

right to disseminate it" (citation omitted)); cf. *Treasury Employees,* 513 U. S., at 470 ("The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said").

The Court's decisions, then, have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions. See, *e.g., Rankin,* 483 U. S., at 384 (recognizing "the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment"). Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to "constitutionalize the employee grievance." *Connick,* 461 U. S., at 154.

III

With these principles in mind we turn to the instant case. Respondent Ceballos believed the affidavit used to obtain a search warrant contained serious misrepresentations. He conveyed his opinion and recommendation in a memo to his supervisor. That Ceballos expressed his views inside his office, rather than publicly, is not dispositive. Employees in some cases may receive First Amendment protection for expressions made at work. See, *e. g., Givhan* v. *Western Line Consol. School Dist.,* 439 U. S. 410, 414 (1979). Many citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like "any member of the general public," *Pickering,* 391 U. S., at 573, to hold that all speech within the office is automatically exposed to restriction.

The memo concerned the subject matter of Ceballos' employment, but this, too, is nondispositive. The First Amendment protects some expressions related to the speaker's job. See, *e. g., ibid.; Givhan, supra,* at 414. As the Court noted in *Pickering:* "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." 391 U. S., at 572. The same is true of many other categories of public employees.

The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. See Brief for Respondent 4 ("Ceballos does not dispute that he prepared the memorandum 'pursuant to his duties as a prosecutor'"). That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. ...

Two final points warrant mentioning. First, as indicated above, the parties in this case do not dispute that Ceballos wrote his disposition memo pursuant to his employment duties. We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate. We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. See *post,* at 431, n. 2 (Souter, J., dissenting). The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

Second, Justice Souter suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. See *post,* at 438-439. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching. ...

Justice Souter, with whom Justice Stevens and Justice Ginsberg join, dissenting (excerpts)

...

Open speech by a private citizen on a matter of public importance lies at the heart of expression subject to protection by the First Amendment. See, *e.g., Schenck* v. *Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 377 (1997). At the other extreme, a statement by a government employee complaining about nothing beyond treatment under personnel rules raises no greater claim to constitutional protection against retaliatory response than the remarks of a private employee. See *Connick* v. *Myers*, 461 U. S. 138, 147 (1983). In between these points lies a public employee's speech unwelcome to the government but on a significant public issue. Such an employee speaking as a citizen, that is, with a citizen's interest, is protected from reprisal unless the statements are too damaging to the government's capacity to conduct public business to be justified by any individual or public benefit thought to flow from the statements. *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568 (1968). Entitlement to protection is thus not absolute. ...

The fallacy of the majority's reliance on *Rosenberger's* understanding of *Rust* doctrine, moreover, portends a bloated notion of controllable government speech going well beyond the circumstances of this case. Consider the breadth of the new formulation:

> "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Ante*, at 421-422.

This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to . . . official duties." See *Grutter* v. *Bollinger*, 539 U. S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition"); *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools'" (quoting *Shelton* v. *Tucker*, 364 U. S. 479, 487 (1960))); *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957) (a governmental enquiry into the contents of a scholar's lectures at a state university "unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread"). ...

For the full opinion, see: http://www.supremecourt.gov/opinions/05pdf/04-473.pdf.

COMMENTARY

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THE FIRST AMENDMENT STATES that "Congress shall make no law … abridging the freedom of speech[.]" That is, it limits governments and constrains public officials. However, governments and officials act in a variety of capacities and contexts. Governments manage parks, stock library shelves, teach students, fund research, prosecute criminals, and wage wars. And, of course, they support universities.

It is both sensible and unsurprising that the First Amendment operates in similarly varied ways, depending on the capacity or context in question. The Constitution affords the government more leeway when it is managing what goes on in its own facilities than when it is regulating what happens in a person's home or on the sidewalk. Officials have more flexibility when it comes to determining the content of the Department of Transportation's web site than when they seek to censor *The Washington Post*. And, as the Supreme Court affirmed in the *Garcetti* case, the First Amendment permits closer regulation of the speech of public employees on the job than it does of citizens on the soapbox.

In *Garcetti,* the Supreme Court ruled—in a 5-4 decision, through an opinion authored by Justice Anthony Kennedy—that the First Amendment does *not* "protect[] a government employee from discipline based on speech made pursuant to the employee's official duties." To be sure, as the Court noted, "public employees do not surrender all of their First Amendment rights by reason of their employment" and "a citizen who works for the government is nonetheless a citizen." At the same time, though, "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." And so, when public employees "make statements pursuant to their official duties," the Court concluded, they are "not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."

Now, as Justice Souter observed in his dissenting opinion, a "public university professor" is a public employee, and a rule that excludes from constitutional protection the speech of thousands of academics, scholars, and researchers at public colleges and universities could easily "imperil First Amendment protection of academic freedom[.]" Accordingly, Justice Kennedy and the majority were careful to acknowledge that "a case involving speech related to scholarship or teaching" could well require a different approach.

Indeed, it should. Universities are, as professor Paul Horwitz has emphasized, vital "First Amendment Institutions," and the government's efficiency-based reasons for controlling public employees' job-related speech cannot justify curtailing the academic freedom of scholars and teachers at state-funded

institutions. The lecture or monograph of a professor at such an institution simply does not "belong" to the government in the way that the instructions and information provided by a clerk at the Department of Motor Vehicles might. Indeed, because the Court in *Garcetti* recognized the "necessity for informed, vibrant dialogue in a democratic society," it would be glaringly inconsistent with this recognition, and this necessity, to mechanically apply public-employee-speech doctrine in the academic setting.

Properly understood, the *Garcetti* case does not invite or allow academic administrators to censor or sanction scholars and teachers in higher education for what they teach or write, even if what they teach or write is upsetting, unorthodox, or misguided. Trustees and administrators at publicly supported universities and colleges alike should, after *Garcetti* as before, carefully distinguish between the appropriate supervision and control of employees' on-the-job speech, on the one hand, and unjustified, dangerous intrusion in the academic enterprise, on the other. It is true that several post-*Garcetti* lower-court cases have interpreted the Court's decision as permitting disciplinary action taken against faculty members for intramural statements made in the course of their official duties. More important, though, is the recent ruling by the U.S. Court of Appeals for the Fourth Circuit, in which that court insisted that *Garcetti* should not be applied "in the academic context of a public university" or to the "academic work of a public-university faculty member." *Adams v. Trustees of UNC-W, 640 F.3d 550* (4th Cir. 2011).

It should be clear—and universities should adopt policies that make it clear—that this "academic work" includes participation by faculty members in institutional governance, in debates and controversies about university policies and practices. The "academic context" of a public university cannot be limited to what faculty members do in research carrels and classrooms. Trustees of universities, charged with the care of those institutions' academic missions and integrity, should not wait for the Supreme Court to rule definitively on the constitutional foundations and content of academic freedom and should not leave it to post-*Garcetti* lawsuits to secure protection for that freedom, in all the various ways it is exercised in the public university of today. Instead, the relevant rules, statutes, and provisions should be reviewed carefully and amended so as to state clearly that *Garcetti* will not be used as an occasion to interfere with the governance, scholarship, teaching, and administrative roles of faculty members.

Case Studies

“Colleges and universities should welcome intellectual pluralism and the free exchange of ideas. Such a commitment will inevitably encourage debate over complex and difficult issues about which individuals disagree.”

— Statement on Academic Rights and Responsibilities,
American Council on Education, 2005

CASE STUDY #1

Academic Freedom and Controversial Speakers

University of Wyoming

In May 1972, a bomb exploded inside the Pentagon. The bomb had been set by a terrorist organization called the Weather Underground, which had previously bombed the New York City Police Department, the U.S. Capitol, and other domestic targets. One of the cofounders of the Weather Underground was William Ayers.[1] Over the years, Ayers not only failed to apologize for the bombings, but frankly boasted of them.[2]

Fast-forward to the spring of 2010, and shift to the University of Wyoming. A research group on campus, the Social Justice Research Center (SJRC), invited Ayers, then Distinguished Professor of Education at the University of Illinois at Chicago, to speak about education reform. The invitation provoked an immediate, powerful, and overwhelmingly negative response. The university received hundreds of emails and phone calls protesting it. Former U.S. senator Alan Simpson (R-WY), an important fundraiser for the university, was among those who received calls predicting violence if the speech went forward as planned. State political officials, including the governor, weighed in against the invitation. The SJRC withdrew the invitation.

Public safety was the official reason the invitation was canceled. Still, many of those who offered that reason also stressed their outrage over Ayers' past, mixing the two matters. "You don't bomb the Pentagon and bomb some of the structures of our foundation of government, and say the things he said through the years," said Simpson.[3]

University president Tom Buchanan denied that the university had given in to pressure, but said: "The University of Wyoming is one of the few institutions remaining in today's environment that garners the confidence of the public. The visit by Professor Ayers would have adversely impacted that reputation."[4]

The already-complicated situation grew more complicated still: A student, Meg Lanker, issued a second invitation to Ayers, this time to speak to a student group. The university again refused Ayers permission to speak, and again cited safety concerns. This time, Lanker and Ayers sued, charging that the University of Wyoming was violating their constitutional rights to free speech and assembly.

On April 27, U.S. district judge William Downes found that the threats the university had received were not credible. Barring the speech, the judge ruled, would amount to an unconstitutional "heckler's veto."[5] Following the judge's ruling—after a month-long fight—Ayers gave his speech.[6]

The University of Wyoming had to pay over $86,000 in legal fees and University officials have subsequently expressed regret over their handling of the issue. As UW provost Myron Allen observed, the fracas hurt the school's reputation as a "neutral forum" for intellectual debate.[7]

Questions for Consideration

Does a university have any discretion in determining whom it will invite to speak? If so, when and at what level are such decisions to be made?

Since the legislature funds universities with taxpayer dollars, should a university disinvite a speaker when legislators disagree?

If a controversial speaker is invited, are there steps a university can take to ensure differing or multiple perspectives?

Analysis

Considered from every angle, the William Ayers episode was a black eye for the University of Wyoming.

The invitation appeared calculated to shock and offend many in its community. Nevertheless, the SJRC was within its rights to issue the invitation, and once the invitation was issued, the students and faculty at Wyoming had a right to hear the speaker. For those students and that faculty, this right was a matter of academic freedom. When the invitation provoked a strong, censorious response, the university had to decide whether to stand behind the invitation, or to yield to what the court ultimately deemed to be the "heckler's veto" of those who threatened violence. The university yielded, abandoning its duty to uphold students' and professors' academic freedom to hear a wide range of viewpoints, including those with which they or others disagreed. The tactic of disinviting a speaker because of the threat of violence was exposed in court as a pretext, adding to the embarrassment of the university and eroding its credibility.

The C. Vann Woodward Committee Report (see pp. 23-30) discusses at length appropriate procedures for handling threats of disruption, including violence. Such threats, as demonstrated by Judge Downes' ruling, do not exempt an institution from its obligations to protect free speech.

CASE STUDY #2

Free Expression and Student Associations

University of California–Hastings College of the Law

In the academic year 2004-2005, a chapter of the Christian Legal Society (CLS) applied to become a Registered Student Organization at the University of California Hastings College of the Law. Consistent with national CLS policy, the proposed chapter would require all voting members or leaders to sign a Statement of Faith that summarized CLS' understanding of Christian doctrine. Among other things, the statement provided that "[a] person who advocates or unrepentantly engages in sexual conduct outside of marriage between a man and a woman is not considered to be living consistently with the Statement of Faith and, therefore, is not eligible for leadership or voting membership." Non-voting members and non-leaders in the CLS would not be required to sign the Statement, and all students would be allowed to attend meetings and participate in group activities, regardless of their beliefs.

Hastings denied CLS's application, saying the Statement of Faith violated the school's non-discrimination policy by discriminating on the basis of religion and sexual orientation. CLS sued.

Once litigation began, Hastings argued that it had denied official recognition to CLS not on non-discrimination grounds, but because CLS violated the school's "all-comers" policy, which requires any Registered Student Organization to admit any student as a voting member or leader. After two lower courts ruled against CLS, the case, *Christian Legal Society v. Martinez,* was heard by the Supreme Court of the United States. On June 28, 2010, in a 5-4 decision, the Court ruled in favor of Hastings, upholding the constitutionality of "all-comers" policies at public universities. In essence, the court ruled that public universities may require student organizations to accept any students as voting members or leaders, regardless of whether those students disagree with or are even hostile to the groups' core beliefs.[8]

The closely-divided Supreme Court decision reflected a strong difference of opinion. Writing for the majority, Justice Ruth Bader Ginsburg held that student groups may not "discriminate" on the basis of belief.[9] On the other hand, Justice Samuel Alito, writing for the minority, warned that the Christian Legal Society ruling would mean "no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning."[10] It is, he said, for public institutions, "a handy weapon for suppressing the speech of unpopular groups."[11]

The narrowly-tailored decision made it legal for public universities to maintain "all-comers" policies, but did not require them to do so. The ruling applied only to public universities.

Beyond what Alito predicted, the ruling emboldened some private universities to enact their own "all-comers" policies. One such university is Vanderbilt. In April 2011, Vanderbilt "deferred" recognition of its own chapter of the CLS because the organization's

leadership was not open to everyone, regardless of beliefs.[12] A national uproar ensued. The following year, twelve additional religious student organizations defied the "all-comers" policy, and Vanderbilt "derecognized" all thirteen.[13] As of April 2013, the number of "derecognized" groups had grown to fifteen.[14]

"Derecognition" for these groups[15] meant that they were banned from regular access to campus facilities. They were not permitted to use university listserves, to participate in student organization fairs, or to use the "Vanderbilt" name. Vanderbilt also forbade these groups to admit members from outside Vanderbilt.

Vanderbilt organizations were not the only campus groups affected by implementation of *CLS v. Martinez*. The Christian campus group InterVarsity reported in March 2012 that, in the wake of the decision, at least 41 public and private schools scrutinized the practices of the Christian groups on their campuses.[16]

Tufts University

Tufts University provides a significant contrast to the actions of Vanderbilt. In October 2012, the student government derecognized the Tufts Christian Fellowship (TCF) because its officers are required to "support and advocate" the "basic Biblical truths of Christianity." Membership in TCF is open to all comers, regardless of belief, but the organization holds its leaders to stricter standards outlined in its constitution.

TCF appealed to the university administration. The faculty Committee on Student Life (which includes student and faculty co-chairs) created a policy whereby the University Chaplaincy—a university department consisting of the chaplains of four represented religious sects—could permit a "justified departure" from the university's nondiscrimination policy, if it finds a basis for that departure in religious doctrine. However, derecognized religious groups must apply for such exemptions, and agree to provide information on how they interpret their religious doctrines—something TCF was not immediately certain it was willing to do, even for the privilege of being recognized, and permitted to remain on campus.[17]

Questions for Consideration

Given that a college or university is not required to establish "all-comers" policies in the wake of the *CLS v. Martinez* decision, what would be the rationale for doing so? What is the potential benefit or harm of such a policy?

If a university has a non-discrimination policy, can it still allow religious, political, or other campus groups to determine membership on the basis of student beliefs?

Analysis

According to the Supreme Court, an "all-comers" policy can legally be applied to student groups on the campuses of public universities, but it is not a mandated policy for colleges and universities. Accordingly, institutions must decide whether an "all-comers" policy enhances or damages academic freedom and freedom of association on their campuses.

So far, discussion has focused on the prerogative of religious groups to establish rules of behavior for their members or for their leadership. In principle, however, an "all-comers" policy would affect campus political organizations as well.

What is the proper balance of freedom for campus groups to determine the ideological, philosophical, or political positions of their membership or leadership, and campus policies on nondiscrimination? It seems clear that this question will be asked for some time to come, as the law, politics, and associated policies resulting from *CLS v. Martinez* will take years to resolve. On March 22, 2013, for instance, Virginia governor Bob McDonnell signed into law The Student Group Protection Act, which guarantees freedom of association for religious belief-based student organizations and protects the right of those campus groups to choose leaders who share those beliefs. This new law is a direct attempt to protect student groups on public campuses from the effects of the Court's decision.[18]

The aggressive implementation of an "all-comers" policy on some campuses has already significantly eroded student opportunity for free expression. Vanderbilt's action can be seen as undermining a climate of true inquiry and education—inconsistent with academic freedom. The all-comers policy has not increased, but instead reduced, the number of organizations and the range of voices and ideas available to students on campus. This change in campus culture was the ironic consequence of *CLS v. Martinez*: By suppressing students' freedom to associate, a policy that sought to enhance diversity in fact had the opposite effect. As Charles Haynes, a First Amendment expert and a senior scholar for Freedom Forum, told *USA Today*: "When inclusiveness and openness become exclusive and keep people out, then something is wrong."[19]

An "all-comers" policy can indeed be a significant threat to freedom of association, freedom of speech, freedom of worship, free inquiry, and to academic freedom itself. As Vanderbilt political science professor Carol Swain observes, "Today it may be the Christians. Tomorrow, it may be the Jews. Two weeks from now, it could be the atheists. When you start taking away freedoms, it harms everyone."[20]

CASE STUDY #3

Academic Freedom in the Classroom

Columbia University

In 2005, Columbia University was rocked to its foundations by a 40-minute film called *Columbia Unbecoming*.[21] In this film, fourteen Jewish students and recent graduates testified on camera to personally experiencing an atmosphere of indoctrination and intimidation in classes in the university's Department of Middle East and Asian Languages and Cultures (MEALAC).[22]

Students reported that their professors were "red in the face and shouting" when they discussed the Mideast conflict. They said two professors—George Saliba and Hamid Dabashi—canceled classes on short notice to attend a pro-Palestinian rally. One student related how Saliba told her she had no claim to the land of Israel because she had green eyes and was "not a Semite."[23] Another reported that one Arabic-language professor answered his question about the correct use of the verb "to prevent" with the sentence: "'Israel prevents ambulances from going into refugee camps.'" This student pointed to his *kippah*, or skullcap. "I have to say," he said, speaking to the camera, "I really don't think he would have said that had I not been wearing this on my head."[24]

Amid headlines and immense public pressure, Columbia president Lee Bollinger responded with a strong statement that identified the professors' conduct as a violation of students' academic freedom. Bollinger assailed "the temptation to use the podium as an ideological platform, to indoctrinate a captive audience, to play favorites with the like-minded and silence the others." Academic freedom, he continued, means responsibility: "We should not say that academic freedom means that there is no review within the university, no accountability for the 'content' of our classes or our scholarship. There is review, it does have consequences, and it does consider content." Responsibility, Bollinger concluded, means responsibility for oneself: "[o]urs is and must remain a system of self-government."[25]

Bollinger followed his words with a new policy that established three new grounds for students with grievances involving the classroom conduct of professors in matters relating to political and social issues. The policy specified the conduct that could justify such complaints. This conduct included "failure to show appropriate respect in an instructional setting for the rights of others to hold opinions differing from their own; misuse of faculty authority within an instructional setting to pressure students into supporting a political or social cause; and conduct in the classroom or another instructional setting that adversely affects the learning environment."[26]

University of California at Berkeley

A similar situation arose at the University of California at Berkeley in the fall of 2002, but the university's response was quite different. In this case, the university offered a writing course entitled "The Politics and Poetics of Palestinian Resistance." The

course advocated the Palestinian perspective on the Israel-Palestine conflict, and stated, in its official course description, that "conservative thinkers are encouraged to seek other sections." This description ran afoul of the university's established policy on academic freedom, which emphasized that professors teaching controversial subjects must be "dispassionate" and "give play to intellect rather than to passion."[27]

A protest arose, and the offending sentence was removed from the course description. However, rather than change the actual class, the faculty and administrators of the university changed their policy on academic freedom. The new policy allowed classroom teachers to advocate particular points of view—as long as those points of view are developed according to professional standards within their disciplines.[28] After the episode, professor Martin Trow warned of the consequences of allowing professors "the right to teach their political views without the necessity to present alternative perspectives." He foresaw that giving in to such a one-sided approach would amount to a loss of public trust.[29]

University of Minnesota

In 2009, the College of Education and Human Development (CEHD) at the University of Minnesota proposed a redesign of its admissions and curriculum around the concept of "cultural competence." In theory, helping students develop "cultural competence" means helping them acquire the ability to interact effectively with people of different cultures.[30] The application of the concept in this case, however, amounted to adopting a particular point of view pertaining to race, culture, class, and gender. Students were either to accept this point of view, be re-educated to accept it, or be refused admission to the program.[31] All faculty, too, were required to "commit to the centrality of race, class, culture, and gender issues in teaching and learning, and consequently, frame their teaching and course foci accordingly."[32]

When it was brought to the attention of the university's Board of Regents, the university amended the policy. In the words of its general counsel Mark B. Rotenberg, "No university policy or practice ever will mandate any particular beliefs, or screen out people with 'wrong beliefs' from the university." [33]

Brandeis University

Six years ago, Brandeis University incurred national embarrassment over the case of a professor accused by students of racial harassment. Professor Donald Hindley had taught Southeast Asian politics and Latin American politics at Brandeis since 1962. Hindley was known for humor, and for sarcasm that sometimes seemed "on the edge,"[34] but he had never, in decades of teaching, been accused of harassment or discrimination. However, in the fall of 2007, while teaching Latin American politics, Hindley sought to define a racist American usage. "When Mexicans come north as illegal immigrants," he later recalled saying, "we call them wetbacks."[35]

Hindley intended to present the term as pejorative. However, more than one student complained to the department chair, Steven Burg. Burg later reported that one student complained, as well, of something Hindley had said to the student personally.[36] At this stage, the Brandeis Faculty Handbook recommends mediation. Burg bumped the complaint up the administrative ladder.[37]

According to Hindley, on October 22 he received an email from Jesse Simone, Director of Employment, Employee Relations and Training, requesting an appointment. The two met for approximately one hour. Simone interrogated Hindley about the incident in his class, and accused him of racial harassment and discrimination. On October 30, Simone sent Hindley a letter stating that "you made statements in class that were inappropriate, racial, and discriminatory," and that violated Brandeis' Non-Discrimination and Harassment Policy. On the same day, Hindley got a letter from

Marty Krauss, Provost and Senior Vice President for Academic Affairs. Krauss' letter said Brandeis would put a monitor in Hindley's classroom "until I [Krauss] have determined that you are able to conduct yourself appropriately in the classroom." The letter also required Hindley to attend "anti-discrimination training."

The monitor appeared in Hindley's class. According to Burg, Hindley read Krauss' letter to the students, and initiated an email campaign protesting the decision against him.[38] Hindley accused the university of targeting him for his politics, including his support for Palestinian rights,[39] and appealed to Brandeis' Committee on Faculty Rights and Responsibilities.

The Faculty Senate met in emergency session and strongly faulted the administration in a unanimous resolution. In the ensuing weeks, students protested and the Committee on Faculty Rights and Responsibilities issued three scathing reports on the university's management of Hindley's case, saying administrators abused their own power and violated Hindley's academic freedom. Yet the university did not apologize, and the monitor remained in place for the remainder of the term. The matter received national coverage and was a lingering cloud over the administration of Brandeis' former provost and president.

Questions for Consideration

Does academic freedom allow professors to share political views or discuss controversial material in the classroom? Under what circumstances is it appropriate or inappropriate?

Does a professor have professional obligations to provide a set of balanced readings that responsibly set forth a range of viewpoints on matters of controversy?

Many people complain about a lack of political diversity amongst faculty on campuses. Is that a proper trustee concern? If so, what can trustees properly do?

What policies would be effective in avoiding incidents such as the Brandeis case in the future?

Analysis

The Columbia, Berkeley, and Minnesota examples are far from isolated. They illustrate what happens when professors push a particular point of view to the detriment of the academic freedom of the student body. In a 2004 survey by the American Council of Trustees and Alumni on bias in the classroom, 49 percent of students at America's top 50 colleges and universities said professors frequently injected political comments into their courses, even if they had nothing to do with the subject. Almost one-third of students—29 percent—felt they had to agree with professors' political views to get a good grade. Subsequent surveys at the state level have shown similar problems.[40]

A June 2006 survey by the American Association of University Professors identified public concern. The AAUP found that 58.4 percent of the American public had only some or no confidence in American colleges and universities, and that 45.7 percent said political bias was either a very serious problem or the biggest problem facing higher education.[41]

Many in the academy reject such views, arguing that there isn't a problem. But some faculty members admit to the type of behavior reported by the students. Women's studies professor Pamela L. Caughie of Loyola University (Chicago), for example, stated: "In teaching students [feminism's] history, its forms, and its impact, I am teaching them to think and write as feminists.... I feel I am doing my job well when students become practitioners of feminist analysis and committed to feminist politics."[42]

The policy adopted by Columbia president Lee Bollinger in the aftermath of the release of *Columbia Unbecoming* was a necessary response to faculty that threatened academic freedom by suppressing discussion and presenting only one point of view. Bollinger's policy recognized that the hallmark of academic freedom is the disciplined and vigorous exchange of diverse points of view. Berkeley's failure to articulate a firm policy against politicizing the classroom contrasts poorly with the clarity of Columbia's statement and the action it took in establishing appropriate grievance procedures.

Similarly, the trustees of the University of Minnesota, in rejecting the proposed redesign of admissions and curriculum at the College of Education and Human Development (CEHD), did more than rid UM of a program that would have compromised the rights of students and faculty and possibly exposed the school to litigation. They also served their university's long-term interests, as is evident in the words of their general counsel, by encouraging intellectual diversity and protecting academic freedom on their campus.

It is important to remember that on college campuses, where student opinion and public perception are likely to be both highly emotional and highly significant factors, the need for dispassionate review is crucial. It is here that Brandeis administrators failed, magnifying, rather than addressing the initial problem. When an administration does not act judiciously or adhere to the principles of academic freedom, there is room for extensive mischief and damage in the classroom.

CASE STUDY #4

Academic Freedom and Philanthropy

Cal Poly–San Luis Obispo

In the fall of 2009, Michael Pollan, author of *The Omnivore's Dilemma*, was scheduled to speak at Cal Poly–San Luis Obispo as the invited guest of Cal Poly's Sustainable Agriculture Resource Consortium. Pollan's work challenges traditional commercial agriculture; it has won awards, but has also drawn strong pushback from those he criticizes.[43]

Before Pollan's lecture, Cal Poly's president received a letter from David E. Wood, chairman of the Harris Ranch Beef Company.[44] "While I understand the need to expose students to alternative views," Wood wrote, "I find it unacceptable that the university would provide Michael Pollan an unchallenged forum to promote his stand against conventional agricultural practices."[45] Wood had pledged to contribute $150,000 toward a new meat-processing plant on campus, but the Pollan invitation, he warned, had caused him to "rethink my continued financial support of the university."[46] Harris Ranch's owner, John Harris, likewise began to rethink the $350,000 he had pledged toward the plant.

Unwilling to jeopardize a half-million-dollar gift, Cal Poly converted Pollan's lecture into a panel, taking care to ensure that Wood and Harris' points of view were represented. Pollan objected, calling the matter a question of academic freedom. "The issue is about whether the school is really free to explore diverse ideas about farming," he protested.[47] Nonetheless, Pollan ultimately participated in the panel discussion.

Foreign Grants

Sensitive though it can be to accept grants from domestic donors with political affiliations, grants from foreign interests are more sensitive still. This has become a special concern since September 11, 2001, when universities received a substantial number of offers of funding for Middle Eastern studies from international sources claiming an interest in promoting an understanding of Islam. One such funder, Prince Alwaleed bin Talal bin Abdulaziz Alsaud of Saudi Arabia, donated $20 million to create the Prince Alwaleed bin Talal Islamic Studies Program at Harvard in 2005, and another $20 million to Georgetown University to expand its Islamic Studies department.[48] The expressed purpose of the programs at Harvard and Georgetown is to "bridge gaps and bring people closer together," in the words of Nadia H. Bakhurji, secretary general of the Alwaleed bin Talal Foundation.[49] Outside the U.S., Alwaleed also donated to the University of Edinburgh, the University of Cambridge, the American University of Cairo, and the American University of Beirut.[50]

The donations attracted considerable attention. For one thing, Alwaleed was controversial. He had attempted to give money to the Twin Towers Fund after September 11, but then-New York City mayor Rudolph Giuliani rejected the donation because Alwaleed had said the U.S. "must address some of the issues that led to such a criminal attack."[51] Alwaleed published an op-ed in the *New York Times* rejecting the

notion that anything "can justify terrorism,"[52] and he blamed "Jewish pressures" for Giuliani's decision.[53] Skeptics remained concerned about the intention behind his donations.[54]

By 2012, Bin Talal's Harvard grant funded the Center for Middle East Studies (CMES); at Georgetown, Bin Talal's grant funds the Center for Muslim-Christian Understanding. The controversy over the source of funding has extended to the choice of the directors and the directors' positions concerning Israel and Arab terrorism.[55]

Questions for Consideration

When do the "strings attached" in a gift constitute a violation of academic freedom that gives outsiders inappropriate control over what happens in the university?

Should an institution have a policy on gifts or address each gift on its own facts?

When a campus has branches in foreign countries, funded by individuals or by the government, should trustees worry about academic freedom? And what can they do to protect it?

If a donor wants to retain control over the selection of a chair he/she endows, can this happen without violating academic freedom?

Analysis

The key to academic freedom is the scholarly presentation and exploration of diverse points of view. Outside funders are at liberty to offer funding for particular fields of study of their choosing, but they must respect the university's right to reject their request. And they must understand the university's professional obligation to make other competing perspectives available.

In the case of Cal Poly, Pollan raised a legitimate objection when he opposed the university's change in format. He was invited under certain conditions and had a right to assume the university would stick to that plan. Cal Poly could have ensured alternative perspectives without changing the format—inviting a subsequent speaker, for example, to offer an opposing viewpoint. As it happened, in the end there was a fortunate outcome in that Cal Poly's change of format for Michael Pollan's visit did not damage and may have enhanced academic freedom. In converting Pollan's lecture to a panel, Cal Poly diversified the points of view to which members of the university community would be exposed, broadening the debate on a controversial topic.

The actions of Harris Ranch Beef were problematic in that they showed little concern for academic procedures. As a potential donor, Harris Ranch would have been within its rights to reconsider its forthcoming grant, but the method of expressing its concern was an attempt to interfere with an invitation the institution had properly issued. Cal Poly, in turn, allowed the hope of future funds to affect its judgment about what could and could not be said on its campus.

In these days of high institutional costs and scarce funding, conscientious donors can play an important role in enhancing students' education and strengthening colleges and universities. But it is important that institutions be wary of accepting conditions with a gift that threaten or compromise academic freedom. When the funder represents a foreign interest, the university must remain particularly alert, or it risks potentially becoming a tool in the service of another nation's propaganda machine with the inevitable (and arguably deserved) public opprobrium such a posture can bring. Major donors often give with conditions, but those must be compatible with academic freedom.

CASE STUDY #5

Academic Freedom and Academic Quality

George Mason University

In the spring of 2000, the George Mason University Board of Visitors unanimously adopted a new set of general education requirements including a semester-long course on U.S. history and a second one on Western Civilization.

The board, for the most part, adopted the curriculum designed by a faculty committee and approved by the Faculty Senate. That curriculum included tougher writing requirements, public speaking, and computer skills. The faculty plan also called for students to take one of a variety of courses on the subject of "U.S. and Western institutions, traditions, and economies." That requirement was modified by the board to require U.S. history and Western Civilization instead.

The board's actions came in the wake of a report entitled *Losing America's Memory*, that documented how very few American colleges expected their graduates to study American history, even though a survey of top college seniors showed they were deeply ignorant of their history and heritage.

The board's action met with almost immediate condemnation from the Faculty Senate, which voted 21-9, with one abstention, to censure the board for interfering with the curriculum. The faculty called the board's changes "academically inferior."[56]

The board chairman called the faculty action "silly" and emphasized the board's ultimate responsibility for the educational policy of the university. "The board felt any educated person should know U.S. history and Western Civilization, both of which are the foundation of the society," he told the *Chronicle of Higher Education*. He described the board's action as simply approving a "framework," and not dictating course design.[57]

State University of New York

In December 1998, the State University of New York Board of Trustees adopted a resolution requiring a minimum of 30 credit hours in general education for each student, covering mathematics, natural sciences, social sciences, American history, Western civilization, the arts, the humanities, a foreign language, and information management. The curriculum was quite different from the previous "distribution requirements" approach which allowed students to pick and choose from a wide range of topics to satisfy their general education requirements.

The board's action came in the wake of a study showing that students could graduate from SUNY without studying math, science, English, composition, history, literature, art or philosophy. Under the existing requirements, students could satisfy humanities requirements by taking courses in "Sports Writing," "Love and Sexuality," or "Stage Combat I." Eight of the sixteen SUNY campuses did not require any courses in Western civilization at all. The report recommended

that SUNY adopt a "core curriculum" outlining what every student must know.

The chairman of the SUNY Board Committee on Academic Standards called the report "a valuable and timely contribution as the trustees and the academic community continue to deliberate on the key issue of curricular reform." The board chairman told *USA Weekend* that "the concept of a core curriculum appears to be an eminently sensible idea" and promised to work with faculty "to move toward a more intellectually coherent core curriculum."[58]

Opponents of the changes attacked the board for inappropriate activism. A story appeared in the *Chronicle of Higher Education* reporting "sharp opposition from faculty leaders" to the board resolution and criticizing the trustees for trying to "micromanage what has historically been the responsibility of the faculty." Faculty that had previously approved a curricular proposal described, in the story, as "a loosely configured core that would allow each SUNY campus to set general-education requirements," criticized the trustees' prescribed subjects and emphasis on "mainstream ideas and cultures." Jon Sorenson, a SUNY spokesman, said that "it's up to the campuses to decide how that course will be delivered, and in what form."[59] In adopting the new curriculum, the board members explained that the framework supported the board's belief that college graduates should be proficient in reading and writing; should understand enough math and science to be able to function in a modern, twenty-first-century society; should be able to communicate in a foreign language; and should have a knowledge of the history and governing institutions of this country that will prepare them for informed citizenship.

Questions for Consideration

Do trustees violate academic freedom when they address academic issues?

What is the appropriate sphere of activity for trustees regarding academic issues?

What differentiates the discharge of fiduciary responsibility from interference in faculty prerogatives and academic freedom?

If, for example, students can't get a course on military history, what trustee action, if any, would be appropriate?

Analysis

Among the reasons that universities have lay boards is the potential to bring a broad perspective to bear on such questions as: What does an educated person need to know and be able to do in today's world? Trustees share their experience as leaders in economic, professional, and civic life.

Presidents often focus on growth, faculty on their disciplines. Trustees can focus on a yet larger picture. Moreover, trustees have a fiduciary obligation that includes the academic and financial health of their institutions. And that means exploring and deciding the best way to ensure students receive an excellent education, at an affordable cost, that will allow them to succeed in a world that will look very different in the future.

As outlined in the case studies, boards that address curricular issues will not find the task easy. Trustees are often told that choice is essential to make students happy and that a limiting framework will prompt inter-departmental disputes over who will teach core courses. And they will be told bluntly that trustee involvement in matters such as general education is a violation of academic freedom. Trustees, however, cannot legally delegate away their responsibility over academic quality. The failure of governing boards to focus on academic programs is, says former college president Dr. Robert Dickeson, "arguably the single greatest cause of overspending." Without board engagement, internal campus decision making often results in a fragmented and ineffective curriculum.

In their 2011 book *Academically Adrift: Limited Learning on College Campuses*, Richard Arum and Josipa Roksa tracked the dire consequences of curricula that lack rigor and coherence. They found that students were spending more than half of their time sleeping and socializing and that, after four expensive years, more than a third of the students they surveyed had little or no learning gains.

ACTA's 2012-2013 What Will They Learn?™ survey of core curriculum requirements shows that over one-third of colleges and universities require no college-level math. Less than two in five require literature. Less than 14 percent have an intermediate-level foreign language requirement. Less than 20 percent require even a basic course in U.S. government or history, and less than 5 percent require basic economics. Most distribution requirements, often offered as an alternative, include a range of disconnected offerings. In the fall of 2012, Penn State, for example, offered over 250 choices for satisfying its "United States Cultures" requirement, including courses on hotel management, the history of punk rock, and "Natural Disasters: Hollywood vs. Reality."[60]

To serve students' freedom to learn, trustees must engage issues of academic quality and rigor, including what skills and knowledge will help students succeed after graduation. This inquiry does not constitute interference in the classroom; indeed, programmatic oversight does not violate academic freedom.

Working with the president and faculty, trustees can demand an academic program of value designed to prepare graduates for success in career and community. Academic freedom is faculty freedom to teach and students' freedom to learn. Appropriate trustee engagement in curricular oversight can foster academic freedom, rather than detract from it.

CASE STUDY #6

Academic Freedom and Freedom of Conscience

Missouri State University

In the spring of 2005, Emily Brooker was an undergraduate at Missouri State University (MSU) in southwest Missouri, pursuing a bachelor's degree in social work. In one of her courses, she and her classmates were required to write—and sign—a letter to the state legislature advocating homosexual adoption, an issue in Missouri at the time.

Brooker did not support homosexual adoption, as it conflicted with her Christian beliefs. She agreed to complete all her assignments, but refused to sign the letter, offering instead to research the topic and write a paper on it. For this, the School of Social Work lowered her grade and charged her with a Level 3 Grievance—its highest offense; a faculty committee then subjected her to a two-and-a-half-hour interrogation. Brooker was denied representation. She was told that she would not be permitted to graduate unless she consented to close monitoring, pledged not to discriminate, and agreed that she would, as a professional social worker, place children in homosexual adoptive homes.[61]

Brooker sued, seeking to clear her record and to obtain compensation for the violation of her basic civil rights. In the midst of a national outcry, the university temporarily assigned the professor who had taught the course to nonteaching duties. It also commissioned an independent study of the MSU School of Social Work. This study found "a fear of voicing differing opinions from the instructor or colleague … particularly … regarding spiritual and religious matters." It found that the word "'bullying' was used by both students and faculty to characterize specific faculty." It found "no history of intellectual discussion/debate," but rather "an atmosphere where the Code of Ethics is used in order to coerce students into certain belief systems regarding social work practice and the social work profession."[62] The report called the program "toxic" and recommended several possible courses of action. Each option called for major reforms; one option proposed the department be closed down and the entire faculty fired.[63]

In the midst of these developments, the legislature took action. On April 12, the Missouri House of Representatives passed House Bill 213, on a vote of 97 to 50. The bill would have required Missouri's public universities to report annually on specific steps taken "to ensure and promote intellectual diversity and academic freedom."[64] The bill defined intellectual diversity as "the foundation of a learning environment that exposes students to a variety of political, ideological, religious, and other perspectives, when such perspectives relate to the subject matter being taught or issues being discussed." It included suggested actions universities could take.[65]

House Bill 213 did not become law. But the president of MSU publicly acknowledged that Brooker's claims were largely correct and settled her lawsuit. He also took corrective action, transferring four of the tenured faculty

in the Social Work department to other departments and dismissing four other non-tenured professors.[66]

In October 2007, in the wake of the proposed legislation, the University of Missouri announced that its four campuses would launch special websites where students could file complaints regarding viewpoint discrimination. Special ombudsmen were appointed to handle the complaints. The complaints were to be compiled in a database and an annual report.[67]

University of Northern Arizona

In 2011, three students at the University of Northern Arizona decided to commemorate the ten-year anniversary of September 11, 2001, by giving away small American flags. It was raining, so the students assembled inside the student union, standing against the wall of the large room.

Because the students had a video camera, there is no dispute about what happened next. A university administrator approached, and told the students that they weren't in an "approved vendor space" and would have to go outside. The students—who were not selling anything, and who wished to avoid the rain—refused.

A second administrator followed the first. This official told the students they were not allowed to pass out flags without a permit, and said the university could use "time, place, and manner" rules to make that determination. The students again refused to move. A third administrator followed the second. This one claimed the First Amendment meant "free speech in a designated time, place, and manner"—without adding that these restrictions must be reasonable, content-neutral, and narrowly tailored to serve a significant government interest. The students again stayed put.

A fourth administrator came, and repeated "time, place, and manner," four times. After that, the university called the police. A police officer arrived, and took the names of two students, while stipulating that the issue was not a police matter, but rather, a matter concerning the university's code of conduct.

Initially, the students faced disciplinary charges for "failure to comply with a university official" and "interfering with university activities."[68] News coverage that was embarrassing for the university ensued, and within one day, the university quickly dropped the charges.

Questions for Consideration

Sometimes students claim that they are protesting misconduct in the classroom, when in fact they just don't like the ideas they are hearing. What are the signs that actual abuse is involved—as opposed to legitimate educational challenge of ideas and beliefs? And what are the criteria for determining whether the matter involves policy issues that should have the attention of the governing board?

What constitutes a reasonable policy for student rights of expression and assembly?

What policies and procedures should the university have in place to ensure that ideology does not become a factor in determining the rights granted to students?

Analysis

It is a clear violation of students' academic freedom to punish them for refusing to advocate points of view in class they do not share. If such action occurs at a public college or university, it is a violation of the students' First Amendment rights as well. Missouri State University acted prudently when it undertook an extensive independent study of the Social Worker Program. And the action by the University of Missouri recognized the importance of obtaining data about the campus culture and acting, if necessary, to protect the marketplace of ideas on its campuses. Colleges and universities that do not do so can and should expect that legislatures will step in—as the Missouri House of Representatives began to do. Increasingly institutions, especially public institutions, can expect litigation when students' constitutional rights are at issue.

As the flag incident at Northern Arizona illustrates, institutional policies may impinge on reasonable exercise of student rights and infringe upon protected speech. It is a reminder that permit requirements need to meet a high standard of reasonability, lest they become tools for arbitrary and quixotic enforcement. The presumption of the administrators that free speech should be restricted to a "designated time, place, and manner" is itself a sign of a serious misunderstanding of the First Amendment. As it was, the university was embarrassed by both local and national news coverage. Fortunately, local police did not overreact, and the university quickly retreated from the disciplinary charges against the students.

CASE STUDY #7

Academic Freedom and Research Integrity

Conflicts of Interest

In 2008, it was revealed that Charles Nemeroff—a leading authority on depression and chair of Emory University's psychiatry department—had failed to report more than $800,000 in payments that he had received over six years from pharmaceutical giant GlaxoSmithKline (GSK).[69] While he was receiving these payments, Nemeroff was also receiving federal research grants to study, among other matters, depression.[70] GSK manufactures paroxetine, a drug used to treat depression; the company has paid hundreds of millions of dollars to resolve lawsuits for allegedly suppressing data about addiction and birth defect complications. The company has also settled claims regarding a possible correlation between paroxetine and an increased risk of suicide in young adults and children.[71]

Nemeroff's underreporting of his income from GSK was not discovered by Emory. It was discovered in an investigation by Senator Charles Grassley (R-IA). When Grassley first made his charges, Emory defended Nemeroff, saying his paid speeches for GSK weren't product-specific, but, rather, were "CME-like"—a reference to "continuing medical education," which doctors routinely do.[72] The university initially said it would address the problem by not seeking research grants or other contracts involving Nemeroff for two years. It would require Nemeroff to get approval from the dean's office for paid engagements, and would grant him approval only for talks sponsored by academic institutions or professional societies.[73]

Grassley was outraged by the phrase "CME-like," which he said "appears to be a new term created at Emory University."[74] Grassley confirmed with GSK that some of Nemeroff's talks had indeed been product talks, and warned Nemeroff and the university of "the penalties for making false statements."[75]

Grassley noted that the reporting requirements existed to assure "a level of objectivity in publicly-funded research, and state in pertinent part that [National Institutes of Health] investigators must disclose to their institution any 'significant financial interest' that may *appear to* affect the results of a study [emphasis added]."[76] Nemeroff might protest, as he did: "I have dedicated my career to translating research findings into improvements in clinical practice in patients with severe mental illness."[77] The point, however, was not whether Nemeroff's financial relationship with GSK actually affected his work on depression; the point was that his work could not be trusted because he misrepresented the relationship, in violation of reporting requirements.

Nemeroff resigned from the Emory faculty.[78] However, a year later he found another job, as chairman of the Department of Psychiatry at the University of Miami, which acknowledged the scandal at Emory, but called him "an extraordinary psychiatrist and scientist."[79] Senator Grassley, concluding "that universities are not and have not managed their professors' financial conflicts of interest," now supports a federal rule that would establish a website that would publish the out-

side income of medical researchers receiving grants from the National Institutes of Health.[80]

Research Misconduct

In 2000, Emory University's tenured history professor Michael Bellesiles released *Arming America: The Origins of a National Gun Culture.* Bellesiles' book, published by Knopf, argued that gun ownership in peacetime was comparatively rare in colonial and frontier America, and that the culture of gun ownership dated only to the Civil War.[81] Bellesiles said he based his claims on archival sources, including probate and militia records. He explicitly linked his work to the national debate on the meaning of the Second Amendment and to other political issues associated with gun ownership: His book opened with commentary on the threats guns allegedly present to "a claim of faith in God and all dreams of childhood innocence."[82] Gun control advocates praised *Arming America*, and so did the academy. The book won widespread professional and critical acclaim, including Columbia University's prestigious Bancroft Prize.

Pieces of Bellesiles' book had originally appeared as scholarly articles, meaning that they underwent standard peer review. At least one of these articles, which was published in the *Journal of American History* in 1996, laid out Bellesiles' main thesis.[83] This article attracted the attention—and the skepticism—of Northwestern law professor James Lindgren. Before the book was published, Lindgren asked to see Bellesiles' probate database. Bellesiles told him there was none. He had only yellow pads, he said, and those had been irreparably damaged in a flood.[84]

When the book was published, however, questions from Lindgren persisted. What's more, now Lindgren was joined by other academic critics, among them professor Joyce Malcolm of George Mason University and Clayton Cramer, a software engineer with a master's degree in history. All of these academics asked the kinds of questions an effective peer review process would have been expected to generate before publication.[85] Bellesiles, though, was unable to answer. When asked to substantiate his claims, he said that his records had been destroyed, and that his website must have been hacked and his documents altered. When archives were found not to hold records Bellesiles claimed to have seen, he then said he did not remember where he had done his research.

As his defenders fell away, Bellesiles lashed out at his critics. In June 2002, when the National Endowment for the Humanities (NEH) stripped its name from his Newberry Library fellowship, Bellesiles accused the NEH of "McCarthyism" and called its action a "political decision that should send chills through academics everywhere and is clearly intended as a warning to any scholar who dares to work on a controversial topic."[86]

As the evidence against Bellesiles mounted, Emory University conducted an internal inquiry, and then appointed an independent committee of three distinguished historians to investigate Bellesiles' work. The committee found that "[e]very aspect of his work in the probate records is deeply flawed," and that Bellesiles' efforts to defend himself had been "prolix, confusing, evasive, and occasionally contradictory." It concluded that Bellesiles' "scholarly integrity is seriously in question." Bellesiles denied the charges, but also resigned from Emory rather than face the possibility of being fired.[87]

Columbia rescinded the prize it had awarded his book, and several of Bellesiles' best-known academic defenders and early reviewers withdrew their support. One was Roger Lane, Benjamin R. Collins Research Professor of Social Sciences at Haverford College in Pennsylvania, and now professor emeritus. Lane had reviewed *Arming America* for the September 2001 issue of the *Journal of American History*, writing that Bellesiles' "evidence is such that if the subject were open to rational argument it would be over." Once Bellesiles was exposed as a fraud, Lane announced: "I'm mad at the guy. … He's betrayed us. He's betrayed the cause."[88]

Ghostwriting

In 2003, an employee of a company called DesignWrite drafted a 14-page outline of a medical article about menopause, listing the author as "TBD"—to be decided. DesignWrite sent the outline to Dr. Gloria Bachmann, a professor of obstetrics and gynecology at the Robert Wood Johnson Medical School in New Brunswick, NJ. Bachmann agreed to sign the finished work. DesignWrite sent her a draft, to which she made one correction. The article was published almost verbatim in *The Journal of Reproductive Medicine* in 2005 under Bachmann's name. It called hormone drugs the "gold standard" for treating hot flashes.[89]

Those drugs are made by Wyeth (now part of Pfizer), which paid DesignWrite $25,000 to generate the article. The involvement of Wyeth and DesignWrite in developing Bachmann's article was not disclosed.[90] Their role did not come to light until the use of hormone drugs fell out of favor, and thousands of women who used the drugs filed lawsuits against Wyeth. At that time, a spokesman for Wyeth said the practice of using consulting firms and ghostwriters was routine.[91]

Dr. Joseph S. Ross, a professor at Mount Sinai School of Medicine in New York who has researched the subject, agrees. In an interview with the *New York Times* after the Bachmann incident, he said ghostwriting is "almost like steroids and baseball… you don't know which articles are tainted and which aren't."[92]

In 2009, Senator Grassley began to investigate medical ghostwriting. In June 2010, the senator released a report on the topic.[93] The report revealed, among other things, that the anonymous editor of a specialty medical journal believed that about a third of the articles submitted to his journal were ghostwritten.[94]

According to an article published in *The British Journal of Psychiatry*, almost 50 percent of publications on drugs still on patent are ghost-written. The *New York Times* also reported on a study that found a ghostwriting rate of 7.9 percent in *The Journal of the American Medical Association* (JAMA), 7.6 percent in *The Lancet*, 7.6 percent in *PLoS Medicine*, 4.9 percent in *The Annals of Internal Medicine*, and 10.9 percent in the *New England Journal of Medicine*.[95] Against this backdrop, a study published in *PLoS Medicine* found that only 13 of the country's top 50 medical schools specifically prohibit ghostwriting. When Grassley asked the top ten American medical schools if they had investigated a case of ghostwriting in the preceding two years, only two schools had: The University of California, San Francisco, and the University of Washington Medical School.[96]

Plagiarism

In December 2003, Harvard undergraduate Todd Fine discovered the wholesale plagiarism of professor Steven G. Livingston. While researching his senior thesis, Fine stumbled upon a 1996 book by Neil Winn, a professor at the University of Leeds. Fine noticed that five pages of Winn's book were virtually identical to a paper of Livingston's that had been published in the *International Studies Quarterly* in 1992. About the most significant changes Winn had made were to switch American spellings to British spellings.[97] Fine told his father, Gary Alan Fine, a sociologist at Northwestern University, who notified Livingston, then a political science professor at Middle Tennessee State University.[98]

Livingston pursued the matter—but did not make much progress. The publisher of the journal that ran his original article declined to address the matter, even though the journal owned the copyright. Winn's university claimed that Winn was being "disciplined," but Winn remained on

the faculty, and the book containing stolen content remained, months later, on Winn's university web page. In an interview with the *Chronicle of Higher Education*, Gary Alan Fine worried about how such responses implicitly condoned plagiarism. "If a professional organization won't stand up and say that this is wrong," wondered Fine, "what message does this give to my son?"[99]

Like ghostwriting and conflicts of interest in research funding, plagiarism is common in the university. Forty percent of professors say they have been victims of this crime.[100]

Questions for Consideration

What are the legal obligations of the university to discourage conflict of interest, ghostwriting, plagiarism, and misconduct in faculty research?

What are the ethical obligations of the university to discourage conflict of interest, ghostwriting, plagiarism, and misconduct in faculty research?

What policies and procedures, within and beyond post-tenure review, should the university have in place regarding conflict of interest, ghostwriting, plagiarism, and misconduct in faculty research?

Analysis

Academic freedom does not mean absolute academic license. It does not mean "anything goes." It means academic self-governance and accountability to the public, according to ethical norms.

The extent of the current crisis of academic integrity is evident in survey statistics. In a 1993 survey, only 55 percent of professors said they "should, to a great extent, exercise responsibility for the conduct of their colleagues."[101]

A 1999 article in the *Journal of Higher Education* reported that 65 percent of female faculty and 52 percent of male faculty believed there to be "some or a great deal of faculty misconduct on campus." The good news is that most of the respondents reported taking action; the bad news is the persistence of the problem: A 2004 survey by the American Physical Society reported that 39 percent of recent Ph.D.s witnessed or had knowledge of plagiarism, failed attribution, or research misconduct.

Law professor Neil Hamilton, a contributor to this guide, has asserted that neither graduate students nor faculty "understand the social contract, academic freedom, or the principles of faculty professionalism." The AAUP's own study, described by Hamilton, revealed that only four percent of faculty and three percent of students said their departments took a very active role in fostering "ethical preparedness." Seventy-one percent of department chairs and full-time faculty said they discussed research ethics with students, but only 39 percent of graduate students said their professors covered the topic.

A vital part of academic self-governance is the establishment and enforcement of ethical standards among peers. This is the system of the American Psychological Association, as documented in its extensive publication, *Ethical Principles of Psychologists and Code of Conduct*.[102]

A robust enforcement of professional standards within the professoriate, along with a well-regulated system of peer review, might have discouraged Michael Bellesiles from inventing documents, or Neil Winn from plagiarizing the work of Steven G. Livingston, or the editors of *The Journal of Reproductive Medicine* from publishing a ghostwritten article signed by Gloria Bachmann. Unfortunately, in all those cases, there was no effective peer review system.

A vital part of academic accountability is also transparency. A level playing field of equitably-applied reporting requirements for outside income can offer transparency, without unduly impinging upon intellectual freedom. Unfortunately, again, self-regulation proved insufficient.

The AAUP asserted in its *Declaration of Principles* that "if this profession should prove itself unwilling to purge its ranks of the incompetent and the unworthy ... the task will be performed by others."[103] It is already happening. If the universities do not provide accountability, the public will insist upon it, by other means, as Senator Grassley has already begun to do. Hamilton adds that something greater even than the universities is at stake. "[T]he battle," he writes, "is actually for the soul of the profession."[104]

CASE STUDY #8

Academic Freedom and Protection for Non-Tenured Faculty

Iowa Southwestern Community College

From 2001 to 2007, Steven Bitterman taught Western civilization as an adjunct at Iowa's Southwestern Community College. Then one day he happened to tell his class that the Biblical story of Adam and Eve might be best appreciated as a myth.

Bitterman was fired over the phone. "The vice president said the students and their parents had threatened to sue the school, and sue me, and she said: 'We don't want that to happen, do we?'" Bitterman told the *Chronicle of Higher Education*. "She told me I was supposed to teach history, not religion, and that my services would no longer be needed."[105]

The American Humanist Association (AHA) was among those that rose to Bitterman's defense. With the Association's help, Bitterman sued, and asked the college to acknowledge "that all ideas and beliefs are open to critical assessment in the classroom by both instructors and students."[106]

The college replied that it "understands and adheres to the principles of academic freedom in the governance of its instructors."[107] It added: "All instructors at Southwestern Community College, both full-time and adjunct, are given the freedom to present the material for which they are responsible in the manner of their choosing."[108] With the support of the AHA, Bitterman won a $20,000 settlement.[109] Southwestern insists it settled only to avoid litigation, and that it did nothing "improper."[110]

Depaul University

On September 15, 2004, Thomas Klocek was a part-time adjunct professor at DePaul University's School for New Learning in Chicago, Illinois, where for fourteen years he had taught a variety of courses drawing on his expertise in Slavic languages. On that day, at a student fair in the school cafeteria, Klocek started a conversation with the Students for Justice in Palestine (SJP) and United Muslims Moving Ahead (UMMA). As part of his dialogue with the students, he cited a *Chicago Sun-Times* article that quoted the general manager of Al-Arabiya television thus: "It is a certain fact that not all Muslims are terrorists, but it is equally certain, and exceptionally painful, that almost all terrorists are Muslims."[111] An angry argument followed. When Klocek left, he thumbed his chin at the students.[112]

On September 24, dean Susanne Dumbleton told Klocek that students from SJP and UMMA had complained, and that the university had already met with them. She suspended Klocek, effective immediately, and ordered him off campus without letting him see the complaints, providing him with a hearing, or giving him a chance to confront his accusers. In a subsequent letter to the student paper, *The DePaulia*, Dumbleton made it clear Klocek was being punished for what he had said: "The students' perspective was dishonored and their freedom demeaned. Individuals were deeply insulted.... Our college acted immediately by removing the instructor

from the classroom." On November 10, Klocek was informed of his punishment in a letter: In the following semester, he would be allowed back into the classroom. But he would be permitted to teach only one class, and it would be observed.[113]

In the summer of 2005, Klocek sued DePaul for defamation, but the third judge assigned to the case—a graduate of DePaul Law School—dismissed the suit, and the Illinois Supreme Court declined to hear Klocek's appeal.[114]

Questions for Consideration

Does a university have an obligation to provide adjunct professors with rights of academic freedom?

Why do some institutions offer this freedom to adjuncts, while others don't?

How will tenured faculty react if the institution provides adjuncts with academic freedom?

Analysis

Historically, tenure has been defined as a core part of academic freedom because it ensures that professors are free to pursue the truth wherever it may lead, without fear of sanctions.

Today, though, three-quarters of faculty appointees at degree-granting colleges not only do not have tenure, but have no expectation of receiving it, as their positions are non-tenure track.[115] If these faculty members say or do something someone finds offensive, they are at risk. This is true whether they are teaching at public institutions, where their speech is constitutionally protected, or at private institutions, where it is the prerogative of their employers to extend these rights to them, or not.

When they lose their rights or their jobs, some adjunct professors will take legal action—and sometimes they win large settlements. Litigation—with its high costs and uncertain, almost haphazard outcomes—is the predictable result of a system that fails to protect the academic freedom of non-tenure-track faculty.

CASE STUDY #9

Academic Freedom and Tenure

City University of New York–Brooklyn College

When Robert David ("KC") Johnson came up for tenure at the Brooklyn College campus of the City University of New York (CUNY) in the fall of 2002, he was expected to sail through the process. An acclaimed, Harvard-educated historian, Johnson had published three books (two with Harvard University Press), edited a fourth, and was editor of volumes 2-4 of the Lyndon Johnson tapes. Johnson's colleagues pronounced his teaching "exemplary" and "truly exceptional," and one noted that Johnson's was "one of the best classes I have observed."[116]

Nonetheless, after Johnson objected to a one-sided panel on the September 11 attacks, and opposed the hiring of someone he regarded as unqualified, senior faculty opposed his bid for tenure, citing his lack of "collegiality"—a new standard, nowhere to be found in CUNY rules.[117] KC Johnson felt that his tenure denial was based on inappropriate considerations unrelated to academic merit. He went public. An uproar ensued. Because of his extensive research and writing, he had many friends, both inside and outside the academy.

Students held a public protest, and wrote to CUNY chancellor Matthew Goldstein and Brooklyn College president Chris Kimmich to condemn the decision, and to expose a campaign by the history department chair to turn students against Johnson. Twenty distinguished historians from across the country sent a letter expressing "shock and dismay" at the college's denial of tenure to "one of the most accomplished young historians in the country." CUNY's standard of "collegiality," the historians said, is "a grave threat to academic freedom."[118]

The president of the American Council of Trustees and Alumni at that time, Jerry L. Martin—a former tenured philosophy professor and AAUP chapter head—also wrote to the CUNY chancellor and spoke with several trustees: "This is more than just a tenure case," he wrote. "This is a test case to decide whether any young professor, no matter how outstanding, can be purged by politically intolerant colleagues. If Johnson can be fired, anybody can be fired. Academic freedom will be gone. ..."[119]

As a consequence of the national outrage over the case, CUNY's Board of Trustees asked Goldstein to review the matter. Goldstein met with Johnson, read one of his books, and reviewed the report of a special panel of three CUNY professors from outside Brooklyn College, which he charged to review the case. Ultimately, Goldstein recommended that the board reverse the College's decision. The board accepted his recommendation, with several trustees speaking publicly about the injustice, and Johnson was promoted with tenure.[120]

A poll commissioned by the AAUP in 2006 found that more than two-thirds of the public—68.7 percent—thinks tenure should be modified. An additional 13.3 percent thinks it should be eliminated. That makes

a total of 82 percent that thinks the tenure system is due for a change. In 2007, a Zogby poll found that 65.3 percent of respondents agreed with this statement: "[A] professor who does not have tenure is more motivated to do a good job than one who does have tenure."[121]

Former University of Colorado president Hank Brown and others have written candidly of the risks universities take if they do not ensure a fair and dispassionate tenure review process: The universities' independence, and academic freedom itself, are at stake. These authors write: "Colleges and universities will benefit from making their tenure-related processes open and transparent and holding the leadership accountable for high standards and unbiased review of tenure cases. … It is imperative that we in higher education take the initiative to examine ourselves. There are many lawmakers at the state and federal level willing to intervene if we do not."[122]

Questions for Consideration

Governing boards regularly approve professors recommended for tenure by the departments. How can a board effectively review the names or do anything more than rubber stamp the faculty recommendations? How can the board be certain that professors who should earn tenure are not unfairly denied it?

What is the best way to ensure that the tenure process is transparent and accountable?

Analysis

For the better part of a century, tenure has been understood to be an essential guarantor of academic freedom. Indeed, the AAUP introduced the tenure standard in 1915 to establish academic freedom, by protecting professors from politically-motivated firings.[123] Despite this long history, the tenure review process has been largely opaque, and, in many cases, vulnerable to abuse.

Only public protest averted egregious abuse in the case of KC Johnson. That the system came so near to a grave miscarriage of justice is disquieting and should alert all boards to be vigilant not only about the professors recommended for tenure, but also those who receive negative recommendations. Trustees need to see accurate summaries of all tenure cases, so that they can make a thoughtful assessment of the integrity of the process.

Ordinarily, to be "collegial" is to share power and authority to promote the free exchange of ideas; collegial men and women hold one another to high standards to do so. But to Johnson's colleagues, being "collegial" meant espousing a particular point of view—and falling into line without disagreement.

This understanding of collegiality is pernicious for academic freedom, which is why many at the time called the decision to grant Johnson tenure a major win for academic quality and academic freedom:

> If a scholar and teacher with Johnson's outstanding record could be denied tenure under the phony guise of "collegiality" just for refusing to "go along get along," it would be "open season" on anyone who thinks independently. One of the most important duties of boards and chancellors is to protect academic freedom—from enemies inside academe as well as outside. The CUNY board and Chancellor Goldstein rose to the challenge and set an example for boards and administrators everywhere.[124]

A university professorship is a position of public trust and great public influence. The public knows it, and will not tolerate abuse of that trust. The consequence is that the processes for hiring and promoting professors and granting them tenure must be sound, transparent, and beyond reproach.

Where academic freedom is concerned, trustees should not be "rubber stampers" who go along to get along. Trustees bear the ultimate responsibility for the institutions they manage. Because academic freedom is vital to those institutions, it is vital for trustees to make their campuses places where academic freedom is honored.

Best Practices: Action Items for Trustees

BEST PRACTICES

Action Items for Trustees

Protecting the Free Exchange of Ideas on Campus

No one has the right not to be offended. As the C. Vann Woodward Committee wisely observed, a university has a

> need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable. To curtail free expression strikes twice at intellectual freedom, for whoever deprives another of the right to state unpopular views necessarily also deprives others of the right to listen to those views.

The AAUP concurs, declaring that "the freedom to hear is an essential condition of a university community and an inseparable part of academic freedom." This means universities must make room even for unpopular speech. To ensure that they do so, trustees can:

- ***Survey the campus climate.*** Colleges and universities regularly survey their campuses on a range of issues. Intellectual diversity can be one of them. A number of prominent institutions have taken this idea to heart, sometimes with self-studies and, in at least one case, with an external evaluation. These studies can provide crucial baseline information for trustees interested in advancing this central principle of education: intellectual diversity on campus. Examples of questions can be found in ACTA's state report, *Show Me: A Report Card on Public Higher Education in Missouri*, available on www.GoACTA.org.

- ***Eliminate speech codes.*** Unfortunately, too many institutions have policies in place that punish "offensive" speech or restrict expression to designated "free speech zones." The university should be a place where diverse views can be expressed freely. Trustees should eliminate all speech codes and other policies that restrict free expression.

- ***Acknowledge diversity publicly.*** Because a rich variety of viewpoints and respect for diversity of opinion are essential to a solid education, trustees can consider acknowledging those goals publicly in statements of institutional purpose. The strategic plan is the central document of the university. It presents a long-range vision for the university and outlines the practical steps needed to realize it. Including an endorsement of intellectual diversity in such a document is important, and trustees—who should contribute actively to the development and implementation of a strategic plan—can insist upon it.

- ***Don't disinvite speakers.*** No one has a "right" to speak at a university. Yet once a speaker has been invited to a campus, a university must not yield to pressure to withdraw the invitation. To do so

compromises academic freedom. To disinvite a speaker because of the threat of violence is worst of all, because it gives a veto to would-be thugs.

- ***Encourage responsible decision making when inviting speakers.*** A university is not powerless to enhance the level of discourse and debate: A university's best opportunity to weigh the appropriateness of potential speakers is at the point of invitation. Colleges and universities should anticipate the issue of controversial speakers and have standing policies and procedures in place for responsible and productive examination of such situations. It is important to remember that choosing speakers well means choosing speakers who enlarge the range of ideas expressed on a campus. Trustees who seek to enhance academic freedom should ensure that their universities' processes for choosing speakers are both transparent and open to individuals who represent ideas or points of view that are too little addressed in everyday campus life. Such a system will responsibly serve the freedom to hear, and will enrich education as well. The Woodward Report (see pp. 23-30) offers relevant and excellent recommendations for trustees.

- ***Vet student grievance guidelines.*** Trustees can vet (and amend, if necessary) student grievance guidelines. Grievance procedures should provide a clear, accessible, and well-publicized avenue for redress if students believe they have been subject to unfair grading due to personal beliefs. The ideal system gives a step-by-step procedure for students to follow and allows them to appeal to a neutral third party if necessary.

- ***Declare support for intellectual diversity in course syllabi and other campus documents.*** Trustees can foster greater awareness of academic freedom and intellectual diversity by having course syllabi include a declaration of students' academic rights and responsibilities. Trustees should consider including statements on course syllabi that indicate their institutions' commitment to intellectual diversity on campus and in the classroom. As suggested by the Woodward Report, trustees can insist that all university catalogs, as well as faculty and staff handbooks, include explicit statements on free expression and the right to dissent. Student attention should be directed to these statements each year at registration. Deans and faculty should address entering students on academic freedom and free expression as part of their orientation.

- ***Ensure that gifts to the university—domestic and foreign—are free of strings that impinge on academic freedom.*** Trustees should insist on regular reports on the implementation of targeted gifts.

- ***Protect academic freedom for non-tenured faculty.*** Increasingly, "faculty" means "non-tenured faculty"—and non-tenured faculty lack the rights and prerogatives of the tenured. Without these rights, non-tenured faculty do not have academic freedom; in certain fields, students may be taught by an intimidated professoriate; and educational institutions are vulnerable to lawsuits, with all the costs and uncertainty they entail. For everyone's protection, and to secure academic freedom for all, trustees should ensure that non-tenured faculty enjoy full First Amendment and due process rights.

- ***Understand what*** Garcetti v. Ceballos ***means—and what it does not.*** The Supreme Court ruled that public employees—including professors at public universities—do not have First Amendment protection for "statements pursuant to their official duties." The Court, however, also observed that it was not ruling on a "case involving speech related to scholarship or teaching." Thus, the

Court's decision has not challenged the academic freedom of teaching and research. What remains ambiguous is the extent to which a public university may limit the speech of its employees regarding governance and administration. It is here that trustees must take the initiative to define and protect academic freedom.

- ***Review policies concerning student groups***. A campus climate that welcomes a robust, vigorous mix of ideas helps broaden students' horizons. Crucial to creating such a climate is a vibrant, diverse range of student-run groups. However, the Supreme Court's decision in *CLS v. Martinez* may prompt administrators to make changes that will adversely affect students' right of association in their political, religious, and social groups. Trustees should insist that administrators report any proposed changes in policies concerning recognition of student groups, before any action occurs. Trustees should acquaint themselves with policies at other institutions; some universities have amended their non-discrimination policies to permit student groups to function freely on campus.[125] Above all, trustees would be well advised to assess their own existing policies, hear from students about the state of associations on their campuses, and consider adopting policies that protect both the right of assembly and campus diversity.

Ensuring Academic Integrity and Accountability

Academic freedom is the freedom of higher education institutions to run themselves according to scholarly standards of integrity. It is a disciplinary directive, not a declaration of freedom from accountability. In short, academic freedom does not mean "anything goes."

To ensure academic integrity and accountability, trustees can:

- ***Encourage departments to diversify.*** Departments should be encouraged to be honest in their own self-appraisals and try to correct for any bias when they evaluate candidates for positions. If this bias is reflected in always designating searches in fields representing one point of view, they might consider designating the next position for a different field that provides some diversity (such as diplomatic or military history). Academic departments that are intellectually open, striving for a range of approaches for the stimulation of both students and faculty, might be rewarded with additional resources, since they are providing superior service to the mission of the university.

- ***Ensure oversight of the tenure process.*** Trustees should insist on seeing accurate summaries of all tenure cases, so that they can make a thoughtful assessment of the integrity of the process. Summaries should include the candidate's publication record, overview of teaching evaluations, and excerpts from the letters of outside reviewers. Trustees should also request a specific list of new faculty lines granted, with one-paragraph descriptions, so as to give a sense of the pedagogical breadth (or lack thereof) of tenure candidates down the road.

- ***Implement meaningful post-tenure review.*** Trustees at both public and private institutions should strive to guarantee the integrity of tenure at their schools. If their college or university does not have a system of post-tenure review, they should work closely with faculty and administrators to implement a rigorous policy. Trustees at schools that already have post-tenure review should ensure that their institutions conduct regular self-assessments, and make improvements when necessary. Schools should publish both their post-tenure review policies and their self-assessments, to enhance the mechanisms of self-governance and restore public trust in academe.

- ***Review and amend, if needed, policies on academic ethics.*** These policies should cover the various forms of research misconduct, including but not limited to plagiarism, ghostwriting, and conflicts of interest, with respect to outside funding. Suspected misconduct should be investigated, albeit with appropriate regard for due process, and documented misconduct should be sanctioned, once again, while honoring due process. Such sanctions should cover disciplinary actions up to and including dismissal. Trustees should cultivate a culture of accountability at the departmental, college, and institutional levels, and should regularly publish what they are doing to ensure their institutions' integrity.

- ***Create a culture where employees—including professors—have a clear understanding of their duties.*** This is similar to the education that many employers and licensing authorities of lawyers, physicians, and other professionals require at regular times in a career. Trustees should ensure their institutions have robust programs for educating faculty in their institutions' ethical standards. Hiring, promotion, and post-tenure review should be as rigorous and transparent as possible. Adherence to professional standards should be part of faculty collective bargaining agreements and contracts. And faculty (tenured and non-tenured) should be expected to engage in a regular assessment of their knowledge and effectiveness in upholding the correlative duties of academic freedom. The findings of this assessment should be published.

Conclusion

Protecting academic freedom is not a job that is done, then crossed off a list. It takes leadership, courage, and skill, and after that, it takes constant vigilance. But it is not optional. Academic freedom is essential to the integrity of the university. If integrity is not maintained from within, the public will attempt to impose it from without, at great institutional cost.

End Notes

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