THE JAMES G. MARTIN CENTER FOR ACADEMIC RENEWAL

Scholastic Gag Orders: NDAs, Mandatory Arbitration, and the Legal Threat to Academics

By Stephen Baskerville

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Introduction

As radical activists serve as self-appointed censors in our cultural institutions, attention has focused on the militants' quasi-Bolshevik tactics. But much less attention has focused on the absence of resistance: the silence of able-minded scholars, whose talents and learning could fight intimidation, and the failure of nerve by institutional leaders who could gain overwhelming public support.

Colleges and universities now respond not by defiantly defending their principles, but by devising new and secretive methods to rid themselves of the faculty who resist intimidation—without the world knowing.

Two methods provide a veil of legally enforced secrecy that shields institutions from negative publicity, professional censure, and even oversight: non-disclosure/disparagement agreements and mandatory arbitration.

Both mechanisms enable institutions to conceal unethical conduct that would bring public condemnation upon them. Both conservatives and liberals consider their use unethical because they protect administrators from legal liability and criticism while leaving scholars in legal jeopardy and possibly even at risk of criminal punishments.[1]

Because secrecy is the overriding imperative, information is difficult to obtain. These mechanisms exist to conceal, and the mechanisms are themselves concealed and disguised. We cannot know therefore how many and which institutions use them. Nevertheless, recent scandals involving Evangelical institutions show that they seem to be especially popular at religiously affiliated colleges, though nothing suggests that they aren't used by public universities

[1] Jeremiah Poff, "Conservative Professor Says Baptist Seminary Used COVID as an Excuse to Get Rid of Him," The College Fix, 26 May 2020. American Association of University Professors, "Say No to NDAs and Forced Arbitration in Higher Education," 7 September 2018.

as well.[2] Apparently, "higher education institutions that pursue unique missions can also be susceptible to unique governance pitfalls."[3]

This battle involves more than academic freedom. It concerns the power to take control of entire universities and leverage the legal system to eliminate whoever is in the way. Scholars must understand what is taking place. They need to defend their profession and sound the alarm so the public understands what is at stake. Shared governance, the voices of faculty and faculty assemblies, and effective oversight by governing boards are also endangered. Even the constitutional integrity of the judiciary itself is potentially undermined.

Non-Disclosure/Disparagement Agreements

Non-disclosure agreements (NDAs) may serve legitimate business purposes. Non-*disparagement* agreements (not always the same thing) are inherently unethical, at least in academia, because *ipso facto* they violate academic freedom and conceal other ethical violations.

[2] The use of NDAs at public universities are rarely publicized, making them hard to track. Purdue University Global attracted negative publicity in 2018 for a broadly written nondisclosure agreement that it required faculty members to sign. Goldie Blumenstyk, "Do Corporate-Style NDAs Have a Place in Higher Ed?," *The Chronicle of Higher Education*, 4 September 2018.
[3] Christian Barnard, "Liberty University: A Cautionary Tale," James G. Martin Center for Academic Renewal, 25 October 2019.

Scholars must understand what is taking place. They need to defend their profession and sound the alarm so the public understands what is at stake.

The process goes something like this: Universities can terminate professors (with or without tenure) without warning, instantly cutting them off from their livelihood and the grievance procedures and oversight bodies of the university. If the professor renounces their legal claims, waiving statutory and constitutional rights, and promises silence, then the university may temporarily restore salary as "hush money."[4] This insulates administrators from accountability, for both the termination itself and any other ethical or political issues leading to the dismissal. It inverts the law itself into an instrument of extortion.

The professor becomes legally punishable for disclosing *the institution's* contractual breach. Colleagues, students, prospective students, and faculty are all kept in the dark about it happening. Even oversight bodies charged with ensuring the institution's integrity—faculty senates, accreditors, and the institution's own governing boards—can be kept unaware of their use.[5]

The most effective recourse to politically motivated dismissals—going to the press to draw public attention—is precisely what the NDA forbids.

[4] Poff, "Conservative Professor Says…"
[5] Lawrence Fuqua, "SBTS Trustee Sees Serious Problems at Al Mohler's Seminary," Capstone Report, 29 November 2020.

Like any restriction on freedom of expression, the scope of an NDA is unclear and broad enough to scare professors away from even publishing academic articles on the topic. A professional article on NDAs written by a professor who signed an NDA could potentially open them up to legal action, as could publicly defending their own integrity and reputation.

The only possible purpose for university administrators to demand a professor sign an NDA in an academic setting is to hide suspicious conduct by administrators, especially surrounding a dismissal. Thus, NDAs invariably prohibit divulging their own existence. One actual non-disparagement agreement, used by Patrick Henry College (a non-denominational Christian institution), reads:

- Dr. [X] agrees that he will not disclose the terms of this agreement at any time to anyone.
- Dr. [X] agrees that he will not at any time disparage [the College], its affiliates or related organizations, directors, officers, employees, or students in any way.
- Dr. [X] that he will not initiate communication in any fashion at any time with anyone directly or indirectly associated with any accrediting agency.

As noted, such devices seem to have special appeal for Evangelical institutions. Even before President Jerry Falwell Jr.'s recent disgrace, Liberty University was criticized for using NDAs to silence dissenting faculty and even trustees and creating "a culture of fear where people are unable to speak out."[6] Buried in *Politico*'s prurient accounts is the revelation that Liberty uses "non-disclosure agreements that stop current and former staff *and board members* from discussing sensitive matters" (emphasis added).[7]

Multiple dismissals of conservative professors at two important Baptist theological seminaries, allegedly for their dissent on the institution promoting leftist theories of sexuality, race, and "social justice," were likewise accompanied by NDAs.[8] A conservative professor fired from a prominent theological seminary for similar reasons was given a severance package combined with an NDA, though he cannot discuss the case, which is precisely the purpose. Another refused to sign but is reluctant to talk because his case is covered by mandatory arbitration (discussed below).

"I am appalled by Evangelical Christian use of Non-Disclosure Agreements to prevent

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[6] Barnard, "Liberty University..."
[7] Brandon Ambrosino, "'Someone's Gotta Tell the Freakin' Truth': Jerry Falwell's Aides Break Their Silence," Politico, 9 September 2019. Maggie Severns et al., "'They All Got Careless': How Falwell Kept His Grip on Liberty Amid Sexual 'Games,' Self-Dealing," *Politico*, 1 November 2020.
[8] Robert Oscar Lopez, "COVID-19 Completes Liberal Takeover of Southern Baptist Convention," *American Thinker*, 23 April 2020. Lopez introduced a resolution at the Southern Baptist Convention condemning NDAs as unethical, shortly before himself being fired from Southwestern Baptist Theological Seminary, allegedly for his stance on homosexual politics. Robert Oscar Lopez, "Liberty's Future is Predictable, Based on the 2018 Paige Patterson Case," 23 April 2019.

further discussion of concerns," Robert Gagnon of Houston Baptist University wrote. "I expect this of left-wing 'liberal' denominational structures, not Evangelical institutions." He continued:

> It gives the appearance of being hush money. A professor who has served faithfully for…years should not be forced to muzzle himself and violate conscience as a condition for receiving even a couple of months of salary.[9]

Tom Rush, a trustee at Southern Baptist Theological Seminary, went on record recently saying that "this contract was unethical" and that "it was hush money to keep them [fired professors] quiet." Rush pointed out that "They allegedly were being terminated for financial reasons, but if that's the case, why silence them?"[10]

Why this proclivity among Evangelical colleges?

First, they loathe controversy and avoid engaging in public debate.[11] "The church has a bad habit of keeping things secret. They want to keep it in house, take care of it in house," a former dean at Liberty said. "And Liberty's the same way."[12]

Second, business executives who do not understand academic ethics often run conservative institutions and assume NDAs can serve legitimate purposes, as they do in the business world. One college president, also a corporate executive, told the author that "Separation agreements…are common in the employment world, both for businesses and non-profits," after firing a professor who could have told him why it is not equivalent.

These institutions also mostly lack tenure because they want the (perfectly legitimate) option of dismissing faculty who deviate from the institution's religious principles. But this habit can serve the *il*-legitimate purpose of punishing healthy dissent and constructive criticism and protecting administrators' arbitrary power (including administrations that themselves deviate from the religious principles). Because institutions must still profess to respect academic freedom on non-doctrinal matters and fear criticism, such dismissals must be hidden.

Mandatory Arbitration

Yet refusing to sign an NDA is no panacea.

Faculty contracts now contain mandatory arbitration (MA) clauses (often disguised), requiring that "employment disputes" be adjudicated in secrecy by private arbitrators.[13] Here, too, professors are instantly cut off from their salaries, the

[9] "Top Baptist Professor: Al Mohler's Strong-Arm Tactics Are 'Sub-Christian,'" Capstone Report, 26 May 2020.
[10] Lawrence Fuqua, "Trustee Reveals Disturbing Look Inside of Albert Mohler's SBTS," Capstone Report, 28 November 2020. The quotations are the article's paraphrases of Rush's more extended comments, which can be verified from the video starting at 14:10.
[11] Stephen Baskerville, "The Crisis of the Christian Colleges," *Crisis*, 17 August 2017.
[12] Severns et al., "'They All Got Careless'…"
[13] Jason P. Baily, "Mandatory Arbitration in Higher Ed Employment Contracts," Browne House Law Group, 11 July 2018.

courts, grievance procedures, oversight bodies, and, most importantly, collegial and public opinion. They can object only in a secret proceeding run by lawyers, not academic colleagues, who can suppress ethical questions because proceedings are closed and without record, and public disclosure is punished.

As with NDAs, we cannot know how many faculty members get purged because secrecy is the whole point.

Mandatory arbitration, too, may serve legitimate purposes among business firms. But even in non-academic contexts, MA has been harshly criticized for depriving individuals of statutory and constitutional rights.[14]

Standard MA requires parties to forego redress in the courts and instead submit disputes to secret binding arbitration. Ethical criticisms arose when businesses began imposing the practice on individual employees and consumers (which was originally prohibited). Institutional clients allegedly enjoy superior leverage over isolated individuals, dictate the arbitration clauses (often supplied by the arbitration firms), and collude with arbitrators.[15]
MA is now an "epidemic." This privatized judiciary "has largely displaced the civil justice system for most of the major transactions of ordinary people."[16] (Your inbox probably contains a dozen notices changing your "terms of service" to arbitration with everyone from banks to retailers).

Arbitration discards accepted legal norms and procedures, including due process protections. Arbitrators (enjoying legal immunity) have no specified limits on what awards or punishments they can inflict, including unlimited punitive damages and lawyers' fees. Nothing requires that they follow the law, and yet their secretive decisions are enforced by civil (and even criminal) courts with almost no opportunity for challenge or appeal. One firm's rules (used by educational institutions) include these departures from open justice:

- Proceedings are secret, with participants bound to silence; no record or transcript is kept or permitted; and no access by public, press, or family.
- No guarantees for contractual, statutory, or constitutional rights.
- Rules of evidence are explicitly discarded, with no requirement to record evidence or explain decisions.
- Proceedings cannot be stopped, and one cannot withdraw.
- Decisions, damages, and punishments *in absentia*, without parties present to defend themselves.
- No limits on arbitrators' rulings, their scope or relevance to merits, issues, or facts.

[14] Katherine V.W. Stone and Alexander J.S. Colvin, "The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of their Rights," Economic Policy Institute Briefing Paper #414, 7 December 2015.
[15] Arguments are summarized in Stone and Colvin, "Arbitration Epidemic."
[16] Stone and Colvin, "Arbitration Epidemic," 16.

- Damages and fees can be imposed without finding legal culpability.
- Decisions are without appeal, legally binding, and enforced by courts before which parties cannot present their case.
- Unlimited fees can be imposed on parties who can be prevented from presenting their side of a case, including defending themselves, until fees are paid.
- No separation of powers or checks and balances in arbitrators' selection or powers.[17]

Arbitrators can even issue restraining orders that carry criminal penalties. This constitutionally questionable tool allows a personalized criminal code to be legislated around a legally innocent individual, imposing criminal punishments for doing what no statute prohibits and what anyone else may do. Punishments include mandatory incarceration *without trial*, even when the infringement is inadvertent or unavoidable—which it may well be, since it only prohibits otherwise legal acts.[18] Despite enormous potential for injustice, arbitration is defended in business settings because arbitrators seek a reputation for fairness and impartiality.[19] Incentives governing business, though, are mostly irrelevant in higher education.

Academic freedom and other ethical principles become subsumed into an "employment dispute" which excludes one's academic colleagues from any role.

Secrecy and Faculty Rights

Higher education brings even more serious dynamics into play because of MA's greatest asset to institutions: secrecy.[20] Unorthodox professors can be airbrushed out of an institution, gagged, and placed under possible legal liability for objecting publicly. Academic freedom and other ethical principles become subsumed into an "employment dispute" which excludes one's academic colleagues from any role.

[17] Information about arbitration comes from Stone and Colvin, "Arbitration Epidemic," and similar articles cited below, from the Guidelines for Christian Conciliation (January 2019) of the Institute for Christian Conciliation (used by educational institutions as discussed here), and from discussions with attorneys, who unanimously confirm that the harshest interpretations of arbitration regulations are all possibilities under arbitration law as currently written and practiced.

[18] Stephen Baskerville, *Taken Into Custody* (Nashville: Cumberland House, 2007), 177-186.

[19] Stone and Colvin, "Arbitration Epidemic."

[20] Despite widespread criticism in employment contracts generally, the implications for academic freedom are unexplored. Students subject to similar provisions discover comparable implications: "Because the enrollment contracts typically include gag clauses that prevent students from sharing information about their complaint and the results of the arbitration with outside parties, their complaints are effectively silenced. They are heard only through a secretive process that prevents information from becoming public through the court system—ultimately shielding bad actors from public accountability." Anthony Walsh, "States Should Act to Prohibit Mandatory Arbitration in College Enrollment Contracts," The Century Foundation, 26 May 2020. Of course, student complaints raise wholly different issues from academic freedom for faculty.

Larger ethical contexts then become irrelevant, and students, donors, trustees, senates, accreditors, and the public will never know.

Instead, lawyers "settle" everything in secret arbitration. The dispute will be reduced to material issues, with ethical principles ignored. Regardless of material awards, the institution wins the important battle before the procedure ever begins because the secrecy keeps its reputation intact, regardless of how unethical its actions. MA cannot address ethical violations because it is itself the principal method of enabling and concealing those violations in the first place.

Even if professors decline to claim damages for unjust firings, they cannot be certain that any public criticism they make will not trigger an arbitration procedure against *them* by the institution. *In absentia*, one could potentially be forced to pay exorbitant damages and massive legal fees, since no rules limit the amount.

Why would arbitrators act so unjustly?

In education, material settlements are trivial compared to the *procedure* itself. The arbitration firm is selling the power to silence and intimidate faculty. It offers universities a no-lose proposition: You may have to pay some damages, but your reputation is guaranteed to remain intact so long as the professor can be kept quiet.

Given the lack of restraints on damages described above, the firm has both the means and the incentive to collude with the institution and twist the knife on any recalcitrant faculty who questions its reputation for integrity. Criticizing the college's ethics, including the arbitration procedure itself, undermines both the college's credibility and the arbitration firm's entire selling point.

Whether or not the arbitrators would act as ruthlessly as they can, the open-ended possibilities of legal action provide a clear threat that will intimidate anyone. When your aim is to shut someone's mouth, the threat is everything. "While [Baptist seminary President Al] Mohler says he wouldn't take the former professors who signed such an agreement to court, he says that threatening them works." This refers to an NDA, but the point is the same.[21]

Even vindicating one's reputation by divulging larger ethical or political issues behind one's dismissal (e.g. to a prospective employer) could bring retribution. (Few will believe the favorite pretext of "budget cuts"). Suspicion of having signed an NDA (and taken "hush money") may also compromise one's professional integrity, as some academics or administrators may assume signing an NDA is complicity in wrongdoing.[22]
A larger danger arises here: Faculty governance could disappear altogether, as

[21] Fuqua, "Trustee Reveals Disturbing Look…"
[22] At least one professor lauds his colleagues' refusal to sign. "Irrespective of whether Professors [Russell] Fuller and [Jim] Orrick are right or wrong in their accusations [against Southern Baptist Theological Seminary]…they come across by their actions in not signing the NDA as having more courage and integrity." "Top Baptist Professor..."

higher ed bureaucrats gain more power and control by using NDAs and MA. Administrations can suppress any dissent or criticism about their leadership (or any topic) and render grievance procedures useless. All looks serene because no controversy can surface in the first place. Faculty are reduced to hired hands.

The Peculiar World of Religious Arbitration

Eliminating divergent views is advanced by the most controversial version of MA: religious arbitration (RA). This, too, has been criticized in other areas for entangling church and state,[23] violating religious freedom,[24] and even establishing Sharia law.[25] With secrecy effectively immunizing them from public criticism, Christian organizations appear to be erecting a framework to penalize "Christophobia," copying prohibitions on "Islamophobia" and "homophobia."[26]

Faculty governance could disappear altogether, as higher ed bureaucrats gain more power and control by using NDAs and MA.

Yet those objections may distract from a larger issue, a sleight-of-hand that disguises standard MA with an aura of religious sanctimony. For it is not clear that religious arbitration contains anything religious at all. At least with the Christian version (used by educational institutions), it simply replicates standard mandatory arbitration sprinkled with Bible verses.

RA invokes religious faith for commercial gain. Behind the smiles, fee-charging and profit-making firms develop a market for "Christian" arbitration. This gives the firm (one dominates the market) a further incentive to collude with employers, such as colleges, who support their monopoly by embedding arbitration clauses into employment contracts. (Some college contracts replicate the principal firm's suggested language verbatim). Without competitors, incentives to impartiality cited by MA's defenders do not really apply to the Christian version.

The pitfalls are further obfuscated by the religious-therapeutic veneer. Labeled as "Christian Conciliation," it claims to "conciliate" disagreements to avoid litigating them, promising a less "adversarial" alternative that redeems antagonists spiritually ("change their

[23] Brian Hutler, "Religious Arbitration and the Establishment Clause," *Ohio State Journal on Dispute Resolution*, vol. 33, no. 3 (2018), 338, 340. Sophia Chua-Rubenfeld and Frank Costa, "The Reverse-Entanglement Principle: Why Religious Arbitration of Federal Rights Is Unconstitutional," *Yale Law Journal*, vol. 128, no. 7 (2019), 2120, 2087, 2099, 2105.
[24] Nicholas Walter, "Religious Arbitration in the United States and Canada," *Santa Clara Law Review*, vol. 52, no. 2 (2012), 504, 566.
[25] Courts apparently have already upheld arbitration decisions based on Sharia law. Chua-Rubenfeld and Costa, "Reverse-Entanglement Principle," 2095. Walter, "Religious Arbitration," 569.
[26] Christian arbitrators equate criticism of their clients with criticism of Christianity itself, rationalizing the secrecy "to prevent a public quarrel that would give others an opportunity to criticize and mock Christianity." Guidelines for Christian Conciliation, 12.

attitudes and behavior"). The therapeutic camouflage further moves the process away from justice. Organizations jumping onto the mandatory arbitration bandwagon for self-interested reasons can advertise it as spiritual uplift for those they plan to injure.

Replacing justice with moral improvement may leave their potential future adversaries feeling good, but they have also lost any recourse against unjust and arbitrary judgements.

Whether operated by the American Arbitration Association or relabeled by the Institute for Christian Conciliation (ICC, a firm with clients in higher education), the reality is the same. ICC's *Guidelines for Christian Conciliation*[27] make very clear that what they are practicing is simply standard MA. In fact, its *Guidelines* actually *prevent* people from using moral pressure alone and can punish them for it—moral pressure would defeat the secrecy and make the arbitrators superfluous.

What religious arbitration offers is another way for Christian colleges to bypass public (and legal) scrutiny. It enables colleges to avoid the legal liability, public scrutiny, and impartiality that comes with a non-secretive process. The business product being sold here is not reconciling people who disagree, but eliminating them.

[27] This is the version most often cited in law review articles and litigated in cases. See Chua-Rubenfeld and Cost, "Reverse-Entanglement Principle," 2094-2098, 2101-2102.

The Model: Christian Colleges as Political-Business Empires

It is ironic that Christian colleges are not only joining their secular counterparts in purging faculty but using methods that weaponize their religion in such a mercenary fashion. One might wonder what kind of ethics and theology these institutions teach.

This use of MA becomes comprehensible when one understands the political dynamic driving some Evangelical institutions. Though nothing so sinister as the "theocracy" suspected by their detractors,[28] it is still enough to vitiate authentic institutions of higher learning.

Often founded by conservative political moguls[29] as components of their political-business empires, the newer, alternative Evangelical institutions can exhibit "a governance model that place[s] too much power in the hands of one person."[30] Rarely do they offer more than their secular counterparts when it comes to critically examining ideas and society, and they are determined to keep faculty on a tight rein.[31] The empire expands primarily by placing students in influential positions of political power.

[28] Hanna Rosin, *God's Harvard: A Christian College on a Mission to Save America* (New York: Houghton Mifflin Harcourt, 2007).
[29] Emma Green, "Liberty University Students Want to Be Christians–Not Republicans," *The Atlantic,* 26 October 2016.
[30] Barnard, "Liberty University."
[31] Stephen Baskerville, "Jerry Falwell, Jr. and the Tragedy of Christian Higher Education," *New English Review*, September 2020.

Liberty University's mission, for example, aims to "train champions for Christ," and Jerry Falwell proclaimed, "We're turning out moral revolutionaries." Despite the ostensible liberal arts ethos, procuring jobs becomes an end in itself, eclipsing "critical thinking," and education itself becomes secondary.[32] The pipeline of jobs and influence must be protected at all costs.

Nothing endangers that influence so much as controversy, and so faculty are treated as hired hands who are expected to teach and otherwise keep quiet. Criticizing the wrong people or deviating from boilerplate conservatism could block the pipeline.

Colleges become another vehicle of political influence, with students and faculty as pawns in the game—not prophets or intellectuals who critically assess ideas.

Conclusion

Whether motivated by a desire for political influence or the self-perpetuating desire to protect their reputation and avoid accountability, NDAs and MA threaten the integrity of an institution of higher education.

Religious or secular, contractual clauses that gag professors present a unique threat to academic freedom in higher education. NDAs and MA deprive the institution of faculty voices that can help ensure the centrality of academics and the pursuit of truth.

The most debilitating feature of this legal climate is the admission of intellectual incapacity by institutions of learning. When self-interest is at stake, high-minded pretenses about the exchange of ideas give way to high-level administrators quietly stabbing their colleagues in the back and stopping the mouths of critics with legal threats. These actions constitute an open admission that colleges have become havens for intellectually incapable people whose professional competence, by their own judgement, is insufficient when their own interest is at stake.[33]

If institutions continue to use non-disparagement agreements, mandatory arbitration, and other legal mechanisms to deal with criticism and

[32] These institutions usually start life with a contradiction. Their initial claim to superiority involves returning to the traditional liberal-arts curriculum deserted by mainstream academia. Because they are essentially political operations, however, they soon become dominated by applied courses that train their cadres in techniques of political activism and power, such as journalism, pre-law, business, law enforcement, and security studies. Taught by practitioners rather than scholars, these subjects are perceived by students as advantageous for their careers and quickly drive out the liberal arts, while functionaries drive out the scholars. One college offers the doublespeak of "Applied Liberal Arts."

[33] John Ellis writes that "Large numbers of people holding professorial titles have neither any real interest in academic work, nor aptitude for it" and attributes the "breakdown of higher education" to "a concentration of people who don't really belong in academia but are now numerous enough there to control it, to abuse it for their own selfish purposes, and effectively to destroy it." Ellis' account points to a preponderance of left-wing ideologues but allows that it is not necessarily limited to professors alone nor to leftists among them. *The Breakdown of Higher Education* (New York: Encounter, 2020), 182.

fights over academic freedom, the public should be more skeptical of the classroom instruction they offer and the scholarship produced in their Ivory towers.

About the Author

Stephen Baskerville, PhD, has worked for 30+ years in universities in the United States and Europe. His publications include *The New Politics of Sex: Civil Liberties and the Growth of Governmental Power* (2017), and *Not Peace But a Sword: The Political Theology of the English Revolution* (1993, expanded 2018), plus peer-reviewed articles on politics, law, history, religion, and higher education. In July 2019, he was dismissed as Professor of Government from Patrick Henry College.

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