

GARY WIHL

Politics, Academic Freedom, and the General Counsel's Office

POLITICAL PRESSURE on colleges and universities has been a matter of common debate and concern since 1934. That was the year the American Association of University Professors (AAUP) and the Association of American Colleges (the precursor of AAC&U) established a series of conferences in order to reaffirm and develop the 1925 Conference Statement on Academic Freedom and Tenure.

These conferences produced the 1940 Statement of Principles on Academic Freedom and Tenure that is still the reference point for many college and university policies today. It underwent another set of revisions in 1970, when interpretative statements were added; the statement has the endorsement of approximately two hundred learned societies and organizations, including the American Council of Learned Societies, the Modern Languages Association, the American Sociological Association, the American Academy of Religion, the associations of most foreign language teachers, and many law school societies.

The AAUP conceived of the tenure system in the context of a fundamental research mission within universities: a greater emphasis on research went hand in hand with greater protections and freedom of inquiry for faculty members. The principles set forth in the statement produced practices in the university that include protection for the political viewpoints of faculty as citizens, for the appropriate use of controversial materials in teaching, and for the rights of faculty to due process. Essentially, the

AAUP could foresee a large, complex research community in which controversial, indeed potentially radical, books were going to be written about history, the clash of cultures, class economics and wealth, political power, ideology, and religion. And we can see abundant evidence of this research in the vast quantity of scholarship that has changed our understanding of the historical struggle for democracy, in gender studies, in the relationship of the religions in the Middle East, Northern Europe, India, and China, and more recently in interpretations of civil rights by the U.S. Supreme Court. Even in 1940, no one could have anticipated the history that would be written in the aftermath of Nazism and Stalinism.

We now seem to be in the midst of squandering this tremendous legacy and achievement in dubious controversies, endless litigation, impractical speech codes, and various forms of mischief and harassment perpetrated upon faculty and universities by opponents of "political correctness." Political research and analysis have morphed into culture wars and court battles over academic freedom in relation to obscenity, or into episodes of racial or ethnic conflict on college and university campuses.

The overall trajectory for university research and academic freedom is still upwards, in my opinion. I continue to be amazed at the quality and quantity of scholarship on the political problems of our time: be it books about colonialism and the slave trade, the complex philosophical origins of liberalism and republicanism and federalism, multicultural citizenship, the legal and constitutional legacy of the Enlightenment, the story of nineteenth-century voting reforms, or the role of the arts and

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literature in furthering democracy in Latin America and the Middle East. Beneath this great canopy of scholarship, there is a lot of sensationalism and hyperbole, a myriad of tempests in teapots. Why the disconnect between the products of academic freedom and the sublunary world of university administration, where a provocative remark inside class, an unruly lecturer, or a single racial epithet can unleash forces that can take a university into years of litigation?

Politics

My own experience as a student, faculty member, and administrator has included constant exposure to political pressure. The vast majority of that experience has demonstrated the resilience and strength of the academic system. Examples of political pressure include students complaining about a lecturer using a map of the Middle East that does not include the state of Israel; an attack by the National Rifle Association on the scholarship of my former colleague at Emory, Michael Bellesiles; a difficult tenure case involving a faculty member whose scholarship examined the formulaic style of pornographic materials; an African American student charging a Caribbean faculty member with racism; and a colleague at Rice whose work on the sexuality of the Hindu god Kali led to a series of virulent attacks in the Calcutta media and calls for his dismissal. In all these cases, action for or against the faculty member followed academic protocols and maintained academic integrity. Politics did not overrun academic freedom. I can point to only one experience where a political crisis overran the university. In 1970, during my first semester as a college student, the Canadian government unleashed the War Measures Act in response to a terrorist attack in Montreal and actually arrested lecturers and graduate students at McGill University who had any known sympathies with radical separatist groups.

By and large, such extreme action is rare in North America. Faculty are not subject to the kinds of political risks that threaten faculty in South America, Africa, and Asia, which are documented by organizations like Scholars at Risk (SAR). To give just two recent examples from the more than 450 cases documented by SAR over the last four years: Saad Eddin Ibrahim, a sociology professor at the Univer-

sity of Cairo, was imprisoned for five hundred days for making a film about Egyptian election irregularities; Alexander Naty, an anthropologist at the University of Asmara, Eritrea, returned from an overseas conference on religion to face detention and dismissal from his university. (For a more extended sampling of the true political dangers faced by scholars and researchers in many universities outside the United States, see Quinn 2004.)

I am personally humbled by my ignorance of all the European writers and artists who have suffered persecution during the period Milan Kundera (1996) calls the “seventy years of trial regime” in the Soviet bloc: Bunin, Meyerhold, Halas, Broch, and Vancura. How can we equate the imprisonment, exile, or persecution of these writers with the farcical battle over the supposedly racist epithet “water buffalo” at the University of Pennsylvania, which ultimately brought down the president, Sheldon Hackney, and spawned the Foundation for Individual Rights in Education (FIRE)? FIRE’s growing strength could be seen in its 2000 attack upon my own university’s president, David Leebron, for admonishing a law professor at Columbia about an exam question based on the hypothetical case of a fetus killer from an anti-fertility cult. In this hypothetical case, one of the attacker’s victims, who had been unsuccessfully seeking an abortion, actually writes a thank you note to this attacker when she loses her fetus. When then-Dean Leebron wrote to Professor Fletcher about the possibility of creating a hostile environment for the female students in his class, he received a lengthy lecture from FIRE on academic freedom, civil rights, the harsh reality that law students must face as well as FIRE’s mission to protect liberty, free speech, and freedom of conscience on American campuses.

Our universities operate in a political context rich in legal protections, due process, and basic norms about academic freedom that has contributed substantially to the social good of equality, diversity, and tolerance. Ironically, references to free speech and freedom of conscience as the source of academic freedom are part of the diminishment of academic freedom on U.S. campuses today.

Constitutionally, there is no definition of academic freedom, although the Supreme Court and many state courts have taken on cases involving academic freedom under the

protections offered by the First Amendment. Universities are now struggling with the legacy of court interpretations of academic freedom in this rather special context of the First Amendment, a context very different from the norms of research and teaching that support the AAUP principles of academic freedom. Because of the conflation of academic freedom and First Amendment freedoms, and because of the escalation of controversy into litigation, university administrators deal less and less with actual political problems and rather more with politicized speech and risk management.

The content of political speech tends to diminish into epithets, slurs, unintentional insults, and gratuitous controversy even as scholarship about the sources of racism, equality, rights, and national sovereignty grows more and more complex. Since universities inevitably generate controversy, disagreement, and critical analysis, what really needs to be protected is robust, complex political discourse. As J. Peter Byrne puts it in his wonderful essay on the courts' takeover of academic freedom issues (2004, 99), some of the most decisive cases of academic freedom have involved "low-level writing classes in two-year institutions," not the stuff of Scholars at Risk. What is going on here? And what can academic administrators do about it?

Speech

Ever since the landmark case of *Sweezy v. New Hampshire* in 1957, the courts have tested the application of the First Amendment and the Civil Rights Act to a wide variety of conflicts between governments and the universities, administrators and faculty, faculty and students, and between student groups on campus. Looking back over many years of litigation, it is remarkable to see the devolution from the truly political protection of a professor in a state school who faced dismissal because he taught Marxism in the 1950s, to courts trying to determine if they need to offer constitutional protection to professors who use vibrator jokes to teach writing, foul language to encourage class discussion, or who teach racist science or creationism. By now, the courts have established a pattern of intrusion into academic affairs. Yet their ability to offer protections and remedies is limited to procedural rights, reinstatement of contracts,

or finding cause for discrimination by gender, age, or race.

When it comes to the true substance of politics, Byrne sums it up beautifully in one sentence: "the First Amendment has no concern for intellectual quality" (2004, 112). Intellectual quality is, first and foremost, the concern of speech that can properly be called academic research or university-level teaching. Politics in the university, or political pressure by special interest groups upon the university, frequently entails legalistic reasoning about low-grade political content. Byrne's larger argument aims to rebalance the relationship between the courts and the universities. *Sweezy* was a good moment for academic freedom because, in that case, the Supreme Court, through the opinions of Justices Warren and Frankfurter, offered to protect the rights of the university when it comes to judging academic content and quality. The state has no business

2006 AAC&U ANNUAL MEETING

PODCAST

Legislative Attacks on Academic Freedom: The Latest Threats and Ways to Counter Them

Many state and federal legislators today have a strong interest in creating mandates for curriculum, faculty hiring, and other traditional academic prerogatives. How do initiatives such as the Academic Bill of Rights square with constitutional free-speech principles? What is happening in state legislatures? In this discussion of current legislative threats, two higher education law experts provide historical context and address developments in state legislatures around the country.

About the speakers

ANN FRANKE, an attorney, is president of *Wise Results*, a consulting firm that advises colleges on legal issues and risk management.

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telling universities what they can and cannot teach. Byrne believes that there are solid legal grounds, dating back to nineteenth-century common law doctrines, for the courts to protect academic freedom as an *institutional right*, as a right that belongs to the institution as a whole. Thus, universities are in a position to develop academic protocols and standards for evaluating the intellectual quality of faculty and student speech. Under the AAUP principles of academic freedom, that is a primary mission of the university.

The problems begin with so-called “political correctness” pressures on the universities and university efforts to establish special speech codes, because faculty and student speech has become the point of focus for most litigation



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in the last twenty years. The courts’ rejection of any policing of campus speech, in the name of the First Amendment, interferes with the educational goals of *academic* speech, based as they are on serious intellectual content and reflection. Byrne writes that the legal conflicts over speech codes “displace academic norms by the civic norms of the First Amendment . . . they utterly fail to acknowledge that the college or university stands in a different relation to the speech of its students than the government does to the speech of citizens generally” (2004, 101). He summarizes his position on law and the university in this way:

As a lawyer with little claim to philosophical sophistication, I am impressed by the difference between speech in the college and university context and in society at large. Speakers in academia are expected to speak carefully after study and reflection in a manner that invites response from

others who similarly care about the topic. (2004, 137)

Careful, reflective speech—the product of academic freedom—is what needs to be protected.

By labeling academic and civic speech as equally free, by applying First Amendment protection directly to all utterances inside the university, we end up not with academic freedom but with FIRE. Political discourse and research, which emanate from our best scholarly works, are being displaced by debates about individual rights to utter insults, slogans, epithets, and slurs on university campuses.

The role of administrators

The general counsel’s office is a good place to go for advice about contracts, intellectual property, disability issues, sexual harassment, personal security, and discrimination. It is a bad place to go to defend or promote political values that touch deeper layers of social conflict. These values can only be defended or promoted by the use of robust, complex, truly academic vocabularies; but it is not the business of the courts to assess those sorts of academic vocabularies. Legal theorists are among the first ones to tell us that—not just Byrne but Ronald Dworkin and Mari Matsuda, legal faculty with a real stake in protecting academic freedom.

Dworkin (1996) has laid out some very practical advice for university administrators in an essay on academic freedom. He writes, academic freedom insulates scholars from the administrators of their universities: university officials can appoint faculty, allocate budgets to departments, and in that way decide, within limits, what curriculum will be offered. But they cannot dictate how those who have been appointed will teach. (246)

Academic freedom does not entitle any subject to be taught; administrators have the responsibility to decide which subject areas are important to fill. Universities, in fact, offer greater freedom and protection to the people they choose to hire than is generally the case with so-called free speech, because universities value people who may end up saying uncomfortable or difficult things and are willing to provide them with a serious audience of capable learners. But people are not entitled to work in a university, or to gain tenure in a university, just by being controversial. Their work must be important, useful, and promising.

If I follow Dworkin's subtle reasoning, our job as administrators is not to block potentially controversial speech but to entitle people to speak who are likely to say things that are important and useful. Courts cannot consider the value of speech in this way. Administrative decisions work well when they promote speakers who are capable of saying useful and important things—for example, the kinds of things I described earlier as the canopy of political research produced by scholars—as opposed to insults and demeaning comments that end up as causes for litigation. If administrators are willing to take a stand on the values of importance and usefulness, difficult as they may be to define and maintain, we have a better chance of supporting faculty when and where it really counts.

But what about the problem of insults and demeaning speech, the fighting words that have been the center of so much pseudo politics within universities? They are a fact of life, and the harm they create cannot be ignored by university administrators. Mari Matsuda, like Byrne, locates our problems with the management of harmful, racist speech in the “unique” First Amendment jurisprudence of the United States. Various forms of hate speech are protected in this country in ways that are unimaginable in other Western democracies that belong to the International Convention on the Elimination of All Forms of Racial Discrimination. The United States is, Matsuda points out (1993, 30–31), “alone among the major common law jurisdictions in its complete tolerance of [racist hate] speech”—meaning, in its belief that First Amendment protections are paramount, even when it comes to the protection of offensive speech.

Matsuda's interest in the topic of hate speech covers large philosophical questions about the use of law in response to acts of hatred, incitements to violence, and persecution. These questions go far beyond the scope of this essay on academic freedom and what I would call true political discourse by members of a university community. Her aim is to circumvent First Amendment jurisprudence in order to find “a range of legal interventions, including the use of tort law and criminal law principles” as means of combating racist hate propaganda (1993, 38). The university is among the special cases that she explores for ways and means to combat racism and hate.

Far from allowing the spread of racism on campus, caving into First Amendment doctrine, Matsuda hypothesizes that universities may be able to use the “law of defamation” to combat hate speech. Students have a relatively weak status within the university and are undergoing great personal changes during their college years. Moreover, there are few places to retreat from racism if one lives on or near a university campus and must associate with peers in order to take full advantage of university life. The weak status of the target, under the law of defamation, may give universities the ability to limit the freedom of verbal attackers. Would this work in a court of law? I cannot say. Matsuda, like Byrne, wants to balance the most insightful, progressive contributions of higher education with the narrowly relevant applications of the law to university conflict.

I have argued that American universities continue to offer exceptional protection for scholars, that the tradition of academic freedom has produced a wealth of political scholarship and analysis, and that, following Byrne and Matsuda, constitutionally protected speech cannot be directly equated with academic speech. My message is optimistic. If we can look past some of the legal entanglements of the last decade, universities may again become the place where we discover the political insight produced by a Hannah Arendt, or a John Rawls, or a Judith Shklar, or a Charles Taylor. □

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REFERENCES

- Byrne, J. P. 2004. The threat to constitutional academic freedom. *Journal of College and University Law* 31 (1): 79–142.
- Dworkin, R. 1996. *Freedom's law: The moral reading of the American constitution*. Cambridge, MA: Harvard University Press.
- Kundera, Milan. 1996. *Testaments betrayed: An essay in nine parts*. New York: HarperCollins.
- Matsuda, M. 1993. Public response to racist speech: Considering the victim's story. In *Words that wound: Critical race theory, assaultive speech and the First Amendment*, ed. M. Matsuda, C. R. Lawrence III, R. Delgado, and K. W. Crenshaw, 18–51. Boulder, CO: Westview Press.
- Quinn, R. 2004. Defending “dangerous” minds: Reflections on the work of the Scholars at Risk Network. *Items & Issues* 5 (1–2): 1–5.