

ACADEMIC FREEDOM AND PROFESSORIAL SPEECH
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In this presentation on “Academic Freedom and Professorial Speech,” I will discuss three topics: (1) classroom speech and curriculum choices, including recent case law and legislative controversies; (2) faculty free expression in institutional matters; and (3) freedom of inquiry and research post-9-11. Before delving into these issues, I will briefly review some of the legal bases for the protections of academic freedom for professors: constitutional law, contract law, and “custom” of the academy.

I. Some Background: Legal Protections of Academic Freedom for Individual Professors

There are at least three sources of legal protection for the academic freedom of individuals: the U.S. Constitution, contract law, and the “custom” of the academy.

A. Constitutional Law

One source of legal protections for the academic freedom of individual professors is the First Amendment of the U.S. Constitution. The federal constitution was designed to regulate the exercise of governmental power only, and therefore, virtually all of the constitutional restrictions pertaining to academic freedom and free speech apply only to public employers, such as state colleges and universities, and do not generally limit private employers, such as private higher education institutions.

The U.S. Supreme Court has repeatedly held that academic freedom is a First Amendment right of professors.¹ At least six federal appellate courts have expressly followed Supreme Court rulings, recognizing that the First Amendment protects the academic freedom of state-employed professors. The Second, Sixth and Ninth Circuits have applied the First Amendment right of academic freedom to protect professors' work in the classroom.² The Seventh and First Circuits have held that a professor's First Amendment right of academic freedom extends to research as well as to teaching.³ The Eighth Circuit has ruled that the First Amendment protects professors as scholars.⁴

Only the Fourth Circuit has ignored the Supreme Court's recognition of individual academic freedom as a "special concern" of the First Amendment.⁵ However, even the *Urofsky*

¹ See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985); *Univ. of Wisconsin v. Southworth*, 529 U.S. 217 (2000).

² See, e.g., *Dube v. State Univ. of NY*, 900 F.2d 587 (2d Cir. 1990), *cert. denied*, 501 U.S. 1211 (1991); *Hardy v. Jefferson Community College*, 260 F.3d 671 (6th Cir. 2001), *cert. denied*, 535 U.S. 970 (2002); *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir.), *cert. denied*, 534 U.S. 951 (2001); *Parate v. Isibor*, 868 F.2d 821, *reh'g denied*, 1989 U.S. App. LEXIS 5203 (6th Cir. Mar. 16, 1989); *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996), *cert. denied*, 520 U.S. 1140 (1997).

³ See, e.g., *Dow Chemical Co. v. Allen*, 672 F.2d 1262 (7th Cir. 1982); *United States v. Microsoft*, 162 F.3d 708 (1st Cir. 1998).

⁴ See, e.g., *Burnham v. Ianni*, 119 F.3d 668 (8th Cir. 1997) (*en banc*).

⁵ *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (*en banc*), *cert. denied*, 531 U.S. 1070 (2001). The Fourth Circuit ruled in *Urofsky* that "any right of 'academic freedom' . . . inheres in the University, not in individual professors . . .," and that the Supreme Court "has focused its discussions of academic freedom solely on issues of institutional autonomy." *Id.* at 410 & 415.

The Fourth Circuit majority's academic freedom analysis has been roundly criticized as "profoundly wrong." J. Peter Byrne, "Constitutional Academic Freedom in Scholarship and in Court," *The Chronicle of Higher Education* (Jan. 5, 2001) ("Because the [en banc *Urofsky*] court relied in no small part on a scholarly article by me to support its conclusion, I feel a duty to express my professional view that the opinion is profoundly wrong as a matter of law, and threatens the freedom of higher education."); see also "Constitutional Law-First Amendment-Academic Freedom-Fourth Circuit Upholds Virginia Statute Prohibiting State Employees from Downloading Sexually Explicit Material," 114 HARV. L. REV. 1414, 1414 (2001) ("In refusing to safeguard the academic speech of state university professors, the court jeopardized the 'robust exchange of ideas' that lies at the heart of academic freedom jurisprudence."); David M. Rabban, "Academic Freedom, Individual or Institutional?," *Academe: Bulletin of the American Association of University Professors* (hereafter *Academe*) 16, 19 (Nov.-Dec. 2001) (arguing that the Fourth Circuit misinterpreted First Amendment academic freedom jurisprudence and commentary) <http://www.aaup.org/publications/Academe/2001/01nd/01ndrab.htm>.

majority itself seemed to concede that individual professors' constitutional rights might be implicated in the application of Virginia's statute prohibiting the viewing of sexually explicit material on state-owned or -leased computers.⁶

In addition, the Third Circuit is currently considering the First Amendment right of academic freedom of professors in a case challenging the enforcement of the Solomon Amendment to law schools,⁷ and the Tenth Circuit is determining the scope of that right in speaking out on institutional matters for a professor who also served as department chair.⁸

Some state constitutions also provide protections to professors at private colleges.⁹

B. Contractual Rights

Internal sources of contractual obligations that protect the academic freedom of faculty may include institutional rules and regulations, letters of appointment, faculty handbooks, and, where applicable, collective bargaining agreements. Academic freedom rights are often explicitly incorporated into faculty handbooks, which are sometimes held to be legally binding contracts under state law.¹⁰

⁶ "[W]hile a denial of an application under the Act based upon a refusal to approve a particular research project might raise genuine questions--perhaps even constitutional ones--concerning the extent of the authority of a university to control the work of its faculty, such questions are not presented here." *Id.* at 415.

⁷ *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld*, Civ. No. 03-4433 (D.N.J., Nov. 5, 2003), *appeal pending*, 2003 U.S. Dist. LEXIS 20650. For a copy of the AAUP's *amicus* brief in this case, see <http://www.aaup.org/Legal/cases/FINAL%20SOLOMON%20BRIEF.pdf>.

⁸ *Schrier v. University of Colorado*, Case No. 02-MK-2366 (D. Col., May 19, 2003), *appeal pending*, No. 03-1275 (10th Cir. 2003). For a copy of AAUP's *amicus* brief in this case, see <http://www.aaup.org/Legal/cases/Schrier%20v.%20U.%20of%20Colo.pdf>.

⁹ See, e.g., N.J. Const., Art. 1, para. 6 & para. 18 (analyzed in *State v. Schmid*, 84 N.J. 535 (1980), *appeal dismissed sub nom.*, *Princeton Univ. v. Schmid*, 455 U.S. 100 (1982)).

¹⁰ See, e.g., *Greene v. Howard University*, 412 F.2d 1128 (D.C. Cir. 1969) (ruling faculty handbook to "govern the relationship between faculty members and the university"). See also Jim Jackson, "Express and Implied Contractual Rights to Academic Freedom in the United States," 22 *HAMLIN L. REV.* 467 (Winter 1999). See generally AAUP Legal Technical Assistance Guide, *Faculty Handbooks As Enforceable Contracts: A State Guide* (2003 ed.) <http://www.aaup.org/catalogue/pubs.htm>.

C. Academic Custom and Usage

Academic freedom may also be protected as part of “academic custom” or “academic common law.” The joint *1940 Statement of Principles on Academic Freedom and Tenure* (hereafter *1940 Statement*) constitutes a “professional ‘common’ or customary law of academic freedom and tenure.”¹¹ As the District of Columbia Circuit observed in *Greene v. Howard University*: “Contracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is. The readings of the market place are not invariably apt in this non-commercial context.”¹²

D. The Relationship Between Academic Freedom and the First Amendment: A Snapshot View

The professional concept of academic freedom for faculty in higher education is set forth in the *1940 Statement of Principles on Academic Freedom and Tenure*, which has been endorsed by over 180 scholarly and professional organizations and is incorporated into many college and university faculty handbooks. (A copy of the *1940 Statement* is posted at <http://www.aaup.org/statements/Redbook/1940stat.htm>.)

¹¹ Matthew W. Finkin, “Towards a Law of Academic Status,” 22 BUFFALO L. REV. 575, 577 (1972).

¹² 412 F.2d 1128, 1135 (D.C. Cir. 1969). See also *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (just as there may be a “common law of a particular industry or of a particular plan,” so there may be an “unwritten ‘common law’ in a particular university,” so that even though no explicit tenure system exists, the college may “nonetheless . . . have created such a system in practice”); *Browzin v. Catholic University of America*, 527 F.2d 843, 848 n. 8 (D.C. Cir. 1975) (finding that jointly issued statements of AAUP and other higher education organizations, such as the *1940 Statement*, “represent widely shared norms within the academic community” and, therefore, may be relied upon to interpret academic contracts); *Bason v. American University*, 414 A.2d 522 (D.C. 1980) (noting the “customs and practices of the university”); *Board of Regents of Kentucky State University v. Gale*, 898 S.W.2d 517 (Ky. Ct. App. 1995) (in defining the meaning of “endowed chair” and whether the position carried tenure, the court examined the “custom” of the academic community).

Academic freedom rights are not coextensive with First Amendment rights, although courts have recognized a relationship between the two. The First Amendment protects expression on all sorts of topics and in all sorts of settings from regulation by public institutions, including public colleges and universities. Academic freedom, on the other hand, addresses rights within the educational contexts of teaching, learning, and research both in and outside the classroom--for individuals at private as well as at public institutions. Accordingly, in addition to the First Amendment and some state laws, academic freedom has been recognized and protected in higher education by academic policy and practice.

II. Faculty Academic Freedom in the Classroom

Speech by professors in the classroom at public institutions is generally protected under the First Amendment and under the professional concept of academic freedom if the speech is “germane to the subject matter.”¹³

A. Classroom Teaching Methods

Are faculty members able to select and use pedagogical methods they believe will be effective in teaching the subject matter in which they are expert? On the one hand, faculty members are uniquely positioned to determine appropriate teaching methods. On the other hand, faculty members should not use such tools to engage in unprotected speech in the classroom, such as religious proselytizing or sexual harassment.

In **Hardy v. Jefferson Community College**, 260 F.3d 671 (6th Cir. 2001), *cert. denied*, 535 U.S. 970 (2002), an African-American student and a “prominent citizen” complained about the

¹³ See, e.g., *Kracunas v. Iona College*, 119 F.3d 80, 88 & n. 5 (2d Cir. 1997) (applying the “germaneness” standard to reject professor’s academic freedom claim because “his conduct [could not] be seen as appropriate to further a pedagogical purpose,” but noting that “[t]eachers of drama, dance, music, and athletics, for example, appropriately teach, in part, by gesture and touching”); see also AAUP, *1970 Interpretive Comments*, POLICY DOCUMENTS & REPORTS 5 (Ninth Ed., 2001) (hereafter *Redbook*) (“[T]he intent of [the *1940 Statement*] is not to discourage what is controversial [but] to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject matter.”).

allegedly offensive language used by Kenneth E. Hardy, an adjunct communications professor, in a lecture on language and social constructivism in his “Introduction to Interpersonal Communication” course. The students were asked to examine how language “is used to marginalize minorities and other oppressed groups in society,” and the discussion included examples of such terms as “bitch,” “faggot,” and “nigger.” While the administration had informed Professor Hardy before this controversy that he was scheduled to teach courses in the fall, the administration later did not renew Hardy’s appointment because administrators said no classes were available. Hardy sued. The Sixth Circuit found the topic of the class—“race, gender, and power conflicts in our society”—to be a matter of public concern and held that “a teacher’s in-class speech deserves constitutional protection.”¹⁴ The court opined: “Reasonable school officials should have known that such speech, when it is germane to the classroom subject matter and advances an academic message, is protected by the First Amendment.”¹⁵

Not all courts agree that individual professors have the academic freedom to select the pedagogical tools they consider most appropriate to teach their subject matter. In **Vega v. Miller (New York Maritime College)**, 273 F.3d 460 (2d Cir. 2001), *cert. denied*, 535 U.S. 1097 (2002), for example, Edward Vega, a former non-tenure-track professor of English, sued the college when it declined to reappoint him after he led an “offensive” classroom “clustering” (or word association) exercise in a remedial English class for “pre-freshman” college students during summer school. The clustering exercise, which “is intended to help students reduce the use of repetitive words in college-level essays,” involves students’ selecting a topic, then calling out words related to the topic, and then grouping similar words into “clusters.” In Professor Vega’s summer 1994 class, the students selected the topic of sex, and the students called out a variety of words and phrases, from “marriage” to “fellatio.” Administrators found that the professor’s conduct “could be considered sexual harassment, and could create liability for the college.”

Vega argued that the nonreappointment violated his constitutional academic freedom. The administrators argued that they were entitled to qualified immunity from the professor’s

¹⁴ For a discussion of the “matters of public concern” test, *see* Section V of this paper.

¹⁵ *See* Donna R. Euben, “Contingent Faculty and the Courts,” *Academe* (Jan.-Feb. 2004) (forthcoming).

claim, and the federal appellate court agreed, because “no decision before 1994 . . . had clearly established that conduct of the sort that Vega undisputedly took violated a teacher’s First Amendment rights.” In so ruling, the court stated:

Since this episode occurred seven years ago and involves a highly unusual set of circumstances, unlikely to be repeated, we see no reason to rule definitively on whether the [the administrators’] action was unlawful . . . [W]e rule only that on the state of the law in 1994, the [administrators] could reasonably believe that in disciplining Vega for not exercising his professional judgment to terminate the episode, they were not violating his clearly established First Amendment academic freedom rights.

The Second Circuit’s analysis that faculty academic freedom under the First Amendment was not “clearly established” in 1994 is surprising, given that court’s ruling in 1990—*Dube v. State University of New York*, 900 F.2d 587 (2d Cir. 1990), *cert. denied*, 501 U.S. 1211 (1991)—in which it recognized as constitutionally protected a professor’s First Amendment academic freedom “based on [his] discussion of controversial topics in the classroom.” *Id.* at 597-98.

Of course, a professor’s First Amendment right to academic freedom is not absolute.¹⁶ And so, even when courts recognize the First Amendment right of academic freedom for individual faculty members, courts often balance that interest against other concerns. In **Bonnell v. Lorenzo (Macomb Community College)**, 241 F.3d 800, *cert. denied*, 534 U.S. 951 (2001), the Sixth Circuit upheld the college’s suspension of John Bonnell, a professor of English, for creating a hostile learning environment. A female student sued the professor, alleging that he had repeatedly used lewd and graphic language in his English class. The court clearly recognized the importance of the First Amendment academic freedom of the professor. At the same time, the court concluded that, “[w]hile a professor’s rights to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute to the point of compromising a student’s right to learn in a hostile-free environment.” The court

¹⁶ See, e.g., William W. Van Alstyne, “The Specific Theory of Academic Freedom and the General Issue of Civil Liberty,” in *THE CONCEPT OF ACADEMIC FREEDOM* 59, 78 (Edmond L. Pincoffs, ed. 1972) (“There is . . . nothing . . . that assumes that the First Amendment subset of academic freedom is a total absolute, any more than freedom of speech is itself an exclusive value prized literally above all else.”).

reached this conclusion, in part, because, unlike the speech at issue in *Hardy*, discussed above, the court found Bonnell's use of vulgar language "not germane to the subject matter."¹⁷

* * *

In determining whether classroom conduct is protected or not, some questions to ask include: Is the conduct "germane to the subject matter"? Consultation with senior faculty in a particular department or discipline as to the appropriateness and validity of particular pedagogical approaches can help guide an administration on this issue. Further, should proceedings ensue, having consulted with faculty will help to protect the administration. Is the conduct directed at the entire class, or to a specific individual or group of individuals (e.g., women, Native Americans, gay and lesbian students)? Is the conduct an isolated incident or part of a pattern and practice of allegedly offensive behavior?¹⁸

B. Curricular Choices and Academic Freedom

The right of teachers "to freedom in the classroom in discussing their subject" under the *1940 Statement* is inextricably linked to the rights of professors' to determine the content of their courses. The *Statement on Government of Colleges and Universities* further provides that faculty have "primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction . . ." <http://www.aaup.org/statements/Redbook/Govern.htm>. As one commentator noted: "Faculty will always have the best understanding of what is essential

¹⁷ See also *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996), *cert. denied*, 520 U.S. 1140 (1997), and *Silva v. University of New Hampshire*, 888 F. Supp. 293 (D.N.H. 1988) (finding institutional sexual harassment policies vague or overbroad as applied to punish professor who used "legitimate pedagogical reasons," which included provocative language, to illustrate points in class and to sustain his students' interest in the subject matter of the course).

¹⁸ See Sonya G. Smith, "Cohen v. San Bernardino Valley College: The Scope of Academic Freedom Within the Context of Sexual Harassment Claims and In-Class Speech," 25 J.C. & U.L. 1 (1998); see also Michael A. Olivas, "Reflections on Professorial Academic Freedom: Second Thoughts on the Third 'Essential Freedom'," 45 STAN. L. REV. 1835 (1993).

in a field and how it is evolving.” Steven G. Poskanzer, *HIGHER EDUCATION LAW: THE FACULTY* 91 (The Johns Hopkins University Press 2002). Such understanding is why institutions appoint such teachers to teach. Moreover, the expertise of a professor and a department helps insulate administrators and trustees from political pressures that may flow from particularly controversial courses.

One case that directly raises the issue of academic freedom in determining curriculum—as well as the tension between the academic freedom of professors and the academic freedom of students—is **Axson-Flynn v. Johnson (University of Utah)**, 151 F. Supp. 2d 1326 (D. Utah 2001), *appeal pending*, Civ. No. 01-4176 (10th Cir. 2002). Christina Axson-Flynn is a former student at the University of Utah, and a member of the Church of Jesus Christ of Latter-Day Saints. She sued the faculty in the university theater department for having violated her rights to free speech and free exercise of religion under the First Amendment by requiring, as part of the curriculum, that students perform in-class plays, despite their possible religious objections. The professors assert that “it is an essential part of an actor’s training to take on difficult roles, roles which sometime[s] make actors uncomfortable and challenge their perspective.” The student alleges that she told the theater department before being accepted that she refused to “take the name of God or Christ in vain” or use certain “offensive” words. After she was accepted into the program, she changed some words in assigned scripts for in-class performances so as to avoid using words she found offensive. Her professors warned her that she would not be able to change scripts in future assignments. Axson-Flynn dropped out of the special theater program and sued her professors.

In 2001 the district court ruled against Axson-Flynn. The court hypothesized that if the curriculum requirements were to constitute a First Amendment violation, “then a believer in ‘creationism’ could not be required to discuss and master the theory of evolution in a science class; a neo-Nazi could refuse to discuss, write or consider the Holocaust in a critical manner in a history class.”

Axson-Flynn is appealing the ruling to the Tenth Circuit. The AAUP filed an *amicus* brief in support of the professors and the administration. See <http://www.aaup.org/Legal/cases/Axson.PDF>. The brief argues that seeking to hold professors

liable for damages because they insist that students complete established course requirements contravenes settled principles of First Amendment faculty academic freedom, and that it is proper to give a high level of deference to academic judgments and requirements established by university faculty. A decision has not yet been issued.

A recent controversy about curriculum that captured the headlines was the 2002 summer reading program at the University of North Carolina (UNC) at Chapel Hill, resulting in **Yacovelli v. Moeser (University of North Carolina, Chapel Hill)**, Case No. 02-CV-596 (U.S. Dist. Ct., Middle District of N.C., Aug. 15, 2002), *aff'd*, Case No. 02-1889 (4th Cir., Aug. 19, 2002). On August 20, 2002, UNC scheduled a schoolwide discussion for all new students based on the reading assignment, *Approaching the Qur'an: The Early Revelations*, by Michael Sells, a professor at Haverford College. Anonymous students and named individual taxpayers sought to halt the summer program, arguing that the assignment of the book violated the Establishment Clause, which provides for the separation of church and state, under the “guise of academic freedom, which is often nothing other than political correctness in the university setting.” The university defended itself, arguing that the program was not endorsing or promoting a particular religion, and that if the court issued an injunction it would chill academic freedom because “the decision was entirely secular, academic, and pedagogical.” As Robert Galloway Kirkpatrick, UNC professor of English, stated in his affidavit: “Would next year’s committee be forbidden to require incoming students to read *The Iliad*, on the grounds that it could encourage worship of strange, disgraceful gods and encourage pillage and rape?”

The federal district court ruled in favor of the university, denying the plaintiffs’ request to stop the reading sections: “there is obviously a secular purpose with regard to developing critical thinking, [and] enhancing the intellectual atmosphere of a school for incoming students.” The day of the reading program, the federal appellate court upheld the trial court’s ruling.¹⁹

¹⁹ See Donna R. Euben, “Curriculum Matters,” *Academe* (Nov-Dec. 2002) www.aaup.org/publications/Academe/2002/02nd/02ndLW.htm. There have been other controversies involving reading programs for college students that have not resulted in judicial opinions. In 2003 UNC’s selection of Barbara Ehrenreich’s book, *Nicked and Dimed*, brought protests and legal threats from some individual students and conservative legal organizations. See Erin O’Connor, “Misreading What

Opponents of UNC's (and other institutions') academic programs argue that teaching about one topic, such as Islam, is inappropriate because, in essence, "the other side" is not being presented. However, a course is not subject to a legal mandate for "equal time." Such a legal imposition would needlessly and seriously undermine academic freedom. As Justice Stevens noted in his concurrence in the Supreme Court case *Widmar v. Vincent*, 454 U.S. 263 (1981), the "judgments" about whether to prefer a student rehearsal of "Hamlet" or the showing of Mickey Mouse cartoons "should be made by academicians, not federal judges." Surely faculty are allowed to assign books (or plays) in their courses without having to provide "equal time" to every competing viewpoint.

Similarly, another federal appellate court ruled that faculty approval of a controversial play selected by a student for his senior thesis, which offended some religious individuals, did not violate the Establishment Clause. In **Linnemeir v. Board of Trustees, Indiana University-Purdue University, Fort Wayne (IPFW)**, 260 F.3d 757 (7th Cir. 2001), some Indiana taxpayers and state legislators sought to compel IPFW to halt the campus production of Terrence McNally's "Corpus Christi." The Theatre Department faculty committee had unanimously approved the selection of the play as the senior project of a drama student. The plaintiffs alleged that the play was an "undisguised attack on Christianity and the Founder of Christianity, Jesus Christ" and, therefore, they claimed, the performance of the play on a public university campus violated the separation of church and state under the Establishment Clause of the First Amendment.

The Seventh Circuit denied the plaintiffs' request for a stay. The majority opined: "The contention that the First Amendment forbids a state university to provide a venue for the expression of views antagonistic to conventional Christian beliefs is absurd." It continued: "Classrooms are not public forums; but the school authorities and the teachers, not the courts,

Reading is For," *The Chronicle of Higher Education* (Sept. 5, 2003). The University of Maryland also has a reading program, but for all students, including incoming freshmen. In 2002 the school selected "The Laramie Project," a play about the murder of Matthew Shepard, a gay college student in Laramie, Wyoming, which professors planned to use for in-class discussions. Some individuals expressed concern that the play offended religious beliefs, announced their opposition to the assignment unless the university presented "other data" on homosexuality, and threatened litigation. See, e.g., Eric Hoover, "Unfazed (and Unconverted) by Book on the Koran," *The Chronicle of Higher Education* (Sept. 6, 2002).

decide whether classroom instruction shall include works by blasphemers. . . . Academic freedom and states' rights alike demand deference to educational judgments that are not invidious"²⁰

Another federal appellate court has ruled, however, that professors have no First Amendment right of academic freedom to determine appropriate curriculum. In **Edwards v. California University of Pennsylvania**, 156 F.3d 488 (3rd Cir. 1998), *cert. denied*, 525 U.S. 1143 (1999), Dilawar M. Edwards, a tenured professor in media studies, sued the administration for violating his right to free speech by restricting his choice of classroom materials in an educational media course. The classroom materials emphasized issues of "bias, censorship, religion and humanism." The department, however, had voted to use an earlier version of the syllabus for the introductory course. Thus, Edwards was teaching from a non-approved syllabus. The court declined to review the case under the standard of whether the professor's course content was "reasonably related to a legitimate educational interest" because "a public university professor does not have a First Amendment right to decide what will be taught in the classroom." The fact that Edwards' departmental colleagues approved a syllabus that Edwards declined to use seems to have contributed to the court's overbroad conclusions.²¹

III. Some Legislative Initiatives Implicating Academic Freedom

There are (and have been) a number of legislative initiatives—federal and state—that threaten institutional autonomy and faculty academic freedom in terms of curricular choices and classroom speech.

²⁰ See Donna R. Euben, "The Play's the Thing," *Academe* (Nov.-Dec. 2001) www.aaup.org/publications/Academe/2001/01nd/01ndLW.htm. For a copy of AAUP's *amicus* brief in this case, see www.aaup.org/Legal/cases/LINNEME1.pdf.

²¹ See Poskanzer, *supra*, at 89 (observing that "at some level the decision reflects deference to collective academic judgment").

A. The Kansas Controversy

In April 2003, Kansas governor Kathleen Sebelius issued a ringing endorsement of academic freedom and vetoed part of a state legislative bill that sought to cut \$3.1 million from the University of Kansas budget because of objections to a course on human sexuality. The legislature had proposed the cuts after learning about a student's objections to the content of a popular course in human sexuality. The elective course, taught for two decades by an award-winning professor, uses videotapes and pictures that depict genitalia and sexual activity.

In a statement about the veto, Governor Sebelius found the proposed cut to be "an inappropriate use of legislative powers designed to impinge upon academic freedom in the State of Kansas." The legislature subsequently passed a bill requiring state institutions to develop a policy on the use "of sexually explicit materials, including videos, as part of the curriculum . . . for undergraduate students."²²

B. The International Studies in Higher Education Act

On October 21, 2003, the U.S. House of Representatives passed H.R. 3077, the "International Studies in Higher Education Act." The bill reauthorizes Title VI of the Higher Education Act, and establishes an "International Advisory Board" to advise Congress and the Secretary of Education on Title VI programs in relation to national needs with respect to homeland security, international education, international affairs, and foreign language training. The board is also to "annually review, monitor, apprise, and evaluate the activities of grant recipients," and to make annual recommendations to Congress and the Secretary of Education.

Despite the explicit ban on the board's making curricular decisions, the power to hold hearings, monitor programs, and make recommendations to ensure that "authorized activities reflect diverse perspectives and the full range of views on world regions, foreign languages, and

²² "Kansas Governor Affirms Academic Freedom," *Academe* (July-Aug. 2003) <http://www.aaup.org/publications/Academe/2003/03ja/03jaNB.htm#8>.

international affairs” gives the board power to have a direct impact on curricular decisions—decisions that properly are a faculty responsibility.

H.R. 3077 has been referred to the Senate Committee on Health, Education, Labor and Pensions, which is expected to consider it as part of the debate over reauthorization of Title VI in the coming months.²³

C. An “Academic Bill of Rights”

The past year has also witnessed a concerted effort to establish what has been called an “Academic Bill of Rights” (“ABR”). In September 2003 Colorado State Senate President John Andrews indicated that he intends to propose legislation of some type in January 2004 to promote the “Academic Bill of Rights” created by David Horowitz and “Students for Academic Freedom.” In October 2003 Congressman Kingston (R-Ga.), introduced House Congressional Resolution 318 for the same proposition.

The following text is an excerpt from AAUP’s statement on the Academic Bill of Rights, which is to be published in the January-February 2004 issue of *Academe*:

Based upon data purporting to show that Democrats greatly outnumber Republicans in faculty positions, and citing official statements and principles of the AAUP, advocates of the ABR would require universities to maintain political pluralism and diversity. This requirement is said to enforce the principle that “no political, ideological or religious orthodoxy should be imposed on professors and researchers through the hiring or tenure or termination process.” . . . While the AAUP endorses this principle, and has spoken to this issue in earlier statements,²⁴ the Association believes that the ABR is an improper and dangerous method for its implementation. There are already mechanisms in place that protect this principle, and they work well. Not only is the ABR

²³ See Mark F. Smith, “The Wisdom Will Survive,” *Academe* (Jan.-Feb. 2004) (forthcoming).

²⁴ See AAUP, “Some Observations on Ideology, Competence, and Faculty Selection,” *Academe* 1a-2a (Jan.-Feb. 1986) (“[C]andidates for faculty appointment should be measured in terms of their own professional competence and integrity, and not in terms of the fit between their ideas and those which constitute or issue from some contemporary orthodoxy or other.”); Judith Jarvis Thomson, “Ideology and Faculty Selection,” 53 *JOURNAL OF LAW AND CONTEMPORARY PROBLEMS* 155 (1990).

redundant, but, ironically, it also infringes academic freedom in the very act of purporting to protect it.

A fundamental premise of academic freedom is that decisions concerning the quality of scholarship and teaching are to be made by reference to the standards of the academic profession, as interpreted and applied by the community of scholars who are qualified by expertise and training to establish such standards. The proposed ABR directs universities to enact guidelines implementing the principle of neutrality, in particular by requiring that colleges and universities appoint faculty “with a view toward fostering a plurality of methodologies and perspectives.” The danger of such guidelines is that they invite diversity to be measured by political standards that diverge from the academic criteria of the scholarly profession. Measured in this way, diversity can easily become contradictory to academic ends. So, for example, no department of political theory ought to be obligated to establish “a plurality of methodologies and perspectives” by appointing a professor of Nazi political philosophy, if that philosophy is not deemed a reasonable scholarly option within the discipline of political theory. No department of chemistry ought to be obligated to pursue “a plurality of methodologies and perspectives” by appointing a professor who teaches the phlogiston theory of heat, if that theory is not deemed a reasonable perspective within the discipline of chemistry.

* * *

In the early 1980s historian Walter Metzger set forth a classic AAUP definition of academic freedom limits for legislatures.²⁵ Professor Metzger granted that a state legislature can, without necessarily intruding on academic freedom, set up or abolish “departments of instruction in academic institutions under its control” because of “budgetary implications.” He continued: “Nor does it [intrude on academic freedom] when, under its licensing powers, it requires candidates for professional degrees to undergo a specified course of training which the state academic institution must provide.” But he insisted “that it invades the very core of academic freedom . . . when it dictates the contents of any course at any level or for any purpose.” Doing so “converts the university into a bureau of public administration, the subject into a vehicle for partisan politics or lay morality, and the act of teaching into a species of ventriloquism. . . . The central precepts of academic freedom . . . are that professors should say

²⁵ Walter R. Metzger, “Comments on Creationism and the Classroom,” *Academe* 12 (Mar.-Apr. 1982).

what they believe without fear or favor and that universities should appoint meritorious persons, not followers of a diversity of party lines.”

IV. Faculty Expression in Institutional Matters

Faculty are not only teachers; they also help to run the academic institution through shared governance. Sometimes legal cases arise when faculty members speak out on institutional matters—such as the process by which a college president is appointed or the negative consequences of a new admissions standard. Such faculty criticism is often directed at the institution’s governing board, the president and other administrators, and faculty colleagues.

Courts often apply the “matters of public concern” balancing test to the expression of faculty members at public institutions, including when they speak out on institutional matters.²⁶ Courts first determine whether a professor is speaking on a matter of public concern and, if so, whether the professor’s speech outweighs the state’s interest in an efficient academic workplace. Courts examine the “content, form, and context of a given statement” in determining whether a particular remark addresses a matter of public concern.²⁷

The application of this traditional employee test to professors in higher education is not particularly helpful.²⁸ For example, under what circumstances can a faculty member’s speech “disrupt” the educational environment when the mission of educational institutions is to create

²⁶ See *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) (a court must “balance between the interests of the [employee], 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”).

²⁷ *Connick v. Myers*, 461 U.S. 138, 147-48 (1983).

²⁸ Much commentary exists criticizing the matters-of-public-concern test and its application to higher education faculty. See, e.g., Rachel E. Fugate, “Choppy Waters are Forecast for Academic Free Speech,” 26 FLA. ST. U. L. REV. 187, 213 (1988) (“The current public employee free speech doctrine is not compatible with academic freedom and poses a serious threat to professors with minority views and unconventional pedagogical teachings.”); Chris Hoofnagle, “Matters of Public Concern and the Public University Professor,” 27 J.C. & U.L. 669 (2001) (“The current public concern test is too narrow and unpredictable in its determination of expression that should be protected by the First Amendment.”).

an intellectual marketplace where unpopular, controversial, and sometimes even offensive speech can be expressed?

In addition, the difference between a “matter of public concern” and a “matter of private interest” is “difficult to draw in many contexts, but is perhaps especially so in the context of classroom speech.”²⁹ Courts opine that public concern exists where professors’ expression “directly affects the public’s perception of the quality of education in a given academic system.” But what does “directly affect” mean? In the end, too much “faculty speech on many important, quality-affecting issues [in institutional affairs] is not protected by the First Amendment.”³⁰

Numerous cases exist in which different courts view similar facts and reach conflicting conclusions about whether the expression is of public concern when faculty speak out on the internal affairs of a college or university. One example: Is faculty advocacy around a “no confidence” vote protected speech? Different panels in the same federal appellate court have looked at similar facts, and reached opposite conclusions.

On the one hand, in **Clinger v. New Mexico Highlands University**, 215 F.3d 1162 (10th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001), the Tenth Circuit ruled that a professor’s speech involving a no-confidence vote was unprotected. In that case a faculty member who was denied tenure sued the university on a number of grounds, including the claim that the administration retaliated against her, in part, for her “advocacy before the Faculty Senate of a ‘no-confidence’ vote with respect to four members of the Board of Regents in light of their purported failure to comply with an internal policy on the appointment of a new president.” She argued that her speech was protected under the First Amendment. The court rejected that argument, finding the challenge essentially one about the “internal structure and governance” of the university, and concluding that such “matters of this nature ‘rarely transcend the internal workings of the university to affect the political or social life of the community.’” And so, the court concluded that “[t]he First Amendment does not require public universities to subject internal structural arrangements and administrative procedures to public scrutiny and debate.”

²⁹ William A. Kaplin & Barbara A. Lee, *THE LAW OF HIGHER EDUCATION* 199 (1995 ed. & 2000 Supp.).

³⁰ Hoofnagle, *supra*, 27 J.C. & U.L. at 707.

On the other hand, in **Gardetto v. Mason (Eastern Wyoming College)**, 100 F.3d 803 (10th Cir. 1996), the same court found a female professor’s speech protected under the matters-of-public-concern test. She spoke out in favor of a no-confidence vote against the college president and criticized in public the president’s reduction-in-force (RIF) plan. The court found her call for the no-confidence vote as “implicat[ing] broader concerns about [the president’s] possible misrepresentation of his educational status, his lack of integrity and leadership, and the corresponding decline in student enrollment” at the college. The court further found her comments about the RIF plan a matter of public concern, because she had “a well informed perspective on expenditures of public funds” in the debate.³¹

V. Freedom of Inquiry and Research Post-9-11

Faculty are not only teachers and partners in the governance of academic institutions, but also researchers. Numerous federal laws—enacted before and after September 11, 2001— affect academic research. I raise briefly below some of the more contentious legal issues that have arisen post-9-11. This section relies extensively on AAUP’s recent report, “Academic Freedom and National Security in a Time of Crisis,” *Academe* (Nov.-Dec. 2003) (hereafter “Academic Freedom and National Security”)

<http://www.aaup.org/statements/REPORTS/911report.htm>.

A. “Classified” Research

Academic research that is funded by the government can, under specified conditions, be classified. An issue that has long “vexed universities and researchers” is “whether, and if so how, they can carry out classified research without impairing freedom of research and scientific progress.” Classified research is generally developed in secret. To enforce secrecy, institutions often create stand-alone facilities for such research, separate from other on-campus

³¹ For a helpful overview of this topic, see Mary Ann Connell, “Institutional Criticizers: Balancing Their Free Speech Rights Against the Rights and Responsibilities of the College or University,” *The University of Vermont Ninth Annual Conference on Legal Issues in Higher Education* (1999).

laboratories and buildings. The AAUP recommends that “fewer restrictions [on academic research] are not only better than more, but restrictions on research, to the extent that any are required, must be precise, narrowly defined, and applied only in exceptional circumstances.”

A recent controversy at George Mason University highlights the new academic environment. Sean Gorman, a graduate student at the university’s National Center for Technology and Law, wrote a dissertation that maps the fiber-optic network that connects businesses in the United States. The federal government classified his work. Gorman stated, “They’re worried about national security. I’m worried about getting my degree.” He continued, “Academics make their name as an expert in something If I can’t talk about it, it’s hard to get hired. It’s hard to put ‘classified’ on your list of publications on your resume.” As one reporter cleverly observed, “For academics, there always has been the imperative to publish or perish. In Gorman’s case, there’s a new concern: publish and perish.” In the end “he will publish only the most general aspects of his work.”³²

B. Export Controls

Two regulatory regimes affect teaching, research, and the dissemination of research results involving foreign nationals: the International Traffic in Arms Regulations (ITAR), administered by the Department of State, and the Export Administration Regulations (EAR), administered by the Department of Commerce. Both of these federal statutory schemes were established before September 11, 2001; how they are applied under current conditions will be of concern to faculty and administration.

1. ITAR

The Export Control Act, 22 U.S.C. § 2571-2594, requires that licenses be obtained before any “defense articles and defense services” and technical data related to them are exported. “Export” is defined to include disclosure “(including oral or visual disclosure) or transferring

³² Laura Blumenfield, “Could Be Security Threat; Student’s Maps Illustrate Concerns About Public Information,” *Wash. Post* A1 (July 8, 2003).

technical data to a foreign person whether in the United States or abroad.” As the AAUP report states, “Classroom discussion or collaborative research with a foreign national, the presentation of a paper to an audience that includes a foreign national, inside or outside the United States, or even informal conversations, may be subject to the Act (which can include criminal sanctions), depending on what has been disclosed (or learned).”

2. EAR

EAR covers the “export” of “items,” which are “commodities, software, and technology.” “Export” is a transmission out of the United States, or “release of technology or software” to a foreign national inside the U.S. Such release may occur by oral exchange in the U.S. or abroad. However, EAR exempts release (or publication) of “fundamental research,” and fundamental research is defined more broadly than under ITAR: “Research conducted by scientists, engineers, or students at a university normally will be considered fundamental research. . . (“University” means any accredited institution of higher education located in the United States.)” *Id.* § 734.8(b).

But, as the AAUP report notes, there is a caveat under the law:

University based research is not considered “fundamental research” if the university or its researchers accept (at the request, for example, of an industrial sponsor) other restrictions on publication of scientific and technical information resulting from the project or activity. Scientific and technical information resulting from the research will nonetheless qualify as fundamental research once all such restrictions have expired or have been removed.

EAR further exempts the release of “educational information,” which is defined as “instruction in catalogue courses and associated teaching laboratories of academic institutions.” Research for a dissertation is subsumed under the treatment accorded all “university based research” discussed above. The AAUP report observes:

Department of Commerce guidance provides that EAR does not cover publication (or submission for publication) in a foreign journal, presentations at foreign conferences so long as they are “open” under EAR’s regulations, or teaching students from countries for which an export license would otherwise be required. The regulations also make clear that some apparent restrictions, for example, on the circulation of a copy of a dissertation not otherwise “published” or the sharing of unpublished research data with a visiting foreign national, do not in fact apply if the contents meet the definition of fundamental research.

EAR includes a separate provision for encryption commodities and software (15 C.F.R. § 740.17). (Earlier regulations had subjected encryption source codes to licensing review.) A few legal cases have emerged in the academic community that involve encryption.

In **Bernstein v. U.S. Department of Justice (University of Illinois at Chicago)**, 974 F. Supp. 1288 (N.D. Cal. 1997), *aff’d*, 176 F.3d 1132 (9th Cir.), *rehearing en banc granted and opinion withdrawn*, 192 F.3d 1308 (9th Cir. 1999), Daniel J. Bernstein, a research assistant professor of mathematics at the University of Illinois at Chicago, sought to use the Internet to show other scientists the source code for an encryption program called “Snuffle,” which he created as a graduate student. In 1995 he sued the U.S. Department of Justice, contending that the federal encryption regulations that control the export of domestic cryptographic research violate the First Amendment. The district court ruled in 1997, and a three-judge appellate panel affirmed in 1999, that the same governmental encryption restrictions at issue in *Junger* (below) violated the First Amendment’s guarantee of freedom of speech because they constitute an “impermissible prior restraint” on speech. When the Clinton administration revised the EAR regulations, the parties agreed to have the case sent back to the district court. In January 2002 Professor Bernstein resurrected his challenge to the revised encryption regulations, but that challenge was dismissed by a judge in July 2003. *Bernstein v. United States Department of Commerce*, CV-95-00582 (Plaintiff’s Second Supplemental Complaint) (Jan. 7, 2002), *dismissed*, No. C95-0582 (N.D.Ca. R, July 27, 2003). The district court rejected Bernstein’s “strained readings” of the amended EAR, and found that he lacked standing to bring the litigation.

In **Junger v. Daley (Case Western Reserve University)**, 209 F.3d 481 (6th Cir. 2000), Peter D. Junger is a law professor at Case Western Reserve University who teaches a course called

“Computers and the Law.” He submitted requests to the Commerce Department to publish encrypted software programs as required under the prior EAR regulations. The Commerce Department found that some of the codes Junger sought to publish were subject to EAR and could not be published. Asserting his First Amendment rights, Junger sued the Department of Commerce, challenging federal regulations under EAR that prohibited him from posting to his website various encryption programs that he had written to show his students how computers work. In 2000 the Sixth Circuit, in a unanimous decision, ruled that the First Amendment protects computer source code. The court observed, however, that national security interests “should overrule the interests in allowing the free exchange of encryption source code.”

C. Some Practical Suggestions

Some ways to respond to the post-9-11 concerns on campus include:

1. Institutional policies should be established by faculty and administration to protect academic freedom against governmental constraints and threats. Such policies could address the acceptance of classified research grants and contracts, access to personal computer files, and sharing of information with external agencies and library and student records. Where pertinent policies already exist, they should be reviewed and refined, with faculty governance bodies playing a central role in that review process; where such policies exist, they should be widely publicized at each institution.

2. Faculty should establish and maintain regular contact with the offices and individuals charged with interpreting and applying relevant policies, and faculty organizations should keep their colleagues and the campus community well informed.

3. Faculty and administration should build substantially closer ties. Such relationships should be built between faculty and the offices of the dean of students or the chief student personnel administrator, the director of

international student affairs, the campus police, and the university legal general counsel. These offices are likely to have heightened responsibilities in tense times and may be helpful in anticipating potential trouble spots. Moreover, in the performance of their regular functions, they may assist in reducing potential risks to academic freedom.

VI. Conclusion

This paper has provided a brief overview of some recent and current controversies involving academic freedom and professorial speech. I look forward to our workshop discussion in which we will explore these issues further.

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