

**ACADEMIC FREEDOM OF  
INDIVIDUAL PROFESSORS AND HIGHER EDUCATION INSTITUTIONS:  
THE CURRENT LEGAL LANDSCAPE**

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Various constituencies make claims to academic freedom and freedom of speech in the academic community. Consequently, even professors, lawyers and judges “are not always clear *whose* academic freedom is at stake.” Robert M. O’Neil, “Academic Freedom and the Constitution,” 11 J.C. & U.L. 275, 281 (1984). Legitimate invocations of academic freedom can often be difficult to discern and articulate. Nevertheless, there is a substantial body of law to guide us. What follows is a brief overview of the principles and law shaping faculty and institutional claims to academic freedom, followed by a discussion of current and future challenges.

Assertions of academic freedom under the First Amendment tend to arise in one of the following three ways: “claims of professors against faculty colleagues, administrators, or trustees; claims of professors against the State; and claims of universities against the state.” David M. Rabban, “A Functional Analysis of ‘Individual’ and ‘Institutional’ Academic Freedom Under the First Amendment,” 53 LAW & CONTEMP. PROBS. 227, 231 (Summer 1990) (hereafter “A Functional Analysis”). Occasionally these claims may conflict.

As two commentators explain:

Constitutional principles of academic freedom have developed in two stages, each occupying a distinct time period and including distinct types of cases. The earlier cases of the 1950s and 1960s focused on faculty and institutional freedom from external (political) intrusion. These cases pitted the faculty and institution against the State. Since the early 1970s, however, academic freedom cases have focused primarily on faculty freedom from institutional intrusion. In these latter cases, faculty academic freedom has collided with institutional academic freedom.

William A. Kaplin & Barbara A. Lee, THE LAW OF HIGHER EDUCATION 301 (1995 ed.).

**I. Academic Freedom of Individual Professors**

**A. The Professional Standard**

The professional standard of academic freedom is defined by the *1940 Statement of Principles on Academic Freedom and Tenure*, which was developed by the American Association of University Professors (AAUP) and the Association of American Colleges and Universities. It is the

fundamental statement on academic freedom for faculty in higher education. It has been endorsed by over 180 scholarly and professional organizations, and is incorporated into hundreds of college and university faculty handbooks. The *1940 Statement* provides:

Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties. . .

Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter that has no relation to their subject. . .

College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

AAUP, POLICY DOCUMENTS & REPORTS 3-4 (9<sup>th</sup> ed. 2001) (hereafter “Redbook”).

Courts, including the United States Supreme Court, have relied on the *1940 Statement’s* definition of academic freedom. See, e.g., *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 756 (1976); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971).

## **B. The First Amendment Right of Academic Freedom for Professors**

The rights that flow from the professional concept of academic freedom are not coextensive with First Amendment rights, although some courts have recognized a relationship between the two.

- The First Amendment safeguards expression from regulation by public institutions, including public colleges and universities, expression on all sorts of topics and in all sorts of settings.
- The professional (and often legal) definition of 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.

Although the U.S. Supreme Court has consistently recognized that academic freedom is a First Amendment right, the scope of the First Amendment right of academic freedom for professors remains unclear.

In *Keyishian v. Board of Regents of the State Univ. of New York*, 385 U.S. 589 (1967), the Court held that faculty members’ First Amendment rights were violated by a state requirement that

they sign a certificate stating that they were not and never had been Communists, and by vague and overbroad restrictions on verbal and written expression. In so ruling, the Court opined:

Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the “marketplace of ideas.” The nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth “out of a multitude of tongues, [rather] than through any kind of authoritative selection.”

*Id.* at 603 (citations omitted). *See also Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (finding that the government’s inquiry into the subject matter of a University of New Hampshire lecturer’s presentations “unquestionably was an invasion [of the lecturer’s] liberties in the areas of academic freedom and political expression--areas in which government should be extremely reticent to tread”).

These Supreme Court cases involved the First Amendment right of academic freedom of individual professors to be free from state regulation: *Sweezy* involved a professor’s speech and *Keyishian* involved professors’ rights not to sign a loyalty oath. The *Sweezy* decision also served as the basis for the academic freedom of institutions (see below).

The Supreme Court, however, has not clearly defined the scope of academic freedom protections under the First Amendment, and commentators disagree about the scope of those protections. *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, 61-63 (Edmund L. Pincoffs ed., 1972) (arguing that the inclusion of political utterances by faculty members as subsumed under academic freedom has the potential to lead to less protection for faculty speech than for other public employees) (hereafter “The Specific Theory”); Rabban, “A Functional Analysis,” at 227 (“Constitutional academic freedom . . . may provide professors more protection for professional speech and less protection for unprofessional speech than the free speech clause would afford the same statements by nonacademics.”); J. Peter Byrne, “Academic Freedom: A ‘Special Concern of the First Amendment’,” 99 *YALE L.J.* 251 (1989) (embracing the notion of institutional, not individual, autonomy as a key feature of academic freedom) (hereafter “A Special Concern”).

Whatever the legal scope, it is clear that the First Amendment protection of individual academic freedom is not absolute. As Professor Van Alstyne has written:

There is, of course, 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. Thus, the false shouting of fire in a crowded theater may not immunize a professor of psychology from having to answer for the consequences of the ensuing panic, even assuming that he did it in

order to observe crowd reaction first-hand and solely to advance the general enlightenment we may otherwise possess of how people act under great and sudden stress.

Van Alstyne, "The Specific Theory," at 78.

For a general discussion about the relationship between academic freedom and the First Amendment, see William W. Van Alstyne, "Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review," 53 LAW & CONTEMP. PROBS. 79 (1990) (hereafter "An Unhurried Historical Review"); Matthew W. Finkin, "Intramural Speech, Academic Freedom, and the First Amendment," 66 TEX. L. REV. 1323 (1988); THE CONSTITUTIONAL STATUS OF ACADEMIC FREEDOM (W. Metzger ed. 1977); Rabban, "A Functional Theory," at 227.

### **C. The Sources of Protection for Individual Academic Freedom**

#### **1. Constitutional Law**

The federal constitution was largely 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 colleges, from infringing on professors' freedoms, such as freedom of speech and due process. See, e.g., *Logan v. Bennington College*, 72 F.3d 1017, 1027 (2d Cir. 1995) (holding that sexual harassment policy of private college did not violate the due process rights of tenured professor because the college's "action in terminating [the professor] was in no way dictated by state law or state actors"). But see *Franklin v. Leland Stanford Jr. Univ.*, 218 CAL. RPTR. 228, 230 n. 3 (Cal. App. 1985) (in a case involving the dismissal of a Stanford University professor who advocated violence, the court considered the professor's First Amendment arguments because the university agreed that it should be treated as a state actor: "[F]or purposes of this appeal . . . Stanford has adopted the position that the outcome is the same whether it is viewed as a private or public employer. We thus review Stanford's action as if it were state action."); *Albert v. Carovano*, 824 F.2d 1333, 1339-41 (2d Cir. 1987) (finding Hamilton College to be state actor because, in part, it was chartered by state and received state monies); *Craft v. Vanderbilt University*, 940 F. Supp. 1185 (M.D. Tenn. 1996) (ruling that private university's participation with state government in radiation experiments in the 1940s might constitute "state action" for constitutional standards to apply).

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

## 2. Contractual Rights

Internal sources of contractual obligations 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. *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* (2002 ed.) ([www.aaup.org](http://www.aaup.org)).

## 3. Academic Custom and Usage

Academic freedom is also protected as part of “academic custom” or “academic common law.” The *1940 Statement* constitutes a “professional ‘common’ or customary law of academic freedom and tenure.” Matthew W. Finkin, “Towards a Law of Academic Status,” 22 *BUFFALO L. REV.* 575, 577 (1972).

As the U.S. Court of Appeals for 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.

412 F.2d at 1135. *See 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”); *see also 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). *See generally* Matthew W. Finkin, “Regulation by Agreement: The Case of Private Higher Education,” 65 *IOWA L. REV.* 1119, 1145 (1980) (examining a theory of academic employment based on custom and expectations of the profession).

## II. Institutional Academic Freedom (or Institutional Autonomy)

### A. The First Amendment Right of Institutional Academic Freedom

The U.S. Supreme Court has also recognized a First Amendment right of institutional academic freedom:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment, and creation. It is an atmosphere in which there prevail “the four essential freedoms” of a university--to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

*Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (reversing a contempt judgment against a professor who had refused to answer questions concerning a lecture delivered at the state university) (citations omitted). See also *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., concurring) (“The [academic] freedom of a university to make its own judgments as to education includes the selection of its student body.”).

### B. The Limits of Institutional Autonomy

Just as academic freedom for individual professors is not unbounded, so too does institutional academic freedom have its limits. Justice Frankfurter’s concurrence in *Sweezy* emphasized the value of academic freedom in *academic decisions* that require “the exclusion of governmental intervention in the intellectual life of a university.” 354 U.S. at 262. Van Alstyne, “An Unhurried Historical Review,” at 137 (“To gain purchase through the first amendment, the decision in an academic freedom case, whether individual or institutional, must still rest--as Frankfurter noted--on *academic* and not on some other grounds.”). No court has clearly defined the scope of institutional academic freedom.

**Query:** George Washington University recently argued that its institutional academic freedom was violated by the District of Columbia zoning board’s requirements because they involved “capping student enrollment and the number of its faculty, interfering with GW’s ability to admit academically qualified undergraduates who are unsuited for dormitory life, and placing a moratorium on the construction of non-residential buildings. . . .” See Sara Hebel, “2 Universities’ Battle Over Zoning Raise Issues of Privacy and Human Rights,” *The Chronicle of Higher Education* (Oct. 12, 2001). Does this government regulation implicate solely a proprietary right of the institution or also its academic freedom?

In *George Washington University v. District of Columbia*, Case No. 01-895 (D.C. Dist. Ct., Apr. 12, 2002), the court found that “[t]he University’s conception of academic freedom goes beyond the outer reaches identified and accepted by the courts. . . . The zoning

restrictions imposed by the Board only affect the number of student and faculty and where students may live.”

Based on the “Open Universities” passage of *Sweezy*, a number of commentators have suggested that institutional academic freedom is triggered only by those institutional decisions that implicate their educational functions, which are subsumed under the “four essential freedoms” to protect the academic freedom of individual professors from outside interference. For example, Professor Matthew W. Finkin finds “particularly perverse” the application of the term “academic freedom” to institutional autonomy grounded in “an excrescence of property rights . . . unrelated to the maintenance of conditions of academic freedom within the institution.” Matthew W. Finkin, “On ‘Institutional’ Academic Freedom,” 61 TEX. L. REV. 817, 839 (1983); see *id.* at 846-47 (contending that the “Open Universities” passage in *Sweezy* refers to situations in which academic freedom for the institution was invoked in order to prevent the state from trampling on the rights of individual academics); Matthew W. Finkin, “Some Thoughts on the Powell Opinion in *Bakke*,” 65 *Academe: Bulletin of the American Association of University Professors* 192, 196 (1979) (hereafter “*Academe*”) (“Inasmuch as no nexus between the exercise of academic freedom and the claim of autonomy need be shown, the interests insulated are not necessarily those of teachers and researchers, but administration and the governing board; the effect is to insulate managerial decisionmaking from close scrutiny, even in cases where the rights or interests of the faculty might be adverse to the institution’s administration.”).

Professor David M. Rabban embraces a similar approach:

Institutional academic freedom should . . . relate to the educational functions of the universities, such as the “four essential freedoms”. . . . Independent constitutional rights, such as the free exercise clause and freedom of association, may protect the autonomy of private universities, just as the free speech clause may protect the a professional expressions of faculty. But these additional constitutional rights, because they do not address the distinctive functions of professors and universities, should not fall under the rubric of academic freedom.

Rabban, “A Functional Analysis,” at 300. See also Richard H. Hiers, “Academic Freedom in Public Colleges and Universities: O Say, Does that Star-Spangled First Amendment Banner Yet Wave?,” 40 WAYNE L. REV. 1, 17 (1993) (arguing that “[w]hen Justice Stevens used the expression ‘autonomous decision-making by the academy itself’ [in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985)], he was obviously referring to the decisionmaking *by the faculty*”); Amy Gutmann, NOMOS 25: LIBERAL DEMOCRACY 257, 276 (New York University Press, 1983) (“[A]cademic freedom as an institutional right . . . is not so broad as to permit any university to defend itself against those governmental regulations that are compatible with, or instrumental to achieving, a university’s self-proclaimed educational purposes.”).

Professor Peter Byrne also recognizes limits to institutional academic freedom. He asserts that “[t]he term ‘academic freedom’ should be reserved for those rights necessary for the preservation of the unique functions of the university, particularly the goals of disinterested

scholarship and teaching.” Byrne, “A Special Concern,” at 312. And so he recommends that “universities that do not respect the academic freedom of professors . . . ought not to be afforded institutional autonomy. This limitation . . . may lessen fears that institutional freedom will cloak violations of professors’ academic freedom by institutions bent on intellectual orthodoxy.” *Id.* He also recognizes that “[i]t may be hard to identify what speech (or even point of view) the university expresses as an institution, distinct from those of individual faculty, students, or administrators.” *Id.* But see J. Peter Byrne, “Constitutional Academic Freedom in Scholarship and in Court,” *The Chronicle of Higher Education* (Jan. 5, 2001) (writing that he is “sickened” about the majority’s reliance on his 1989 law review article in *Urofsky v. Gilmore*, and asserting that the majority’s “distortion” of his argument “to strip away legal protection for intellectual inquiry leaves [him] distraught”). (For a discussion of the Fourth Circuit decision in *Urofsky v. Gilmore*, see *infra* pages 9-10, 20-21 and 24.)

So, for example, academic institutions do not have the First Amendment academic freedom to violate Title VII. See, e.g., *Powell v. Syracuse*, 580 F.2d 1150, 1153-54 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978) (ruling that judicial precedent, which made colleges and universities “virtually immune to charges of employment bias . . . was never intended to indicate that academic freedom embraces the freedom to discriminate”).

### III. The Relationship of Institutional and Individual Academic Freedom

#### A. The Legal Landscape

In most institutions, the faculty has the primary responsibility for those “academic decisions” that determine “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” See *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring).

**QUERY:** To what extent is the legal concept of institutional academic freedom (or institutional autonomy) dependent upon the First Amendment right of academic freedom for individual professors?

Steven G. Poskanzer suggests that

. . . courts’ willingness to defer to [institutional] policies is in large part a consequence of their having been established or reviewed by duly constituted faculty bodies (e.g., course content is the province of curriculum committees; the overall level of academic rigor is ultimately traceable to decisions of faculty admissions committees). In a very real sense, then, the *institutional* academic freedom recognized in many judicial opinions may be viewed as the sum of acts of *individual* faculty academic freedom. Conflict between these two notions may thus become illusory.



Steven G. Poskanzer, *HIGHER EDUCATION LAW: THE FACULTY* 102 (Johns Hopkins University Press, 2002) (hereafter “The Faculty”); see also Elizabeth Mertz, “The Burden of Proof and Academic Freedom: Protection for Institution or Individual?,” *N.W. UNIV. L. REV.* 492, 518 (1988) (“[U]niversities have an interest in defending the rights of individual academics, for it is only in their role as defenders of those rights that universities can claim any special constitutional status.”).

While courts have not clearly defined either institutional or individual academic freedom, they have, except for the Fourth Circuit, recognized that these legal freedoms co-exist, albeit sometimes in tension. Accordingly,

[t]he identification by the Supreme Court of institutional academic freedom as a First Amendment right does not support the additional conclusion that the Court rejected a constitutional right of individual professors to academic freedom against trustees, administrators, and faculty peers.

Rabban, “A Functional Analysis,” at 280. Accordingly, institutional academic freedom supplements, but does not supplant, the First Amendment academic freedom right of professors.

These conceptions of academic freedom--individual and institutional--can be mutually reinforcing in the search for knowledge and truth in higher education, but they can also come into conflict when forces within the institutions themselves threaten the free expression rights of faculty members or students. For example, in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 n. 12 (1985), the Court opined, “Academic freedom thrives *not only* on the independent and uninhibited exchange of ideas among teachers and students . . . *but also*, and somewhat inconsistently, on autonomous decision making by the academy itself.” Justice Stevens emphasized the “faculty’s decision” that “was made conscientiously and with careful deliberation” and the need for courts to “show great respect for the faculty’s professional judgment.” *Id.* at 225. See also *Piarowski v. Illinois Comm. College*, 759 F.2d 625, 629 (7<sup>th</sup> Cir.), *cert. denied*, 474 U.S. 1007 (1985) (noting that academic freedom “is used to denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy”); *Feldman v. Ho*, 171 F.3d 494, 495 (7<sup>th</sup> Cir. 1999) (“A university’s academic independence is protected by the Constitution, just like a faculty member’s own speech.”). See also Association of Governing Boards of Universities and Colleges, “Governing in the Public Trust” (providing that “intellectual integrity and academic freedom are at the heart of the historic social justification for self governance in colleges and universities,” and that “board members should be able to articulate this value [academic freedom] and be prepared to support and defend it on behalf of their institutions and individual professors”) ([www.agb.org](http://www.agb.org)).

## **B. The Fourth Circuit Exception?**

Despite Supreme Court law and other federal appellate decisions to the contrary, the Fourth Circuit ruled in *Urofsky v. Gilmore* 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.” 216 F.3d 401, 410 & 415 (4<sup>th</sup> Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001) (discussed further on pages 20-21).

The Fourth Circuit’s academic freedom analysis in *Urofsky* 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 Michael D. Hancock, “The Fourth Circuit’s Narrow Definition of ‘Matters of Public Concern’ Denies State-Employed Academics Their Say: *Urofsky v. Gilmore*,” 6 RICH. J.L. & TECH. 11 (Fall 1999); Michael D. Hancock, “Why *Urofsky v. Gilmore* Still Fails to Satisfy,” 6 RICH. J.L. & TECH. 14 (Winter 1999); Steven G. Olswang, “The Demise of Academic Freedom: *Urofsky v. Gilmore*,” Stetson University College of Law, 22<sup>nd</sup> Annual Law & Higher Education Conference (Feb. 2001); “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.”) (hereafter “Constitutional Law-Academic Freedom”); David M. Rabban, “Academic Freedom, Individual or Institutional?,” *Academe* 16, 19 (Nov.-Dec. 2001) (arguing that the Fourth Circuit misinterpreted First Amendment academic freedom jurisprudence and commentary); Kate Williams, “Loss of Academic Freedom on the Internet: The Fourth Circuit’s Decision in *Urofsky v. Gilmore*,” 21 REV. LITIG. 493 (2002).

As Chief Judge Wilkinson, who concurred in the *en banc Urofsky* judgment only (but dissented from the majority’s reasoning) wrote:

[T]he majority accords the speech and research of state employees, including those in universities, no First Amendment protection whatsoever. I offer no apology for believing, along with the Supreme Court . . . in the significant contribution made to society by our colleges and universities. . . . I fear the court forgets that freedom of speech belongs to all Americans and that the threat to the expression of one sector of society will soon enough become a danger to the liberty of all.

*Id.* at 426 (Wilkinson, C.J., concurring).

Notwithstanding its unsupported broadside attack on the First Amendment individual right of academic freedom, the *Urofsky* majority itself conceded 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:

[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.

### C. AAUP and the Legal Assertion of Institutional Academic Freedom

The AAUP's focus is primarily on academic freedom as an individual right of professors. Nevertheless, the Association has, on occasion, addressed on an *ad hoc* basis the scope of institutional academic freedom in responding to arguments made by college and university administrations in litigation. In some key cases, AAUP has concluded that institutions have academic freedom when a challenged decision involves educational or academic policy and functions (as opposed to other nonacademic decisions).

- *State v. Schmid*, 84 N.J. 535 (1980), *appeal dismissed sub. nom. Princeton Univ. v. Schmid*, 455 U.S. 100 (1982). In this case, the court rejected the university's argument that institutional academic freedom allowed it to bar from its campus political solicitors who asserted a right of access under the state constitution. The Association also rejected the university's claim to institutional academic freedom in the *Schmid* case, because the case did not involve its educational function, but its proprietary interests:

Any direct governmental infringement of the freedom of teaching, learning, and investigation, is an assault upon the autonomy of institutions dedicated to academic freedom. In addition, universities perform functions, such as the selection of faculty, that are inexorably intertwined with the exercise of academic freedom. Freedom of the university is required at certain points in order to protect freedom *in* the university.

AAUP *Amicus* Brief, *Princeton University v. Schmid*, at 3. And so, "when the state intrudes into these ["four essential freedoms"] of a university's intellectual life, it erodes a necessary buttress for the protection of academic freedom." AAUP *Amicus* Brief at 17.

- *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990): The Court rejected the establishment of an "academic freedom" privilege and ruled that the EEOC could review peer evaluations. Filing a nonaligned *amicus* brief to the Court, AAUP contended that, in this case, no tension existed between the institution's claim to academic freedom and that of individual professors because (1) faculty had primary responsibility for tenure decisions, and (2) the university's policy related to its academic decisionmaking functions and therefore deserved First Amendment protection. *See also* University of Pennsylvania Brief at 16 ("Institutional academic freedom--the university's right to some degree of autonomy--is a necessary corollary of the First Amendment rights of the individual university professor.").

- *Bakke v. Regents of the University of California*, 438 U.S. 265 (1978): The Court ruled that while the U.C. Davis program unlawfully discriminated against the medical school applicant Bakke, “the state has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.” *Id.* at 320. The AAUP’s *amicus* brief, which was filed in support of the university, argued that “the selection of an applicant is the result of open discussion and collective effort by the professional group which, presumptively, should be expected to exercise an experienced judgment about the optimal composition of the class selected.” AAUP *Amicus* Brief at 12. Justice Powell relied on academic freedom in his plurality decision.

*See also Barenblatt v. United States*, 360 U.S. 109 (1959) (The Court upheld a conviction of a University of Michigan teaching fellow who had been prosecuted for refusing to answer questions during a session of the House Committee on Un-American Activities; AAUP asserted in its *amicus* brief that institutional autonomy from state interference was a necessary condition for the academic freedom of individual professors); *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985) (The Court upheld the university’s dismissal of a medical student on academic grounds based on the professional judgment of faculty; AAUP argued in its *amicus* brief that only where the faculty fails to exercise its professional judgment does liability arise, that “appropriate deference to academic decision-making is preserved” when “the court’s role [is] confined to examination of the institution’s statement of reasons,” and that institutional academic freedom is not violated when an institution is obliged “to articulate sound academic reasons for student dismissals”). AAUP *Amicus* Brief at 5 & 15.

#### **D. Some Future Challenges**

More clearly defining the relationship and tensions between individual and institutional academic freedom under the First Amendment will be a challenge for AAUP, colleges and universities, and courts. Future cases may provide opportunities to refine that relationship through exploration of:

- The difference in protections under the First Amendment right of academic freedom between K-12 and postsecondary schools; and
- The scope of institutional academic freedom as between private and public sector institutions.

David M. Rabban, “Academic Freedom, Individual or Institutional?,” *Academe* 16, 20 (Nov.-Dec. 2001).

#### **IV. Public Employees and Matters of Public Concern**

The courts have applied the “matters of public concern” balancing test to the expression of faculty members at public institutions. *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”). Under *Pickering* and its progeny, 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. The “content, form, and context of a given statement” is examined by courts in determining whether a particular topic addresses a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983).

Sometimes, however, courts apply the matters-of-public-concern test without special regard for the mission and purpose of higher education. See generally 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.”) The application of that test in the academic context raises some particularly knotty issues:

- **“Efficiency” of the Academic Workplace:** Under what circumstances can a faculty member’s speech “disrupt” the educational environment when the mission of educational institutions is to create an intellectual marketplace where unpopular, controversial, and sometimes even offensive speech can be expressed?
- **What Is a Matter of Public Concern?** 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.” William A. Kaplin & Barbara A. Lee, THE LAW OF HIGHER EDUCATION 199 (1995 ed. & 2000 Supp.). Compare *Landrum v. Eastern Kentucky University*, 578 F. Supp. 241 (E.D. Ky. 1984) (ruling as unprotected speech professor’s comments about school’s real estate curriculum because the comments constituted a “personal grievance”), with *Johnson v. Lincoln University*, 776 F.2d 443 (3<sup>rd</sup> Cir. 1985) (holding as protected speech professor’s comments on faculty reductions, student enrollment, and grade inflation, even though the topics were an outgrowth of personal disputes within the chemistry department, because “questions of educational standards and academic policy” are broad and implicate matters of public concern). See also *Urofsky v. Gilmore*, 216 F.3d 401, 428 (4<sup>th</sup> Cir. 2000), cert. denied, 531 U.S. 1070 (2001) (Wilkinson, C.J., concurring) (observing that unlike most public employees, professors are “hired for the very purpose of inquiring into, reflecting upon, and speaking out on matters of public concern”; they are not “state mouthpieces” of their institutions, but “speak mainly for themselves.”).

For commentary on the application of the matter-of-public-concern test to professors, see Damon L. Krieger, *May Public Universities Restrict Faculty from Receiving or Transmitting Information Via University Computer Resources? Academic Freedom, the First Amendment, and the Internet*,” 59 MD. L. REV. 1398, 1430 (2000) (asserting in discussion of *Urofsky* that *Pickering* doctrine should be “reformulated” because “current public employee speech doctrine is inadequate to address the speech of faculty members”); Alisa W. Chang, “Resuscitating the Constitutional ‘Theory’ of Academic Freedom: A Search for a Standard Beyond *Pickering* and *Connick*,” 53 STAN. L. REV. 915, 938 (2001) (“The first and perhaps most fundamental problem with the automatic application of the *Pickering/Connick* rules to academic contexts is the fact that

university professors are not employees in the traditional sense.”); “First Amendment-Academic Freedom,” 114 HARV. L. REV. at 1419 (noting that the *Urofsky* majority’s reasoning means that *Pickering*’s protection is foreclosed simply because professors speak as employees); see generally Matthew W. Finkin, “Intramural Speech, Academic Freedom, and the First Amendment,” 66 TEX. L. REV. 1323 (1988) (critiquing the application of *Connick* to intramural faculty speech).

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 can help (and protect) an administration if proceedings ensue.
- 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?

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).

## V. Recent Challenges to the First Amendment Academic Freedom of Faculty

### A. Freedom of Teaching

Generally, speech by professors in the classroom is protected under the First Amendment if the speech is “germane to the subject matter.” See, *e.g.*, *Kracunas v. Iona College*, 119 F.3d 80, 88 & n. 5 (2d Cir. 1997) (applying the “germaness” 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,” REDBOOK at 5 (“[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.”).

#### 1. 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 may engage in unprotected speech in the classroom, such as religious proselytizing or sexual harassment.

a. **Some Recent Case Law**

**Hardy v. Jefferson Community College**, 260 F.3d 671 (6<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 1436 (2002): An African-American student and a “prominent citizen” complained about the 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.” The college did not renew Professor Hardy’s appointment, and he 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.” 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.”

**Vega v. Miller (New York Maritime College)**, 273 F.3d 460 (2d Cir. 2001): Edward Vega, a former non-tenure-track professor of English, is suing the college, which did not reappoint him because he led an “offensive” classroom “clustering” (or word association) exercise in a remedial English class for “pre-freshmen” 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.” None of the students or their parents complained. Administrators did not reappoint Vega, arguing that his conduct “could be considered sexual harassment, and could create liability for the college.” Vega raised a number of claims, including that the nonreappointment violated his First Amendment right of academic freedom. The administrators argued that they were entitled to qualified immunity. The federal appellate court ruled that the administrators were entitled to qualified immunity 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 clearly 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 Defendants’ action was unlawful . . . [W]e rule only that on the state of the law in 1994, the Defendants 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.” Vega has filed in U.S. Supreme Court a *certiorari* petition.

**Bonnell v. Lorenzo (Macomb Community College)**, 241 F.3d 800 (6<sup>th</sup> Cir. 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 stated 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 found the professor’s use of vulgar language “not germane to the subject matter.”

**Jon Willand v. Robert Alexander (North Hennepin Community College)**: Jon Willand, an instructor in history, is suing a number of individuals on various claims, including a policy that allegedly limits his “offensive” speech in the classroom. He contends that he was disciplined for the following statements in his courses on “American History” and “The History of World War II”: the Nazis engaged in “human recycling” of their victims; Pocahontas did handsprings nude through Jamestown; and “Native American” is an inaccurate term to describe any race. The complaint asserts that Professor Willand received the following directive from the administration: “You will avoid making comments and using phraseology which may be interpreted by a reasonable person as articulating or promoting racism, sexism, or other ideology which incorporates stereotypical, prejudicial, or discriminatory overgeneralizations that might intimidate or insult students.” Professor Willand is represented by the Center for Individual Rights, and documents about this case are available from CIR’s website ([www.cir-usa.org/recent\\_cases/willand\\_v\\_hennepin.html](http://www.cir-usa.org/recent_cases/willand_v_hennepin.html)).

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 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 their students’ interest in the subject matter of the course).

#### **b. Some Guiding Principles on Free Speech and Harassment**

- Policies should track the discrimination laws and be applied so as to recognize the different types of opportunities and benefits at stake in the context of higher education. Anti-discrimination policies should regulate conduct, not the content of speech.
- University officials should articulate values of tolerance and civility, and respond with “more speech” when racist or sexist expression takes place.
- Content-neutral regulations can be used to limit disruptive behavior and expression (e.g., rules against fighting words, disturbing the peace, alcohol and drug abuse, vandalism of property, arson).



Arthur L. Coleman and Jonathan R. Alger, "Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom From Discrimination on University Campuses," 23 J.C. & U.L. 91 (1996).

## 2. Course Content

The *Statement on Government of Colleges and Universities* provides that faculty have "primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction . . ." REDBOOK at 221. As one commentator noted: "Faculty will always have the best understanding of what is essential in a field and how it is evolving." Poskanzer, THE FACULTY at 91. That is why institutions appoint such scholars to teach. Moreover, the expertise of a professor and a faculty department helps insulate administrators and trustees from political pressures that may flow from particularly controversial courses. See, e.g., David L. Wheeler, "Fort Lewis College Pulls Course on 'Poetics of Porn'," *Today's News* (Dec. 3, 2001) (suspending the listed seminar pending a "special session of the curriculum committee" to review the course for "academic integrity," and reporting that "some state politicians had expressed interest in reviewing all special-topics courses at all state institutions").

**Axson-Flynn v. Johnson (University of Utah)**, 151 F. Supp. 2d 1326 (D. Utah 2001), *appeal pending* No. 01-4176 (10<sup>th</sup> Cir. 2002). Christina Axson-Flynn is a former student at the University of Utah. She is also a member of the Church of Latter-Day Saints. Axson-Flynn has sued her University of Utah theater department professors for violating her right 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 her religious objections. As a part of the theater department curriculum, 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 into the "Actor Training Program" (ATP) that she refused to "take the name of God or Christ in vain" or use certain "offensive" words, such as "fuck." The district court ruled against her. 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." Accordingly, the court found "reasonable for an acting program faculty to use such exercises to foster an actor's ability to take on roles they might find disagreeable." Axson-Flynn is appealing the ruling to the Tenth Circuit.

**Linnemeir v. Board of Trustees, Indiana University-Purdue University, Fort Wayne (IPFW)**, 260 F.3d 757 (7<sup>th</sup> Cir. 2001): Some Indiana taxpayers and state legislators sought

to compel IPFW to halt the campus production of a controversial play, 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, 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 pending their appeal from the district court's refusal to grant a preliminary injunction. The majority opined: "Classrooms are not public forums; but the school authorities and the teachers, not the courts, decide whether classroom instruction shall include work by blasphemers." The opinion continued: "Academic freedom and states' rights, alike demand deference to educational judgments that are not invidious . . ." See Donna R. Euben, "The Play's The Thing," *Academe* 93 (Nov.-Dec. 2001); AAUP's *Amicus* Brief ([www.aaup.org](http://www.aaup.org)).

**Edwards v. California University of Pennsylvania**, 156 F.3d 488 (3<sup>rd</sup> 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 the issues of "bias, censorship, religion and humanism." The department 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 deference to the academic decision of the institution. Poskanzer, *THE FACULTY* at 89 (observing that "at some level the decision reflects deference to (collective) academic judgment," but that such "a consensus is always easier to obtain in opposition to unpopular or unconventional ideas").

**Southern Christian Leadership Conference v. Louisiana Supreme Court (Tulane Environmental Law Clinic)**, 252 F.3d 781 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 464 (2001): The Fifth Circuit upheld Louisiana Supreme Court Rule XX that restricted the types of community groups that may be represented by law clinics, and prohibited law school clinics from representing "solicited" clients. Seemingly the rule had been amended in response to the Tulane law clinic's successful efforts in assisting a local community group to defeat a plan to build a plastics plant in its neighborhood. A number of plaintiffs, including professors and students, challenged the rule. They alleged, in part, that the rule violated the academic freedom of professors to teach and students to learn. *Amici*, including the AAUP, CLEA and AALS, argued in its joint brief that clinicians have a distinct form of academic freedom, and that academic freedom is not limited to the four walls of a classroom. The Fifth Circuit ruled that the limitation on the types of clients law clinics could represent did not "implicate any speech interests," and the solicitation restrictions did not violate the plaintiffs' rights of free speech: "At most, Rule XX indirectly

discourages speech by refusing the educational experience of acting as an attorney in a particular matter to unlicensed student practitioners in clinics whose members or employees engaged in solicitation of that matter.” In so ruling, the Fifth Circuit noted that the impact of the court’s rule “on the educational experience is far from extreme,” even though the court acknowledged that “the clinics themselves will either be forced to change their educational model or to refrain from soliciting particular clients.” In the end, however, “this minimal impact on the clinics” was not suppressive. See Jonathan R. Alger, “Academic Freedom in the Real World,” *Academe* 119 (Mar.-Apr. 2000).

**University of Pittsburgh:** The state legislature was allegedly displeased with the Pittsburgh Environmental Law Clinic’s representation of opponents of an expressway and logging project, and provided in the school’s appropriations bill that no tax money could be used to support the clinic. In response, the university chancellor reportedly announced that the institution intended to sever its relationship with the clinic because the clinic had “cost the university political goodwill.” The administration also assessed the law clinic \$62,559 for overhead and administrative expenses. In January 2002 the faculty Tenure and Academic Freedom Committee of the university reviewed the chancellor’s actions and found them to “clearly involve infringement upon the principles of academic freedom.” Don Hopey, “Law Clinic a Liability for Pitt, Chief Says,” *Post-Gazette* (Nov. 8, 2001) ([www.post-gazette.com/regionstate/20011108lawclinicreg5p5.asp](http://www.post-gazette.com/regionstate/20011108lawclinicreg5p5.asp)). In March 2002 the administration decided to operate the clinic with private funds. Katherine S. Mangun, “U. of Pittsburgh Law Clinic Will Turn to Private Funds to Remain Open,” *Today’s News* (Mar. 18, 2002).

### **3. Grading Practices and Policies**

#### **a. Background**

Assigning grades is part of a professor’s academic responsibilities. AAUP, *The Assignment of Course Grades and Student Appeals*, REDBOOK at 113. Concepts of judicial deference to academic judgments are grounded, at least in part, on the faculty’s special expertise in this regard. As the Supreme Court declared in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985):

When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty’s professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

At the same time, constitutional academic freedom concerns are not usually triggered when the issue is whether a faculty member properly complied with

institution-wide grading policies, which have been developed, or at least approved, by the faculty, such as complying with an established grade curve or submitting final grading sheets. See, e.g., *Wozniak v. Conry (University of Illinois at Urbana-Champaign)*, 236 F.3d 888 (7<sup>th</sup> Cir.), cert. denied, 121 S.Ct. 2243 (2001) (ruling that school did not violate due process rights of a tenured professor at the undergraduate engineering school because he failed to comply with established grading policies when he refused to submit the required materials for review: “No person has a fundamental right to teach undergraduate engineering classes without following the university’s grading procedures.”).

**b. Some Case Law on Grading**

Grading should fall within the core of a professor’s First Amendment academic freedom, although courts have not generally ruled so. Several federal appellate courts have considered the First Amendment protections afforded to professors in assigning grades.

**Parate v. Isibor (Tennessee State University)**, 868 F.2d 821 (6<sup>th</sup> Cir 1986): Professor Natthu Parate, who taught civil engineering at Tennessee State University, sued the administration when his appointment was not renewed because he refused to sign a memorandum changing a student’s grade from “B” to “A.” The court found that the university had violated the First Amendment, reasoning that the “assignment of a letter grade . . . is a symbolic communication intended to send a specific message to the student . . . [and] is entitled to some measure of First Amendment protection.” In so ruling, the court found the “message communicated by the letter grade ‘A’ virtually indistinguishable from the message communicated by a formal written evaluation indicating ‘excellent work.’ Both communicative acts represent symbols that transmit a unique message.” And so, the court ruled, an “individual professor may not be compelled, by university officials, to change a grade that the professor previously assigned to the student . . . . Although the individual professor does not escape the reasonable review of university officials in the assignment of grades, she should remain free to decide, according to her own professional judgment, what grades to assign and what grades not to assign.” At the same time, the court explained that a professor “has no constitutional interest in the grades which his students ultimately receive.” Accordingly, the professor’s rights would not be violated if the administration changed the professor’s grade (as opposed to compelling the professor to do so).

**Brown v. Armenti (California University of Pennsylvania)**, 247 F.3d 69 (3<sup>rd</sup> Cir. 2001): Robert A. Brown, a tenured professor at California University of Pennsylvania, sued the president of the university, claiming that Angelo Armenti, Jr. ordered him to change a student’s grade from an “F” to an incomplete, which Brown refused to do. Brown failed a graduate student in a clinical education

course, stating that she had attended only three of fifteen classes. The Third Circuit held for the university president, concluding that a “public university professor does not have a First Amendment right to expression via the school’s grade assignment procedures.” It opined: “Because grading is pedagogic, the assignment of the grade is subsumed under the university’s freedom to determine how a course is to be taught.” In so ruling, the court rejected the reasoning in the *Parate* decision (above) and, instead, embraced the reasoning in the *Edwards* case (above), because the latter decision offered “a more realistic view of the university-professor relationship.” See Robert O’Neil, “Free Speech for Professors: 2 Court Rulings Sound New Alarms,” *The Chronicle of Higher Education* (Point of View) (June 1, 2000) (“[I]f professors’ grades are no longer sacrosanct, then it is much more difficult to resist pressure to alter disputed grades, award degrees when faculties have declined to do so, waive academic requirements--and so on through a lengthy list of matters that most administrators and trustees wisely view as part of faculty governance. That is a frightening prospect, at which all parts of higher education should take alarm.”). Donna R. Euben, “Making the Grade?,” *Academe* 94 (Sept.-Oct. 2001).

**Yohn v. University of Michigan**, Case No. 99-75997 (E.D. Mich., May 7, 2001): A panel of four professors unanimously flunked two dentistry students, who were taking a clinical course for a second time. The acting associate dean then informed the panel that the students would be allowed to retake the exam, and that other faculty members would grade it. The students retook the exam, which involved crafting temporary bridges, and received passing grades. Professor L. Keith Yohn, an associate professor of dentistry, is suing the institution for changing the grades of the make-up exams from “Fs” to a “C” and “C+.” He asserted a number of legal claims, including that changing the failing grades to passing ones violated his free speech rights. “Dentistry Professor Sues U. of Michigan Over Grade Change,” *The Chronicle of Higher Education* (Feb. 11, 2000). In May 2001 the district court ruled in favor of the university on the First Amendment claim. Relying on *Parate*, the court found that Yohn had failed to allege that he was forced to change the students’ grades and, “[t]herefore, the evidence does not support a First Amendment violation of Plaintiff’s right to academic freedom.” The matter is currently pending before the Sixth Circuit.

- c. **Some Practical Suggestions For Establishing Institutional Grading Policies**
- Faculty and administration should develop clear, written grading policies, governing any and all grading standards and appeal procedures.
  - Such policies should be widely distributed to students, faculty members, and administrators.

- A grade appeals committee should ordinarily consist of faculty members in the department or in closely related fields.
- A grade appeal policy should be established, and should be applied in a fair and consistent fashion. It “should . . . be available for reviewing allegations that inappropriate criteria were used in determining the grade or that the instructor did not adhere to stated procedures or grading standards.”
- Every effort should be made to resolve differences about grades, including those between faculty and administration, within the university.
- Administrators should not unilaterally change a grade assigned by a faculty member and usurp the faculty prerogative to evaluate students academically.

## **B. Freedom of Inquiry and Research**

“[I]t is as much an infringement on the teacher’s academic freedom to constrain or limit the teacher in research activities as it is to limit the teacher’s freedom in the classroom.” Charles Hoornstra & Michael Liethen, “Academic Freedom and Civil Discovery,” 10 J.C. & U.L. 113, 124 (1983).

**University of Alaska:** Linda McCarriston, a creative writing professor at the University of Alaska at Anchorage, published in the journal *Ice Floe* her poem, “Indian Girls,” which describes child sexual abuse. Some in the Anchorage community, especially Native American women, protested the poem as “racist hate speech.” They called for the university to apologize and to sanction the professor. Administrators on the Anchorage campus responded by saying they were investigating the matter. Mark R. Hamilton, the president of the university system, issued a memorandum, writing that “[a]ttempts to assuage anger or demonstrate concern by qualifying our support of free speech serve to cloud what must be a clear message. Noting that, for example, ‘the university supports the right of free speech, but I have asked Dean X or Provost Y to investigate the circumstances,’ is unacceptable.” Scott Smallwood, “Controversy Over a Professor’s Poem Prompts Debate on Free Speech at U. of Alaska,” *The Chronicle of Higher Education* (Apr. 6, 2001); Martin D. Snyder, “Academic Freedom Grade Report,” *Academe* 63 (July-Aug. 2001).

**United States v. Microsoft (Harvard University and Massachusetts Institute of Technology),** 162 F.3d 708 (1<sup>st</sup> Cir. 1998): The First Circuit ruled that the district court properly quashed a subpoena by Microsoft for research by two professors in preparation for their book on Netscape, which was scheduled for publication soon after the Microsoft trial began, because Microsoft could have obtained the same information in a less invasive way. In so ruling, the court opined: “Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses.” Accordingly,

“allowing Microsoft to obtain the notes, tapes, and transcripts it covets would hamstring not only the [professors’] future research efforts but also those of other similarly situated scholars.”

**Urofsky v. Gilmore**, 216 F.3d 401 (4<sup>th</sup> Cir. 2000) (*en banc*), *cert. denied*, 531 U.S. 1070 (2001): The Commonwealth of Virginia enacted a statute that restricts the ability of state employees to access sexually explicit material on state-owned or -leased computers. Several Virginia public college and university professors challenged the law, alleging that it interfered with their academic freedom to research and teach. In 2000 the *en banc* court, in an 8-4 decision, ruled that “the regulation of state employees’ access to sexually explicit material, in their capacity as employees, on computers owned or leased by the state is consistent with the First Amendment.” In so doing, the majority of the court asserted that academic freedom for individual professors is merely a professional norm, not a constitutional right.

**Idaho State University**: In 1998 the Idaho Board of Education tried to block the award of a research grant to Peter Boag, a professor of history, to enable him to study the history of the gay community in the Pacific Northwest. The proposal, which had been endorsed by scholars who ran the program, was opposed by the board’s executive director, who asserted that the research plan was “out of sync” with the purported wishes of the state’s taxpayers. The board also moved to dismantle the research review committee, “replacing top research officers, such as graduate-school deans and vice-provosts, with the presidents of Idaho’s four public institutions.” The professor sued the board, and the board settled the suit. Apparently the state legislature, “annoyed by the lawsuit,” eliminated the \$500,000 grant program. Kim Strosnider, “Idaho Board of Education Blocks Funds for Study on Gay History,” *The Chronicle of Higher Education* (May 2, 1997); Patrick Healy, “Idaho Settles Lawsuit Over Rejected Grant for Gay Study,” *The Chronicle of Higher Education* (May 1, 1998).

### C. Freedom of Extramural Utterances

As Harvard University President Lowell once stated, in weighing the loss to the institution of a \$10 million bequest that was threatened unless a pro-German professor was removed from his chair position:

If a university or college censors what its professors may say, if it restrains them from uttering something it does not approve, it thereby assumes responsibility for that which it permits them to say. This is logical and inevitable. If the university is right in restraining its professors, it has a duty to do so, and it is responsible for whatever it permits. There is no middle ground. Either the university assumes full responsibility for permitting its professors to express certain opinions in public, or it assumes no responsibility whatever, and leaves them to be dealt with like other citizens by the public authorities according to the laws of the land.

Van Alstyne, “A Specific Theory,” at 79-80.

**University of South Florida:** Administrators at the university have threatened to dismiss a tenured professor of computer engineering, Sami Al-Arian. When Professor Al-Arian appeared on a talk show after September 11, 2001, the host discussed a 1988 speech Al-Arian gave in which he called for “victory to Islam” and “death to Israel.” The administration’s position is that dismissal is proper because the professor failed to make clear he was not representing USF; because the school has received calls and letters threatening university officials and Al-Arian; and because the recruitment of students and major donors has been undermined by Al-Arian. In early January the faculty senate rejected a motion of support for the president’s handling of the Al-Arian situation. Ben Feller, “USF Faculty Refuses to Back Firing,” *Tampa Tribune* (Jan. 10, 2002). The legal opinion of USF in this matter is posted at [www.usf.edu/News/2001/arain/2001.12.19.gonzalez.htm](http://www.usf.edu/News/2001/arain/2001.12.19.gonzalez.htm). See also “Protecting Speech on Campus,” *New York Times* (Jan. 27, 2002) (editorial); Sharon Walsh, “Blaming the Victim?,” *The Chronicle of Higher Education* (Feb. 8, 2002). The AAUP’s Committee A on Academic Freedom and Governance is investigating the matter ([www.aaup.org/com-a/prcenback.htm](http://www.aaup.org/com-a/prcenback.htm)).

**Columbia University:** When a photographer captured Professor Edward Said hurling a rock from the Lebanese border into Israel in the summer of 2000, some professors and students at the university called on the administration to sanction Professor Said. In October 2000, in response to an inquiry about the matter from the Columbia College student government, Jonathan Cole, provost and dean of the faculty, issued a statement supporting the professor’s right to express himself: “there is nothing more fundamental to a university than the protection of free discourse of individuals who should feel free to express their views without any fear of the chilling effect of a politically dominant ideology.” “Edward Said’s Action Protected, Says Columbia,” *Academe* 3 (Jan.-Feb. 2001).

**University of Oklahoma:** David Deming, a professor of geology at the university, wrote a letter to the editor of the student newspaper in response to a pro-gun control article. The author, Joni Kletter, a syndicated columnist, had written that current gun laws allowed “criminals, youth, and the mentally disabled to quickly and easily kill as many random people as they want.” Professor Deming’s letter, which was published, replied: “[H]er possession of an unregistered vagina also equips her to work as a prostitute and spread vaginal diseases,” and she should be “as responsible with her equipment as most gun owners are with theirs.” Twenty-five students filed complaints with the administration against Professor Deming, most alleging that he had created a hostile environment for women. In the end, the university declined to pursue the matter. Joel Hardi, “U. of Oklahoma Won’t Pursue Complaints Against Professor Who Compared Gun to Vagina,” *Today’s News* (May 8, 2000); Leo Reisberg, “Harassment Complaint is Filed Against U. of Oklahoma Professor Who Compared Women’s Sexuality to a Handgun,” *Today’s News* (Feb. 28, 2000).



## VI. New Frontiers in Academic Freedom and Free Speech in the Academy

### A. Encryption and Decryption Codes

The courts are struggling to apply free speech, academic freedom, and copyright principles in areas of emerging technology, particularly involving the Internet. Computer science faculty members are facing a number of legal issues in their teaching and research.

**Felten v. Recording Industry Association of America (Princeton University)**, Case No. 01-CV-2669 (N.J. Dist. Ct., Nov. 30, 2001): In June 2001 Edward W. Felten, an associate professor of computer science, sued the Recording Industry Association of America (RIAA) and the Verance Corporation. Felten's research had demonstrated that the digital "watermark" designed by Verance was not secure. The defendants took the position that Felten and his team violated the Digital Millennium Communication Act (DMCA). The plaintiffs asked the court to grant the researchers immunity from prosecution under the DMCA, and to declare the law unconstitutional. The DMCA includes an anti-circumvention provision that makes it a crime for an individual to distribute decryption technology that can circumvent access controls on copyrighted works. The RIAA alleged that allowing Dr. Felten to publish or present his research would contribute to copying of electronic music and violate copyright law. Andrea L. Foster, "Computer Scientists Back Scholar's Challenge to Music Industry," *The Chronicle of Higher Education* (Sept. 7, 2001). In November 2001 the district court dismissed Dr. Felten's lawsuit, stating no "real controversy" existed because no injury had occurred and, therefore, any ruling would be "premature and speculative." The judge opined from the bench that the computer scientists "liken themselves to Galileo," but they are really "modern-day Don Quixotes threatened by windmills that they mistake for giants." Andrea Foster, "Judge Dismisses Digital-Copyright Lawsuit by Princeton Professor," *The Chronicle of Higher Education* (Dec. 14, 2001). Dr. Felten is represented by the Electronic Frontier Foundation, and many of the legal documents are posted on its webpage ([www.eff.org/sc/felten](http://www.eff.org/sc/felten)). The professor decided not to appeal the district court opinion. See Donna R. Euben, "Talkin 'Bout a Revolution: Technology and the Law," *Academe* (May-June 2002) (forthcoming)

**Pavlovich v. DVD Copy Control Association (Purdue University)**, 91 Cal. App. 4<sup>th</sup> 409 (App. Div. 2001): Matthew Pavlovich, a former student at Purdue University, is being sued along with others, by the movie industry for publishing on the Internet a code that unscrambles encrypted DVDs. Pavlovich is challenging California court jurisdiction. In August 2001 the state court ruled the state had jurisdiction because Pavlovich's web posting could harm the movie industry in California. Pavlovich is appealing to the California Supreme Court. Andrea L. Foster, "Free Speech Group Backs Former Purdue U. Student Accused in DVD-Decoding Case," *The Chronicle of Higher Education* (May 2, 2002).

**Universal City Studios, Inc. v. Corley**, 273 F.3d 429 (2d Cir. 2001): The Second Circuit ruled that Eric C. Corley and his company, 2600 Enterprises, Inc., violated the copyright protections of eight motion picture studios under the DMCA when Corley published a computer program on the Internet that is able to circumvent the recording industry's technology devised to block the

copying of DVD movies. In so doing, the court ruled that the DMCA does not violate the First Amendment. The court reasoned that while computer source code is protected by the First Amendment, the scope of that protection is limited because the DMCA provisions on posting such code constitute a content-neutral restriction. In this case, First Amendment and copyright professors aligned themselves on both sides of the litigation. The counsel for Corley was Stanford University Law School Dean Kathleen Sullivan, and *amicus* briefs included one filed by Professor Julie E. Cohen, Georgetown University Law Center, on behalf of intellectual property law professors. The movie studios were represented by David E. Kendall, and *amicus* briefs included one filed by Professor Rodney Smolla, University of Richmond. Corley is seeking *en banc* review of the decision. “2600 Magazine Seeks Another Opinion in NY DeCSS Case” ([www.newsbytes.com/news/02/173635.html](http://www.newsbytes.com/news/02/173635.html)).

**Bernstein v. U.S. Department of Justice**, 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 (9<sup>th</sup> 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 violates the First Amendment. The district court ruled in 1997, and a three-judge 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 its regulations, the parties agreed to have the case sent back to district court. In January 2002 Professor Bernstein resurrected his challenge to the revised encryption regulations. *Bernstein v. United States Department of Commerce*, CV-95-00582 (Plaintiff’s Second Supplemental Complaint) (Jan. 7, 2002).

**Junger v. Daley**, 209 F.3d 481 (6<sup>th</sup> Cir. 2000): This case involved a faculty member’s right to post his own encryption programs on the Internet. Professor Peter D. Junger is a law professor at Case Western Reserve University who teaches a course called “Computers and the Law.” Asserting his First Amendment rights, he sued the U.S. Department of Commerce, challenging federal regulations 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.

## **B. Computer Use by Faculty Members**

### **1. Access to the Internet**

**Urofsky v. Gilmore**, 216 F.3d 401 (4<sup>th</sup> Cir. 2000) (*en banc*), *cert. denied*, 531 U.S. 1070 (2001): The Fourth Circuit upheld the Virginia statute that restricts the ability of state employees, including professors, to access sexually explicit material on state-owned or -leased computers.

**Loving v. Boren**, 956 F. Supp. 953 (W.D. Okla. 1997), *aff'd*, 133 F.3d 771 (10<sup>th</sup> Cir. 1998): The court ruled that the University of Oklahoma did not violate the First Amendment rights of Bill Loving, a professor of journalism at the university, when the administration blocked access from his campus computer to a host of “alt.sex.” The judge ruled that the professor could access the material he sought through a commercial on-line service.

**Jon Willand v. Robert Alexander (North Hennepin Community College)**: Professor Willand is challenging a statewide computer-use policy that allegedly prohibits the use of computer equipment for the “[r]eceipt, storage or transmission of offensive, racist [or] sexist . . . information.” See the Center for Individual Rights website for more information ([www.cir-usa.org/recent\\_cases/willand\\_v\\_hennepin.html](http://www.cir-usa.org/recent_cases/willand_v_hennepin.html)).

## 2. Faculty Webpages

**Felsher v. University of Evansville**, 755 N.E.2d 589 (Ind. S.Ct. 2001): William Felsher, a professor of french, was dismissed. In response, Felsher created Internet websites and electronic mail accounts that contained the letters “UE,” which is the “common abbreviation” of the university. The websites highlighted articles written by Felsher that were highly critical of key university administrators. He also nominated some of these university officials for “various academic positions,” which linked to his websites. The administrators sought and obtained an injunction to stop Felsher’s Internet activities. That court order included a prohibition against “‘maintaining any web site’ with a URL or address containing any of the plaintiffs’ names, including UE.” The court found, in part, that Felsher “created the imposter websites and e-mail address for the sole purpose of harming the reputation of the University and its officials.” The court found the former professor to be a “cyberpredator,” and that the lower court had properly enjoined Felsher from “creating and modifying websites and e-mail addresses containing their names.” The primary holdings of the Indiana Supreme Court was that institutions do not have a common law right to privacy, and that Felsher had defamed three university officials.

**Northwestern University**: Professor Arthur Butz, a tenured professor of engineering, maintains a webpage (<http://pubweb.acns.nwu.edu/~abutz>) proclaiming his belief that the Holocaust never happened. He has also written a book on the topic, *The Hoax of the Twentieth Century*. The Simon Wiesenthal Center expressed concern that the professor’s webpage “makes it appear that it’s carried out with Northwestern’s imprimatur.” The administration declined to intervene. In a 1997 statement, Northwestern President Henry S. Bienen reaffirmed the university’s policy on intellectual freedom, which provides that the computer “network is a free and open forum for the expression of ideas,” and that “the expression of personal opinion . . . may not be represented as views of Northwestern University.” He wrote:

Mr. Butz does not claim that his views are those of the University, and I emphasize again that they are not. His statement says explicitly that the

Web site exists for the purpose of expressing views that are outside his purview as an Electrical Engineering faculty member. In addition, at no time has he discussed those views in class or made the issue part of his class curriculum. As a result, we cannot take action based on the content of what Mr. Butz says regarding the Holocaust without undermining the vital principle of intellectual freedom that our policy serves to protect.

*Northwestern News* (Jan. 6, 1997) ([www.northwestern.edu/univ-relations/media/news-releases/\\*archives96-97/\\*univ/butz.html](http://www.northwestern.edu/univ-relations/media/news-releases/*archives96-97/*univ/butz.html)). Professor Robert M. O’Neil points out the troubling issues raised by Professor Butz regarding “university involvement-facilitation and attribution”: (1) “however little it may have ‘cost’ the institution, this [webpage] was and remains a resource of substantial value to the individual faculty member”; and (2) that unlike Butz’s book, where he is identified as a Northwestern professor, “no one would believe on that basis that the university sponsors, or even condones, his views . . . . But when one encounters Holocaust-denial on a professor’s Web page . . . there is at least an inference of attribution or complicity.” See Robert M. O’Neil, “Free Speech and Community: Free Speech in the College Community,” 29 ARIZ. ST. L.J. 537, 547 (1997). See generally Edward Walsh, “Professor’s Holocaust Views Put Freedom Issues On Line,” *Wash. Post* A3 (Jan. 12, 1997).

**Duke University:** The administration reportedly disabled Professor Gary Hull’s webpage after he posted an article entitled “Terrorism and Its Appeasement.” The article called for strong military action in response to the September 11, 2001 terrorist attacks in the United States. The administration eventually reinstated the webpage, but allegedly required the professor to include a disclaimer that the views reflected in the article were not those of the university ([www.duke.edu/~hull](http://www.duke.edu/~hull)).

**Carnegie Mellon University:** In an effort to comply with a state law that prohibited distribution of obscene materials, the Carnegie-Mellon administration proposed eliminating from the university’s computer network a set of Internet discussion groups on human sexuality. According to Professor Robert M. O’Neil, “[a]fter a year of study, the policy retained the potential for blocking access to newsgroups that carried arguably unlawful material, even if accompanied by lawful graphics.” Robert M. O’Neil, “The Internet in the College Campus,” 17 N. ILL. U. L. REV. 191, 202 (1997). See John Schwartz, “School Gives Computer Sex the Boot; Carnegie Mellon University Taking Discussion Groups Off Its Network,” *Wash. Post* A26 (Nov. 6, 1994) (also noting that Stanford University removed access to sex newsgroups); John Schwartz, “University Reverses On-Line Ban; Sex-Oriented Network Won’t Be Blocked,” *Wash. Post* A13 (Nov. 9, 1994).

**NOTE:** The *1940 Statement on Academic Freedom and Tenure* provides that when college and university teachers speak as citizens, they remain “scholars and educational officers,” and so “should . . . make every effort to indicate that they are not speaking for the institution.” Accordingly, digital disclaimers might be appropriate in such circumstances. See AAUP, “Academic Freedom and Electronic Communication” at 4

(www.aaup.org) (“Thus it may be appropriate to insist that special care be taken in posting or disseminating digital material, on a web page or site created and accessed through the campus computing system, to avoid or dispel any inference that the speaker represents the views of the institution or of faculty colleagues.”).

For a general discussion of academic freedom and Internet access by faculty, see Ray August, “Issues in Higher Education: Gratis Dictum! The Limits of Academic Free Speech on the Internet,” 10 J. LAW & PUB. POL’Y 27, 53 (1998) (asserting that “a university gains very little by specifying the purposes for which faculty web pages may be generated”); Lisa R. Allred, “May a Public University Restrict Faculty Expression on Its Internet World Wide Web Sites? Academic Freedom and University Faculty Use Restrictions,” 24 J.C. & U.L. 325 (1997) (recognizing that the First Amendment protects individual and institutional academic freedom, and positing that “in some circumstances, the content-based restriction of faculty expression on a public university’s Web Server is permissible and will not violate the First Amendment academic freedom rights of university faculty members”).

### **3. Faculty E-Mail Privacy Issues**

#### **a. AAUP Policy**

AAUP policy provides that expression in cyberspace does not “justify alteration or dilution of basic principles of academic freedom and free inquiry within the academic community.” Academic Freedom and Electronic Communications, *Academe* (July-August 1997). The Association has delineated some principles that should govern the development of institutional policies on the privacy of electronic communications. They include:

- First, every college or university should make clear, to all users, any exceptions it considers it must impose upon the privacy of electronic communications.
- Second, there must be substantial faculty involvement both in the formulation and in the application (with due process) of any such exceptions.
- Third, the general standard of e-mail privacy should be that which is assured to persons who send and receive sealed envelopes through the physical mail system—that envelopes would not be opened by university officials save for exigent conditions (e.g., leaking a noxious substance, indicia of a bomb, etc.).
- Fourth, if a need arises to divert or intercept a private e-mail message, both sender and recipient should be notified of that prospect in ample time to pursue protective measures—save in the highly improbable case where any delay would risk danger to life, or destruction of property.

- Fifth, the contents of any such message that has been diverted or intercepted may not be used or disseminated more widely than the basis for such extraordinary action may warrant.

*Academic Freedom and Electronic Communications.* See generally Lawrence White, "Colleges Must Protect Privacy in the Digital Age," *The Chronicle of Higher Education* (June 30, 2000) (critically observing that while "some institutions consider the protection of the privacy rights of computer users an important responsibility. . . . most computer-use policies treat the subject cursorily, if at all").

## **b. Some Cases**

The Fourth Amendment of the United States Constitution protects citizens from unreasonable searches and seizures by governmental officials. Although it does not directly mention a "right of privacy", the courts have interpreted it as providing such a right. Sarah DiLuzio, *Workplace E-mail: It's Not as Private as You Might Think*, 25 DEL. J. CORP. L. 741, 744 (2000). The Fourth Amendment restrains the conduct of governmental actors, and therefore, applies to professors who teach in state higher education institutions.

Supreme Court law provides that public employees may have an expectation of privacy in their offices, such as their desks or file cabinets. *O'Connor v. Ortega*, 480 U.S. 709 (1987). Those expectations of privacy must, however, be balanced against an employer's need for an efficient workplace. And so, the question of "whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis." See generally, U.S. Department of Justice, "Seizing Computers and Obtaining Electronic Evidence in Criminal Investigation" (January 2001)([www.cybercrime.gov/searchmanual.html](http://www.cybercrime.gov/searchmanual.html)).

**Virginia Tech University:** In April 2002 two campus police officers confiscated a professor's computer, which was issued by the university. The officers returned the computer the next day. According to the university's associate vice president for university relations, "the police hope that data from the computer's hard drive will help them track the origin of an e-mail message that had been sent to several people on campus," including Martha McCaughey, an associate professor of women's studies. The e-mail message was sent by an organization that "claimed responsibility for spray-painting anti-rape slogans at more than 15 locations on campus." Jeffrey R. Young, "Virginia Tech Police Seize and Search a Professor's Computer in Vandalism Case," *The Chronicle of Higher Education* (Apr. 9, 2002).

**United States v. Angevine (Oklahoma State University)**, 281 F.3d 1130 (10<sup>th</sup> Cir. 2002): The federal appellate court ruled that a university professor, who allegedly used his university-owned computer to download pornographic images of young

boys, did not have a reasonable expectation of privacy in his computer. The university had a computer use policy that prohibited employees from using its computers to "access obscene materials as defined by Oklahoma and federal law." In addition, the court noted that the university posted a "splash screen" so that each time Professor Angevine turned on his computer, a banner stating the computer-use policy appeared. The court held, "Reasonable people in Professor Angevine's employment context would expect University computer policies to constrain their expectations of privacy in the use of University-owned computers."

**Wasson v. Sonoma County Junior College**, 4 F. Supp.2d 893 (N.D. Cal. 1997), *aff'd on other grounds*, 203 F.3d 659 (9<sup>th</sup> Cir. 2000): The district court ruled that the college's computer policy, which provided it "the right to access all information stored on [the college's] computers," defeated an employee's reasonable expectation of privacy in files stored on employer's computers.

The computer policy explicitly stated, "The district reserves the right to access all information stored on district computers." For this reason, the court ruled Wasson could not have had a reasonable expectation that the district at the request of the President could not access her personnel records and computer files.

**United States v. Butler (University of Maine)**, 151 F. Supp.2d 82 (D. Maine 2001): The court dismissed a complaint by a University of Maine student, who was charged with knowingly and illegally receiving child pornography over the Internet, to suppress evidence gathered from university's computers. The court ruled that the student had no reasonable expectation of privacy in the computer session logs or the hard drives of the university-owned computers: "[T]he defendant has pointed to no computer privacy policies in effect at the University, no statements or representations made to him as a user of the computers in the lab, no practices concerning access to and retention of the contents of the hard drives, not even password requirements." In so doing, the judge concluded "that in 2001 there is no generic expectation of privacy for shared usage on computers at large."

**Kelleher v. City of Reading**, 2001 U.S. Dist. LEXIS 14958 (E.D. Pa. 2001): The court denied the city's motion to dismiss plaintiff's claim against a mayor's assistant for invasion of privacy. The defendants printed, copied, and distributed plaintiff's e-mails. The Court held an employee may have a reasonable expectation of privacy in certain e-mail communications, depending on the circumstances of the communication and the configuration of the e-mail system. Kelleher at \* 17, citing, McLaren v. Microsoft Corp., 1999 Tex. App. LEXIS 4103, at \*10-12 (Tex. Ct. App. 1999).

In addition, some states have invasion-of-privacy statutes, like Massachusetts and Delaware. For a comprehensive overview, see [www.epic.org/privacy](http://www.epic.org/privacy). Some states also recognize the common law tort of invasion of privacy. *Smyth v. The Pillsbury Co.*, 914 F. Supp. 97 (E.D. Pa. 1996) (“The company’s interest in preventing inappropriate and unprofessional comments or even illegal activity over its e-mail system outweighs any privacy interest the employee may have in those comments.”).

**c. Some Resources**

- ✓ For computer use policies from various types of higher education institutions, see [www.cornell.edu/CPL/Policies](http://www.cornell.edu/CPL/Policies).
- ✓ A collection of links to websites, articles, and computer-use policies from Educause ([www.educause.edu/issues/policy.html](http://www.educause.edu/issues/policy.html)).
- ✓ Jonathan R. Alger, “Prying Eyes in Cyberspace,” *Academe* (Sept.-Oct. 1999).
- ✓ W. Scott Cole, University of Florida, “E-mail, Public Records, and Privacy Issues,” NACUA Annual Conference (June 1997).
- ✓ Alan R. Earls, “Is Big Brother Watching the Wired Campus?,” *Connection* (Fall 2000).
- ✓ AAUP, “Academic Freedom and Technology: Conflicting Views – Enduring Values,” *Footnotes* (Fall 2001).

**C. Corporate Threats to Academic Freedom**

The involvement of corporations in higher education has led to threats to academic freedom in research when corporate interests clash with the unfettered pursuit of truth. As Johns Hopkins University General Counsel Estelle Fishbein predicted in the mid-1980s:

During the next twenty-five years, the lure of the corporate dollar may just as insidiously lead to the surrender of important academic freedoms to big business . . . [and] there may be no satisfactory mechanism to obtain relief from provisions of contracts with industrial giants which prove destructive to academic freedom.

Estelle A. Fishbein, “Strings on the Ivory Tower: The Growth of Accountability in Colleges and Universities,” 12 J.C. & U.L. 381, 398 (1985). As AAUP declared in 1915, “The distinctive social function of the scholar’s trade cannot be fulfilled if those who pay the piper are permitted to call the tune.” “1915 Declaration of Principles on Academic Freedom and Academic Tenure,”



REDBOOK at 291; see Donna R. Euben, "Corporate Interference in Research," *Academe* 77 (Nov.-Dec. 2000).

**Johns Hopkins University and Others:** Tobacco companies have subpoenaed ten universities to turn over all documents concerning tobacco-related government-funded research since the 1940s. Harvard University, Johns Hopkins University, New York University, North Carolina State University, four University of California campuses, the University of Arizona, and the University of Kentucky have received subpoenas. Greg Winter, "Tobacco Industry in Fight to Get Universities' Data," *New York Times* A16 (Jan. 20, 2002). Nine of the 10 institutions have reportedly filed objections to the very broad discovery requests. See Beth McMurtrie, "Tobacco Companies Seek Documents From 10 Universities on Research Dating Back to the '40s," *Today's News* (Jan. 21, 2002).

**Beverly Enterprises v. Dr. Kate Bronfenbrenner (Cornell University):** Beverly Enterprises, a national nursing home chain, sued Professor Bronfenbrenner for defamation allegedly caused by her testimony at a "town hall" meeting called by legislators. Dr. Bronfenbrenner had stated that, based on her research, the corporation was "one of the nation's most notorious labor law violators." Beverly sought in pre-trial discovery Dr. Bronfenbrenner's confidential research data, including personal interviews. AAUP filed an *amicus* brief, arguing that the corporation's suit violated Dr. Bronfenbrenner's First Amendment right of academic freedom. Cornell University's associate counsel stated, "The Beverly lawsuit was an attack on academic freedom that sought to punish Dr. Bronfenbrenner for presenting the results of her research in a public forum." The court dismissed the suit on the grounds of legislative immunity, and Beverly appealed, but then withdrew that appeal. "Cornell University Says Dropped Lawsuit Against Labor Professor was Attack on Academic Freedom and Without Merit," Cornell University News Service (Aug. 4, 1998). See Julianne Basinger, "Judge Dismisses Suit Against Scholar Accused of Libeling Nursing-Home Chain," *Today's News* (May 28, 1998). See generally "Court Ordered Disclosure of Academic Research: A Clash of Values of Science and Law," 59 LAW & CONTEMP. PROBS. 1 (1996) (a series of articles on the topic).

**University of Montana:** Norma Nickerson, an associate research professor in the forestry school and director of the Institute for Tourism and Recreation Research, conducted a 1999 study that found that 48% of state residents thought the hotel tax should be used to support environmental efforts, and only 14% thought it should be used to promote tourism, although approximately 87% of the tax currently goes to tourism promotion. The university subsequently stripped Professor Nickerson of her administrative duties and prohibited her from speaking about her research findings at state seminars. Professor Nickerson alleged that the university's actions were prompted by her having angered the Tourism Advisory Council, and her department chair allegedly told her that the university's decision to change her job responsibilities resulted from industry complaints about her research. She filed a grievance against the administration, claiming that the university violated her academic freedom. University counsel reportedly stated that the university is "caught in the middle" because the state legislature authorizes the tourism council to approve of research completed with state funds generated by the hotel tax. Courtney

Leatherman, "Montana Professor Accuses Officials of Violating her Academic Freedom," *The Chronicle of Higher Education* (Mar. 2, 2001).

**College of Southern Idaho:** The College of Southern Idaho cancelled a lecture to be given by Jeremy Rifkin, the author of *The Biotech Century: Harnessing the Gene and Remaking the World*. The annual breakfast, sponsored by the university and the Twin Falls Area Chamber of Commerce, was cancelled after cattle industry executives threatened to boycott the event. Mr. Rifkin questioned what would happen if faculty members or students expressed views similar to his own that explore the environmental and health problems associated with the raising and consumption of beef: "Would they be censured?" Anne Marie Borrego, "College of Southern Idaho Cancels Lecture After Pressure from Agricultural Groups," *Today's News* (Aug. 29, 2001); see also Martin D. Snyder, "CSI Has an Obligation to Provide a Forum," *Times-News, Twin Falls, Idaho* A-7 (Sept. 17, 2001) (expressing AAUP's concern that partnerships between universities and business may bring their separate missions into conflict, and that the cancellation of Rifkin's talk sends a "warning to CSI students and professors about expressing ideas unpalatable to business interests").

## VII. Some Additional Web Resources

American Association of University Professors (AAUP), [www.aaup.org](http://www.aaup.org)

American Civil Liberties Union (ACLU), [www.aclu.org](http://www.aclu.org)

Center for Individual Rights (CIR), [www.cir-usa.org](http://www.cir-usa.org)

Electronic Frontier Foundation (EFF), [www.eff.org](http://www.eff.org)

Foundation for Individual Rights in Education (FIRE), [www.thefire.org](http://www.thefire.org)

Office for Intellectual Freedom, American Library Association (ALA), [www.ala.org/alaorg/oif](http://www.ala.org/alaorg/oif)

The Thomas Jefferson Center for the Protection of Free Expression, [www.tjcenter.org](http://www.tjcenter.org)

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