STATE OF WISCONSIN CIRCUIT COURT BRANCH 42 MILWAUKEE COUNTY

JOHN MCADAMS,

Plaintiff,

v.

MARQUETTE UNIVERSITY,

Defendant,

Case No. 16-CV-003396
Other - Contracts
Case Code: 30303

Marquette University's Response to Plaintiff's Motion For Summary Judgment

Marquette's Position Summarized

Dr. McAdams' expert witness before the FHC anticipated and rebutted the argument Dr. McAdams now is making to this Court. While Dr. McAdams now pushes a contract interpretation wherein (1) he has next to no duties concerning his speech and (2) Marquette has no rights to protect its mission, U.W. Madison Professor Donald Downs rejected this foolish notion:

> Q. Now, turning to teachers and publicly expressing opinions.
>
> A. Right.
>
> Q. You would agree that when the institution can provide evidence of demonstrable harm, then even within academic freedom and free speech, the Supreme Court will allow the teacher to be disciplined, true?
>
> A. Depending on the nature of the harm. If it's demonstrable harm that is contrary to the academic mission of the university, then I would have to say yes.

Tr. Vol. IV 165:5-16.[1]

[1] Dr. Downs' publication, "*Academic Freedom: What it is, What it isn't, and How to Tell the Difference*," is attached for the Court's reference as Ex. A to this brief.

Dr. McAdams' brief concedes two important points that undercut much of his brief:

1. "*According to the Faculty Statutes, and therefore according to his contract with Marquette, Professor McAdams cannot be suspended or fired* ***except*** *for absolute or* ***discretionary cause as set forth in §§ 306.02 and 306.03."***

(McAdams Br. at 3) (emphasis supplied).

2. *"In such a case, the Faculty Statutes provide for a hearing on the issue of cause before the Faculty Hearing Committee ("FHC").* ***Section 307.07 specifies the procedures that the FHC must follow in hearing the matter and requires them to issue their findings and conclusions,*** *together with their recommendation for disciplinary action, to the President of the University."*

(McAdams Br. at 14) (emphasis supplied).

Despite these important acknowledgements, Dr. McAdams' forty page brief never once addresses (much less rebuts) the FHC's detailed Findings and Conclusions about his professional misconduct.[2] The FHC, chaired by Law Professor Bruce Boyden, carefully evaluated Dr. McAdams' conduct against each element of the Faculty Statutes. (*See* Marquette Br. at 14-28).

Because he cannot rebut his peers' detailed findings about his professional misconduct, Dr. McAdams misdirects attention to and misapplies First Amendment and academic freedom principles. Dr. McAdams' First Amendment and academic freedom arguments are wrong because in each instance he ignores the balancing of interests the law requires when it comes to employee speech and conduct. Dr. McAdams is being disciplined because he carelessly and recklessly harmed a Marquette graduate student. His views on issues of the day – including gay marriage – have exactly nothing to do with this case.

As noted above (and conceded but then ignored by Dr. McAdams) the parties' contract calls for professional peers to assess a faculty member's conduct. As detailed in Marquette's Opening Brief, using the middle burden of proof – clear and convincing evidence – Dr. McAdams'

[2] He simply notes briefly at page 14 that the FHC recommended a two semester suspension without pay.

peers from the Colleges of Arts and Sciences, Communication, Engineering, Education and the Schools of Law and Dentistry all found that Dr. McAdams (1) violated his obligations to fellow members of the Marquette community by recklessly attacking a graduate student and (2) that his seriously irresponsible conduct and demonstrated failure to recognize his essential obligations to fellow members of the Marquette community would substantially impair his fitness as a professor.

Dr. McAdams' brief imagines a world in which Marquette cannot protect its students from foolish harm by a Marquette professor. This imagined world has no basis in case law (Dr. McAdams cites none that support this notion), in the Faculty Statutes (they sanction no such thing) or in common expectations. Dr. McAdams' hypothetical world supposes a one-way deal between Marquette and Dr. McAdams that no University would enter into with any employee-teacher.

The law rejects interpretations that contradict real world usage because "[a] contract is to be interpreted in the manner that it would be understood by persons in the business to which the contract relates." *Columbia Propane L.P. v. Wisconsin Gas Co.*, 2003 WI 38, ¶ 12, 261 Wis. 2d 70, 661 N.W.2d 776. *See also infra* at 10, 12 (additional citations). Marquette would not and did not enter into an agreement with Dr. McAdams whereby Marquette was prevented from defending one of its most critical missions – the development and protection of its students. By ignoring the employer-employee dynamic that forms the basis of the contract, Dr. McAdams' grossly misunderstands the protections that he is afforded (not to mention the duties he must satisfy as a professional employee).

I. Disputed Facts in Dr. McAdams' Brief.

Dr. McAdams' brief wrongly spins the interaction between the undergraduate and the graduate student. (McAdams Br. at 5). We urge the Court to listen to the secret recording of the after-class interaction, which was provided as Exhibit 37 from the FHC proceedings. What the

Court will hear is an undergraduate aggressively baiting his teacher knowing that he was secretly recording their discussion. The Court will hear that as the exchange continued Ms. Abbate stated her concern about the impact of the undergraduate's potential anti-gay marriage remarks on other students. She did not question his personal beliefs (contrary to a subsequent false Fox News headline), instead she was only thinking about the other students in the class, which is quite different from the spin, "I am a big bully and you have to believe in gay marriage." She told the undergraduate that he had to be aware of the impact of his remarks on other people.

In addition, we note the following alleged facts that Dr. McAdams mischaracterizes:

- On page 5 of his brief Dr. McAdams implies that same-sex marriage was not discussed during the October 28th class because there could be no real disagreement on it. But as the evidence before the FHC demonstrated, what Ms. Abbate said in class referred to the fact there was no disagreement about whether gay marriage was an example that fit within John Rawls' Equal Liberty Principle. (FOF 35-37; Tr. Vol. I 54:15-20; 54:21-55:17; FHC Ex. 7 MU-041, 044[3]).

- On page 6 of his brief, Dr. McAdams states Dr. Foster never attempted to follow up with the undergraduate student or otherwise deal with his concerns in any way. But he ignores that Dr. Foster explicitly told the student to come back to the Arts & Sciences office if his complaint was not handled to his satisfaction by the Philosophy Department. (FOF 55; Tr. Vol I 170:16-171:6, 196:2-4, 14-16).

- Again on page 6, Dr. McAdams states that the undergraduate student "initially claimed" he had not recorded the conversation to Drs. Snow and Luft. But not only did the student "initially claim" he did not record it, he never admitted to them that he had. Therefore, Drs. Snow and Luft did not hear the recording of the interaction. To the contrary, as noted below, the undergraduate soon emailed his thanks for the time "devoted to my complaint."

- On page 6 Dr. McAdams also alleges that the philosophy department did nothing to address the undergraduate's concerns. But he ignores that the student emailed Dr. Snow thanking her "for the time devoted to my complaint" and that he intended "to heed your advice." (FHC Ex. 9 (Trigg Aff. 3 Ex. 1)). Why would the department do anything further to address

[3] Most of the documents referred to as "FHC Ex. **" are attached to the First Affidavit of Stephen T. Trigg, and documents referred to as "Trigg Ex. **" are attached to the Second Affidavit of Stephen T. Trigg, both of which were submitted in support of Marquette's motion for summary judgment. Documents referred to as "Trigg Aff. 3 Ex. **" are attached to the Third Affidavit of Stephen T. Trigg, submitted in support of this brief. The transcripts from the FHC proceedings are referred to as 'Tr. Vol. I-IV **" and were previously submitted in support of Marquette's motion for summary judgment.

his concerns when he profusely thanked Dr. Snow? Nothing about the email intimates that he expected any additional action by the department.

- On page 7, while Dr. McAdams discusses the student going to meet with Dr. McAdams, he omits that the student had just received notice of the drop deadline for the class, and he needed Dr. McAdams as his advisor to sign a form to drop the class. (FHC Ex. 34; FHC Ex. 35 (Trigg Aff. 3 Ex. 2)). He likewise omits the fact that the drop form shows he was dropping the class due to his grade (which was an "F").

- On page 10, Dr. McAdams states that he "made some effort to call attention to his blog post by sending a link to a few news organizations." But he did much more. Within minutes of posting the blog, he sent it local and national organizations, and in the days, weeks and months that followed sustained his efforts to draw attention to himself and Ms. Abbate. (McAdams Depo Ex. 81 (Trigg Aff. 3 Ex. 3)).

- On pages 11-12, Dr. McAdams alleges that Ms. Abbate had received only three emails regarding the incident before the Daily Nous story was published. But this ignores horrible comments about her on websites, requests for comment from multiple sources, talk radio coverage of the story and an additional early harassing email. (MARQ-010476-477; MARQ-011005; MARQ-011021; MARQ-011248 (Trigg Aff. 3 Ex. 4)). (*See also infra* at 29-30 (screenshots of Ms. Abbate being called "cunt," "ignorant liberal bitch," "bint," fucking CUNT," "fucking homo loving DYKE" and "BITCH CUNT DYKE.").

- On page 13, Dr. McAdams alleges that Marquette told the Journal-Sentinel that Dr. McAdams' presence on campus would pose a threat to public safety. The document sent to the reporter makes plain that Marquette was responding to threats to Ms. Abbate, which occurred because of the blog post – "putting [her] in harms way." Marquette did not say Dr. McAdams himself posed a threat. (MARQ-017414-415 (Trigg Aff. 3 Ex. 5)).

- At various points Dr. McAdams alleges he has been terminated. That is incorrect. He is suspended without pay until January 17, 2017. After that he is free to return to the faculty, subject to the conditions noted in President Lovell's letters of March 24, 2016 and April 13, 2016. (Trigg Exs. 7, 9).

II. Dr. McAdams' Brand-New Contract and First Amendment Arguments Are Plainly Wrong.

Dr. McAdams' brief goes wrong at page 21 when he rests his case on the odd idea that Marquette decided to waive its institutional interests in its faculty contracts. He claims, "Marquette could have written the contract to balance the faculty member's right of free expression with its institutional interest. But it did not." (McAdams Br. at 21).

A simple example rebuts this surprising assertion. If as Dr. McAdams now claims Marquette could not discipline a faculty member "for what they say," *id.*, then it could not prevent a math professor using class time promoting his personal religious beliefs. Nor, in Dr. McAdams' world, could Marquette respond if a professor simply refused to teach his classes as a way to protest Donald Trump's election. (*See* Section 306.02, refusal to perform substantial duties constitutes absolute cause for dismissal). Both professors would claim they were exercising legitimate free speech rights as a citizen and thus under Dr. McAdams' reading of Section 307.02 ¶ 2 they could not be disciplined. This of course is wrong, as Marquette's institutional interest in having its curriculum taught outweighs the teachers' First Amendment right to discuss religion or politics. As a Marquette employee, Dr. McAdams has professional duties along with rights and it is nonsensical to assert there is no balancing of interests. *See also Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 671 (7th Cir. 2006) (colleges and universities are not required to allow chemistry professors to teach James Joyce, nor permit a math professor to fill class time with torts law, despite both issues deserving full public discussion). Under Dr. McAdams' new argument, however, all of these actions would be protected by "free speech" and Marquette would be powerless to discipline the professors for their clear dereliction of duty. Such an absurd result cannot be (and was not) what the parties intended.

A. Dr. McAdams' New Contract Interpretation Argument To This Court (Not Made to the FHC) Makes No Sense and Ignores the Employer-Employee Relationship.

Dr. McAdams' new argument that his contract should be interpreted to treat him as a citizen (and not as an employee) is nonsensical because it ignores the context of his employer-employee relationship with Marquette. Indeed, it is contradicted by his own arguments to the FHC.

1. Dr. McAdams' Brand-New Contract and First Amendment Arguments Ignore His Prior Arguments.

Unlike his brief to this Court, Dr. McAdams told the FHC in August 2015 that he should be treated as if he were a governmental employee in a dispute with his employer. "Marquette Administration may not terminate Professor McAdams in a way that would violate his First Amendment rights of free speech and academic freedom, **were he a professor at a public university**." (McAdams August 31, 2015 Hearing Br. at 4-5 (Trigg Aff. 3 Ex. 6)) (emphasis added). Dr. McAdams embraced the *Pickering* balancing test developed in the government employee context as the controlling standard for his asserted First Amendment protection. (Id. at 5-7).

When the Supreme Court applied First Amendment rights to public employees in *Pickering v. Board of Education,* 391 U.S. 563 (1968), it recognized that a balance must be struck between the rights and duties of employees and employers:

> it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in regulating the speech of the citizenry in general. The problem in any case is to **arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer**, in promoting the efficiency of the public services it performs through its employees.

Id. at 568 (emphasis added). *See also id.* at 569 (noting the need to evaluate "conflicting claims of First Amendment protection and the need for orderly school administration."). Even when commenting on a matter of public concern, the Court had to balance the employee's speech against the maintenance of discipline or harmony among coworkers, the proper performance of the speaker's duties, and any interference with the regular operations of the school. *Id.* at 569-573. Actual disruption to the work environment is not needed to remove the speech from First

Amendment protection, so long as the disruption is likely to occur. *See Waters v. Churchill*, 511 U.S. 661, 680-81 (1994) ("the potential disruptiveness of the speech as reported was enough to outweigh whatever First Amendment value it might have had.").

In *Connick v. Myers* the Supreme Court revisited the *Pickering* test, and focused on the requirement that to receive protection, the speech at issue must be on a matter of public concern. 461 U.S. 138 (1983). *Pickering* and its progeny emphasized that only speech on matters of public concern was protected, which reflected "both the historical evolvement of the rights of public employees, and the common sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* at 143. Where employee expression could not be fairly considered "as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146.

Looking at the content, form and context of the speech, the Court held that only one portion addressed a matter of public concern. *Id.* at 147-48. The focus of the remaining speech was "to gather ammunition for another round of controversy with her superiors." *Id.* at 148. To determine whether this one portion was protected required balancing the plaintiff's interest in the speech, against the government's interest as an employer, taking into account how substantially involved the speech was with matters of public concern. *Id.* at 149-50, 152. Where, as here, "close working relationships are essential" to the job duties, "a wide degree of deference to the employer's judgment is appropriate." *Id.* at 151-52. The employer was not required to allow the office to be disrupted and working relationships destroyed before taking action. *Id.* at 152. Given that the speech "touched upon matters of public concern in only a most limited sense" it was essentially an employee grievance about internal office policy, and the limited First Amendment interest

involved did not require the employer to tolerate actions "which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." *Id.* at 154. *See also infra* at 16-18 (federal court of appeals applying *Pickering* to blogger discipline).

Dr. McAdams now argues for the first time to this Court that the *Pickering* government employee test he previously embraced does not apply to him. (McAdams Br. at 21). Contrary to what he told the FHC, Dr. McAdams' now argues that "regardless of what limitations may be inherent in the concept of academic freedom" his contract guarantees him freedom of expression that *exceeds* that of government offices. (McAdams Br. at 19). Contrary to long-established law and common expectation, Dr. McAdams' insists that no matter what harm he does to vital Marquette interests in protecting its students, Marquette can discipline him only when his words fit into one of the few narrow exceptions for speech by private citizens (e.g., fighting words, inciting violence, etc…). Dr. McAdams' new and novel interpretation of his contract is plainly incorrect.

The cases Dr. McAdams previously cited directly contradict his new argument. In his brief to the FHC (McAdams August 31, 2015 Hearing Br. at 22 (Trigg Aff. 3 Ex. 6)), Dr. McAdams cited *Adams v. Trustees of the University of North Carolina-Wilmington*, which involved claims by a university professor that he was not promoted from associate professor to full professor based on his extramural writings. 640 F.3d 550 (4th Cir. 2011). The court stated that the review of the professor's speech "utilizes the *Pickering-Connick* analysis for determining whether it was that of a public employee, speaking as a citizen upon a matter of public concern." *Id.* at 564. In *Adams*, the Fourth Circuit determined that it was, and because the district court had erred in applying *Garcetti*, the case was remanded to determine whether the University's interests as an employer

outweighed the professor's interests (the second prong of *Pickering*), and whether the employee speech was a substantial factor in the adverse employment decision. *Id.* at 560-61, 565.

Dr. McAdams also cited *Demers v. Austin*, which specifically states that "academic employee speech not covered by *Garcetti* is protected under the First Amendment, **using the analysis established in *Pickering***." 746 F.3d 402, 412 (9th Cir. 2014) (emphasis added). After determining the speech of the plaintiff professor was on a matter of public concern, the Ninth Circuit remanded the case to address the balancing of interests between employee and employer, and whether the professor's speech was a motivating factor in any adverse employment actions. *Id.* at 417.

2. Dr. McAdams New and Novel Interpretation Would Render Other Provisions of His Contract Meaningless and Lead to Absurd Results.

The reason Dr. McAdams presumably did not make his new "I am a citizen not an employee" argument to the FHC is because the notion that an employer has few (if any) rights to protect its institutional interests from damage by one of its employees is without any basis in history or law or common expectation. Dr. McAdams' argument would render significant sections of his contract entirely meaningless and lead to absurd results. *Chapman v. B.C. Ziegler & Co.*, 2013 WI App 127, ¶ 2, 351 Wis. 2d 123, 839 N.W.2d 425 ("Finally and critically, we must interpret contracts to avoid absurd results."); *Isermann v. MBL Life Assurance Corp.*, 231 Wis. 2d 136, 153 605 N.W.2d 210 (Ct. App. 1999) ("Courts must read contracts to give a reasonable meaning to each provision and avoid a construction that renders portions of a contract meaningless."); *Hammel v. Ziegler Fin. Corp.*, 113 Wis. 2d 73, 76, 334 N.W.2d 913 (Ct. App. 1983) ("A reasonable meaning should be given to all provisions of an agreement so as not to render any part of the contract surplusage.").

As the FHC discussed in its comprehensive report, and Marquette emphasized in its brief in support of summary judgment, academic freedom's protections live in concert with and are balanced by other values central to academia and Marquette University. (*See* FHC Report at 68-71, 108-117; Marquette Br. at 26-28). Academic freedom is subject to professional norms, and carries with it duties correlative with rights. (FHC Report at 69, citing the AAUP 1940 Statement (Trigg Ex. 11)). The academic freedom rights of faculty members must be balanced against their responsibilities to students, colleagues, universities, and their communities. (FHC Report at 110) (Tr. Vol. IV 154:11-20, 164:3-24, 165:8-16, 171:3-172:7, 178:23-179:5). Marquette's definition of academic freedom for extramural utterances, which it adopted essentially verbatim from the AAUP, expressly balances the protection of academic freedom by other professional duties. (FHC Report at 111-112, noting that "the definition of extramural freedom in the Marquette Faculty Handbooks is essentially identical" to the AAUP's definition). In addition, the faculty handbook defines the academic freedoms involved in research and in the classroom, in both cases listing specific duties and limitations on the rights of academic freedom. (P. Ex. T26).

Dr. McAdams' new interpretation of the supposed First Amendment rights in his contract would render these balancing tests for academic freedom and other academic duties meaningless surplusage. If the only speech for which a Marquette professor can be disciplined is speech that transgresses one of the narrow exceptions to the First Amendment, then these academic freedom balancing tests are meaningless. In short, you do not need a balancing test if there is nothing to balance. Speech that clearly violates the professional norms of academia, and a professor's obligations to their university and students, would be unassailable in Dr. McAdams' world so long as it did not violate the First Amendment protections. Contrary to decades of academic practices and judicial precedents, Dr. McAdams' interpretation would transfer academic decisions at the

core of how universities regulate themselves from the hands of academics and into the courts. Similarly, his interpretation would render Marquette's standards for absolute and discretionary cause in Section 306.02-.03 meaningless. So long as any speech was conceivably involved, a professor could not be punished despite clearly failing the tests for absolute or discretionary cause.

The correct way to interpret the contract and to avoid rendering any provisions meaningless is either (1) to adopt the FHC's interpretation that Section 307.07 ¶ 2 addresses the pretextual use of disciplinary proceedings, *see infra* at 12-14; or (2) to interpret Section 307.07 ¶ 2 as incorporating only the First Amendment rights of citizens that exist in the employee-employer context (the *Pickering* test). *See infra* at 14-18; *Crandall ex rel. Johnson v. Society Ins.*, 2004 WI App 34, ¶ 10, 269 Wis. 2d 765, 676 N.W.2d 174 (rejecting interpretation of contract that would render provision meaningless); *Wilke v. First Fed. Sav. Loan Assoc. of Eau Claire*, 108 Wis. 2d 650, 657, 323 N.W.2d 179 (Ct. App. 1982) (rejecting interpretation of contract that would render a clause unenforceable under all circumstances). Both interpretations give effect to the entire contract, and do not render certain provisions meaningless. As discussed below, the FHC already worked through the factors in the *Pickering* test when it addressed the standards of personal and professional excellence of University faculties and Dr. McAdams' demonstrated lack of fitness.

B. The FHC Carefully and Correctly Analyzed Section 307.07 ¶ 2 In Light of Marquette Being a Private University as a Protection Against Pretextual Discipline.

Unlike Dr. McAdams shifting views of the Faculty Statutes, the FHC's interpretation of Section 307.07 ¶ 2 is reasonable and does not lead to absurd results. The FHC determined that provision does not incorporate public university (i.e. *Pickering*) standards but instead imposes a restriction against the pretextual use of bringing discretionary cause proceedings. (FHC Report at

117). This reasoning is supported by the rules of contract interpretation discussed above. *See supra* at 10-12.

The FHC detailed that reading that Section 307.07 ¶ 2 "to give Marquette faculty members the same rights vis-à-vis Marquette that government employees have under the First Amendment against their employers" is too problematic to have been the intent. (FHC Report at 118). Asking the FHC to address issues of First Amendment rights would add considerable legal complexity to a process governed by faculty members drawn from across the University about an area of law in constant flux. (FHC Report at 118-119). Such applications would represent "a stark departure from the other determinations that the FHC must make—the nature of professional obligations, the extent of academic freedom, the resolution of factual disputes involving academic activities—that are within the ken of every university professor." (Id. at 119). Furthermore, there were "significant and practical difficulties in interpreting § 307.07 ¶ 2" to apply First Amendment protections to Dr. McAdams' contract. (Id. at 119). This included problems with having the freedoms of faculty members hinge on the twists and turns of public employment law, how the FHC would apply the legal doctrine, and which of the conflicting court decisions it should follow. (Id. at 119). Finally, the protections afforded for academic freedom seemed to be more expansive, even when cabined by the corresponding duties and obligations inherent within the concept of academic freedom. (Id. at 119-120).

On the other hand, the FHC concluded that interpreting Section 307.07 ¶ 2 to prevent the pretextual use of disciplinary proceedings is consistent with the role of the FHC. As the entity charged with reviewing all of the evidence supporting disciplinary proceedings, and reviewing the scholar's record as a whole, the FHC is in the best position to determine whether the proceedings are being used pretextually. As it described, this provision gives it the hook to prevent situations

like that of Ward Churchill, where plagiarism proceedings were used to punish a professor for protected extramural speech. (FHC Report at 117-118).

C. If the Court Were to Go Beyond the FHC Interpretation and Treat Marquette As a Public University, Then Under the *Pickering* Test Marquette's Interests in Developing and Protecting Students Take Precedence Over Dr. McAdams' Desire to Name and Shame a Graduate Student on the Internet.

If the Court does not adopt the FHC's interpretation of Section 307.07 ¶ 2, then public university law leads to the same outcome. As the standard for free speech rights in the employment context has developed, Marquette can discipline Dr. McAdams' for blog post naming a Marquette graduate student and linking her contact information. Marquette is disciplining Dr. McAdams for conduct that violated his duties as a professor and Marquette's institutional mission. Just as Marquette has obligations to faculty, both it and the faculty members have obligations to students. As the FHC reviewed in exhaustive detail, Dr. McAdams attack violated these obligations.

Nor can Dr. McAdams paint himself as a harried defender of conservative principles. Both of Dr. McAdams' expert witnesses agree that Marquette "would have completely and utterly ignored what [Dr. McAdams] wrote" if he had not named Ms. Abbate, linked to her contact information, and written his blog post in a way that directly attacked her. (Wood Depo. 121:9-17 (Trigg Aff. 3 Ex. 7); Downs Depo. 120:7-11 (Trigg Aff. 3 Ex. 8)). Dr. McAdams could have easily avoided the conflict in a myriad of ways, as the aspects of the post that resulted in the attacks on Ms. Abbate did not touch on any areas of intramural criticism. (FHC Report at 92-94). Ms. Abbate's name and contact information were in no way a matter of public concern. As the FHC found, he could have written about both the during class and after-class conversations without linking the story to Ms. Abbate, and effectively made his points. (*See* FHC Report at 92).

To the extent the blog post addressed any legitimate subject of intramural concern (the handling of the advisee's complaint), this discussion "comprised only a small portion of the post."

(FHC Report at 96-97). Dr. McAdams agreed that the only newsworthy aspect of the post was the handling of the complaint by the University, but his blog post barely addressed that point. (FHC Report at 84; FHC Ex. 12 MU-074; FOF 105.1; FOF 103.3; FHC Ex. 18 MU-236).

Instead, the bulk of the post concerned statements Ms. Abbate allegedly made in class and in her after-class exchange with Dr. McAdams' advisee. (FOF 104; FOF 105). Dr. McAdams drafted the post "in a way calculated to direct a negative response at Ms. Abbate, more than at the University or others" based on (1) her alleged comments during the October 28 class; (2) what was said in the after-class conversation; and (3) "an alleged pattern of such incidents by others." (FOF 103). Dr. McAdams specifically targeted Ms. Abbate, as opposed to the University's response to his advisee in a number of different ways, including:

- Identifying Ms. Abbate by name (FOF 103.1, FHC Ex. 12 MU-73);
- Linking to Ms. Abbate's website with her contact information to make it easier for others to find that information (FOF 103.2, FHC Ex. 12 MU-73);
- Dr. McAdams made no other efforts to solve his advisee's problem (FOF 103.4, FHC Tr. Vol. IV 52:17-53:19);
- Dr. McAdams stated that Ms. Abbate had "airily" assumed agreement on the issue of gay rights, and there was no need to discuss it, without any basis for quoting her language, and relying solely on a second-hand report ten days after the fact (FOF 103.5-.6, FHC Ex. 12 MU-73);
- Dr. McAdams quoted extensively from the recorded conversation (FOF 103.7, FHC Ex. 12 MU-74);
- Dr. McAdams implied that JD was pressured to drop the class by Ms. Abbate (FOF 103.8, FHC Ex. 12 MU-74, 76);
- Dr. McAdams linked Ms. Abbate's statements "with 'a tactic typical among liberals now,' which is to deem opposing views 'offensive' and tell the speaker to 'shut up.'" (FOF 103.9, FHC Ex. 12 MU-74);
- Dr. McAdams quoted a columnist referring to that attitude as "totalitarian." (FOF 103.10, FHC Ex. 12 MU 74); and

- "Dr. McAdams asserted that the targets of this effort are Christians, Muslims, and straight white males." (FOF 103.11, FHC Ex. 12 MU 75).

Dr. McAdams blog post in this regard was similar to the questionnaire in *Connick v. Myers*. Only one small portion dealt with what Dr. McAdams considered a matter of public concern (the University's response). *See Connick*, 461 U.S. at 152 (taking into account how substantially involved the speech was with matters of public concern). The vast majority of the blog post, on the other hand, was drafted to direct negative attention towards Ms. Abbate personally, and "the primary urgency in publishing the blog post thus appears to be its revelation of embarrassing details about a member of the Philosophy Department—a department Dr. McAdams has tangled with frequently before—and holding her up to public opprobrium." (FHC Report at 84-85). Given that the blog post "touched upon matters of public concern in only a most limited sense," Marquette was not required to tolerate Dr. McAdams' disruptive conduct. *See Connick*, 461 U.S. at 154.

As discussed in Marquette's Opening Brief at 19-26, the FHC report cataloged the ways in which Dr. McAdams "violated his obligation to fellow members of the Marquette community by recklessly causing harm to Ms. Abbate," which was "substantial, foreseeable, easily avoidable, and not justifiable." (FHC Report at 2, 76-77 and 105).

Courts have upheld discipline against teachers who targeted and attacked the students of their institution. For instance, in *Munroe v. Central Bucks School District*, the Third Circuit addressed discipline arising from a personal blog by a tenured teacher that made derogatory comments about her high school students with sufficient information such that they could be identified. 805 F.3d 454 (3d Cir. 2015). The court assumed that her blog posts met the public concern element of the test because at least some posts touched on broader issues, and proceeded to balance the teacher and public's interests in the speech against the schools legitimate countervailing institutional interests. *Id.* at 470, 472. The court considered how the speech

impaired employee harmony, impacted close working relationships requiring loyalty and confidence, impeded the speaker's duties, or interfered with the employer's regular operations. *Id.* at 472. As in the instant case, because the speech barely addressed a matter of public concern the school was not required to tolerate much, if any, disruption to its interests before disciplining the teacher. *Id.* Speech identifying and denigrating students did not deserve special protection. *Id.* at 473. Applying the *Pickering* test, the Third Circuit held that the speech was sufficiently disruptive to diminish any legitimate interest in its protection, and therefore it was not protected. *Id.*

In reaching this conclusion, the court focused on: (1) the inappropriate tone of the speech; (2) the fact it was directed toward the very persons the school was meant to serve; (3) that it eroded the necessary trust and respect between teachers and students; (4) that she singled out specific and identifiable students in the blog posts; (5) the reactions of students and teachers to the speech resulting in the need to hire an additional teacher; and (6) that she refused to apologize and defended her statements in local and national media. *Id.* at 473-78. Similarly, in *Piggee v. Carl Sandburg College*, the court focused on how an instructor's speech towards one of her students impeded the educational mission of the school and the ability of students to receive an education. 464 F.3d at 672.

Marquette's compelling interest in developing graduate students as effective teachers and in avoiding disruption to its educational mission have been extensively cataloged (1) by the FHC, (2) by Marquette in its previous briefs, and (3) in the expert report from Dr. Nancy Busch-Rossnagel. (Marquette Br. at 17-18, 25-26). Dr. McAdams' attack on Ms. Abbate and his refusal to take responsibility for his actions, has disrupted Marquette's mission and work environment in much the same way as the teachers in *Munroe* and *Piggee*. Marquette is not limiting Dr.

McAdams' ability to speak out on topics of concern; it is only insisting that he do so without harming an essential University function—the development of students.

III. Dr. McAdams' Academic Freedom Arguments – Like His First Amendment Arguments – Ignore His Professional Duties.

Dr. McAdams also argues that his attack on Ms. Abbate was protected by principles of academic freedom incorporated into his contract. He approaches academic freedom as if it were a free-floating, unlimited right bestowed upon him by Marquette for his unfettered use. But, as Dr. McAdams' peers repeatedly point out, the right to academic freedom "carries with it duties correlative with rights." (AAUP 1940 Statement (Trigg Ex. 11)). Academic freedom lives in concert with and is balanced by other values central to academia and Marquette University.

In his brief, Dr. McAdams cites two decisions from the Supreme Court noting the importance of academic freedom to America. (*See* McAdams Br. at 22 discussing *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967) and *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)). But both of those decisions dealt with outside authorities interfering with universities, and to the extent the Supreme Court "has constitutionalized a right of academic freedom at all, [it] appears to have recognized only an institutional right of self-governance in academic affairs." *Urofsky v. Gilmore*, 216 F.3d 401, 412-415 (4th Cir. 2000) (en banc) (discussing *Sweezy*, *Keyishian*, and other Supreme Court decisions).[4] Thus the freedoms they discuss are of the University to be free from outside influence, not of a professor to have carte blanche while attacking a fellow member of the University. In instances such as the dispute with Dr. McAdams, Courts recognize "[i]f a college or university has the 'essential freedom' to determine for itself 'who may teach'—as both this court and the United States Supreme Court have held—that

[4] Earlier, the *Urofsky* court discusses how speech rights of public-university professors are governed by the *Pickering* test. *Urofsky*, 216 F.3d at 406.

necessarily includes the determination whether a faculty member who has tenure should be dismissed." *Gutkin v. University of S. Cal.*, 101 Cal. App. 4th 967, 977 (Cal. Ct. App. 2002) (quoting *Sweezy*).

Dr. McAdams discussion of lower count opinions is similarly unhelpful. For instance, he cites *Salaita v. Kennedy*, 118 F. Supp. 3d 1068 (N.D. Ill. 2015) as holding that anti-Semitic twitter posts were protected as extramural utterances, and standing "for the proposition that disparaging and disruptive 'extramural utterances' cannot be grounds for dismissal simply because they are disparaging and disruptive." (McAdams Br. at 24-25). He is wrong on both accounts. The *Salaita* decision addressed a motion to dismiss and whether Professor Salaita had stated a possible claim, not whether his speech was definitely protected or not, and specifically discussed that whether his twitter posts were sufficient to withdraw his job offer would have to wait until the *Pickering* test was applied at a later date. *Salaita*, 118 F. Supp. 3d at 1082-84.

The decision in *Adamian v. Jacobsen* dealt with vagueness and overbreadth challenges to the definition of academic freedom for extramural utterances, and specifically what "appropriate restraint" meant. 523 F.3d 929 (9th Cir. 1975). The court remanded the case to the district court to determine whether the board of regents' construction of the handbook section was similar to that of the AAUP, eliminating any overbreadth as the court had found it. *Id.* at 934-35. Finally, in *Starsky v. Williams*, the three public utterances at issue concerned (1) a press release characterizing the board of regents as hypocritical questioning their motives; (2) a television speech questioning the moral propriety of the board of regents; and (3) sharply criticizing society in general and universities in particular in a speech. 353 F. Supp. 900, 925 (D. Ariz. 1972). Statements that can hardly be equated with what Dr. McAdams did to Ms. Abbate.

Dr. McAdams also cites the AAUP 1940 Statement and an AAUP Statement on Civility regarding academic freedom for extramural comment, as supporting his position. (McAdams Br. at 23) But as discussed above, the 1940 Statement as incorporated into Marquette's Faculty Statutes includes various obligations that Dr. McAdams was found to have violated, justifying his punishment. The statement by his expert Dr. Wood that academic freedom protects discussion of issues concerning "the governance of colleges and universities and debates over the norms and standards of instruction," may very well be true, but it is irrelevant. (McAdams Br. at 23). Dr. McAdams is not being punished for criticizing Marquette or engaging in a debate over the norms and standards of instruction.

In a few instances Dr. McAdams argues that he is being punished because Marquette thinks his speech was unadvisable, inaccurate, uncivil or that he did not "strive for accuracy, respect and restraint." (McAdams Br. at 24, 26-27). But Dr. McAdams ignores the discussion by his peers of conduct that would not by itself lead to discipline. (FHC Report at 72-74). In it, the FHC discussed how Dr. McAdams' misstatements, lack of confirmation, naming Ms. Abbate and linking to her information without more, or criticizing how a colleague teaches a course had not led to discipline. (Id.). It specifically noted that "civility is not a proper basis for discipline of a faculty member." (Id. at 73-74). But here, the FHC found that Dr. McAdams conduct went beyond factual errors, naming Ms. Abbate, linking to her contact information, "publicly presenting a one-sided criticism of the teaching of a colleague" or "posting an extramural blog that is uncivil." (Id. at 74). Rather, Dr. McAdams recklessly exposed Ms. Abbate to easily avoidable foreseeable harm through the use of improperly obtained information in a way that he should have known could lead to harm. (Id. at 74-75).

Dr. McAdams argues that he is being punished for the reaction of others and that his conduct does not fall within the exceptions for incitement or fighting words. (McAdams Br. at 28). But it is Dr. McAdams own conduct, knowledge, and decisions that led to his discipline. As his peers noted, the harm to Ms. Abbate was foreseeable and easily avoidable, yet he recklessly chose to put her in harm's way. In so doing he violated his obligations to Marquette in general, and Ms. Abbate in particular. The aspects of his post that resulted in the attacks on Ms. Abbate did not touch on areas of intramural criticism, and there was no competing value that offset the harm caused by attaching her name and contact information to the story. (FHC Report at 94). His justifications based on alleged journalistic norms must yield to his obligations as a professor. (Id.).

Finally, to the extent Dr. McAdams argues that he cannot be punished because there were no rules announced before the fact (McAdams Br. at 29), the FHC considered and rejected that assertion. "Although Dr. McAdams was not warned that his behavior was approaching a line that could lead to discipline, no faculty member should need a specific warning not to recklessly take actions that indirectly cause substantial harm to others." (FHC Report at 100).[5]

A. Academic Freedom Requires Balancing Rights and Obligations.

As discussed in Marquette's Opening Brief at 26-28, the committee of Dr. McAdams' peers carefully considered the meaning of Section 306.03 of the faculty statutes in their decision to suspend Dr. McAdams. They noted that the freedoms "of research, of teaching, and of comment that compose academic freedom are freedoms to speak and write as a member of a profession, **subject to professional norms**." (FHC Report at 69) (emphasis added). Importantly, the FHC reviewed and analyzed numerous pronouncements from the AAUP, an organization that Dr.

[5] The FHC in its report (pages 101 to 105) and Marquette in its summary judgment brief (pages 24 to 26) already discussed how Dr. McAdams' actions impaired his value to Marquette, and those arguments are incorporated by reference in response to the arguments raised by Dr. McAdams on pages 29-30 of his brief.

McAdams alleges "is a nationally recognized authority on academic freedom." (Complaint ¶¶ 30-31). As it recognized, the academic freedom for extramural speech is balanced by Dr. McAdams' responsibility to his subject, students, profession, and institution." (FHC Report at 76, quoting and analyzing the AAUP Statement on Professional Ethics (Trigg Ex. 17), as incorporated into the AAUP 1940 Statement (Trigg Ex. 11)).

In accordance with these statements from the AAUP, Dr. McAdams' expert witness Dr. Wood agreed in his testimony that universities must balance academic freedom with other values core to their mission. (Wood Depo. 88:3-13 (Trigg Aff. 3 Ex. 7)). In addition, Dr. Donald Downs agrees that (1) academic freedom is balanced against responsibilities (Tr. Vol. IV 154:11-20), (2) there is a balance of duties and responsibilities for extramural speech (Id. at 164:3-24), (3) demonstrable harm contrary to the academic mission of the university removes speech from the protections afforded by academic freedom and free speech (Id. at 165:8-16), (4) faculty members can properly be fired for extramural comments that seriously disrupt or harm the institution (Id. at 171:3-172:7), and (5) that private institutions have the right to pursue a particular normative vision (Id. at 178:23-179:5).

Additionally, as the FHC noted, Dr. McAdams' obligations to Marquette and its students have to take into account its Jesuit nature and the foundational values it incorporates. (FHC Report at 76-77). These values are expressed in the concept of *cura personalis*, Marquette's Mission Statement, and its Guiding Values. (Id. at 76-77; Report of Dr. Nancy Busch Rossnagel (Trigg Ex. 27)).

In light of the obligations imposed by academia generally, and Marquette specifically, the FHC properly interpreted Dr. McAdams' contract as conditioning the protection for extramural speech on certain conditions, and the "'special obligations' attendant to his position as a university

professor." (FHC Report at 114-116). These obligations include his fundamental responsibilities to students, his profession, and institution and to promote conditions of free inquiry. (FHC Report at 116). Finally, it noted that in accordance with the various statements from the AAUP addressing the language in Marquette's Faculty Statutes, Dr. McAdams' had to be demonstrably unfit for his position before discipline could be imposed. (Id.).

B. Disciplining Dr. McAdams Did Not Violate His Academic Freedom.

The FHC found clear and convincing evidence that Dr. McAdams' attack on Ms. Abbate both violated his obligations as a professor and demonstrated his unfitness, warranting the discipline imposed. These findings were discussed extensively in both the FHC Report (pages 81 to 95, 101-105) and in Marquette's brief in support of its motion for summary judgment (Marquette Br. at 16 to 28).

Dr. McAdams' arguments to the contrary (that his attack on Ms. Abbate was protected by academic freedom) fall flat in light of the FHC's findings regarding the meaning of his contract and actions he took. Dr. McAdams ignores that it was his reckless use of improperly obtained information in a blog post that named Ms. Abbate, linked to her contact information, and was drafted in a way to hold her up for public contempt that resulted in the present dispute. Marquette had no issue with him discussing the administration's response to his advisee's complaint, or with his discussion of other sometimes-controversial topics over the years. These more general discussions are not at issue here.

Dr. McAdams' conception of academic freedom ignores its inherent limitations and the obligations it imposes (discussed *supra* 18-22). Instead of addressing the interpretations of the language in his contract provided by the AAUP and relied on by his peers, he instead quotes a number of statements generally regarding the broad nature of academic freedom. (*See* McAdams

Br. at 22-26). But the breadth of speech protected by academic freedom is not at issue, only Dr. McAdams conduct in this particular instance, and the cited authorities are not helpful in this regard.

IV. Dr. McAdams Received All the Academic Process The Contract Provides.

In Section III of his brief beginning at page 31, Dr. McAdams argues that Marquette violated the process requirements of the Faculty Statutes in three different ways. Dr. McAdams' arguments overstate the requirements of his contract, read new provisions into it and again ignores the FHC's reasoned decision that rejected his process-related claims.

A. Marquette Complied With and Exceeded the Faculty Statute Regarding Documents and Witnesses.

Dr. McAdams complains that the FHC process did not mirror civil litigation with open-ended discovery requests and other pre-hearing discovery. That is not what the AAUP-designed procedures call for, as the FHC and its law professor chair concluded. As Dr. McAdams acknowledges in his brief, *see supra* at 2, the parties look to Chapter 307 of the Marquette Faculty Statutes for the comprehensive process to be followed during disciplinary proceedings. The Faculty Hearing Committee Procedures section includes a provision relating to witnesses and information for the hearing:

> The subject faculty member will be afforded an opportunity to obtain necessary witnesses and documentation or other evidence and is entitled to examine the evidence submitted to the FHC by the University Administration. The Administration also will cooperate with the FHC in securing witnesses from the University and making available documentary or other evidence. Likewise, the Administration will be entitled to examine documentary or other evidence submitted to the FHC by the subject faculty member.

(Section 307.07 ¶ 11).

Courts regularly uphold limited discovery procedures in non-judicial settings where, as here, the parties contractually agree to them. *See Kristian v. Comcast Corp.*, 446 F.3d 25, 42-43

(1st Cir. 2006) (parties could agree to less discovery than could be expected during court proceedings); *Scaffidi v. Fiserv, Inc.*, 2006 WL 2038348, at *3 (E.D. Wis. July 20, 2006) (limits on discovery in arbitration were permissible). Furthermore, the extent of discovery that is allowable is for the contractually agreed decision maker to resolve. *See Kristian,* 446 F.3d at 43 (discovery disputes were "left for an arbitrator to resolve"); *Scaffidi*, 2006 WL 2038348, at *3 (limited discovery "is an issue appropriately decided by an arbitrator.").

Dr. McAdams argues Marquette did not comply with this section, but then glides over the fact that his same arguments were considered and rejected by the FHC. (*See* McAdams Br. at 34.). As stated in its September 16, 2015 decision, the FHC reviewed what the Faculty Statutes require and found Dr. McAdams' arguments misstate what his contract provides and the process requires.

First, contrary to Dr. McAdams' claims, the contract does not give him the right to engage in discovery akin to litigation or to interview witnesses. Prior to the FHC hearings, Dr. McAdams demanded copies of all documents referring or relating to any interviews of witnesses done by Marquette, and "any written evidence that Marquette has that either supports or refutes the charges against Dr. McAdams, including copies of any e-mails sent to or by Ms. Abbatte (sic)" referring in any way to Dr. McAdams or the subject of the dispute. (McAdams August 31, 2015 Hearing Br. at 27-28 (Trigg Aff. 3 Ex. 6)). In addition he requested the right to interview individuals listed in the January 30, 2015 Letter from Dean Holz. (Id.).

Marquette reasonably declined these wide-ranging requests, and over the course of the spring and summer the parties went back and forth a number of times on what was required under the Faculty Statutes before submitting the issue to the FHC. In an August 4, 2015 letter, counsel for Marquette noted that despite the fact the Faculty Statutes did not require it, the University would make available for interviews the five employees it would call as witnesses at the hearing.

(Weber August 4, 2015 Letter at 3 (Trigg Aff. 3 Ex. 9)). Ms. Abbate was not willing, however, to make herself available to Dr. McAdams' lawyers for an interview. With respect to his requests for documents, Marquette provided Dr. McAdams with the relevant, non-privileged interview notes. (Id.). In addition, Dr. McAdams was provided with all documents that supported Marquette's position before the FHC (the exhibits submitted to the FHC) and it noted that it was not required to produce either Ms. Abbate's emails or all documents that refuted Marquette's position. (Id. at 3-4).

Dr. McAdams submitted this process dispute to the FHC. In a reasoned decision interpreting the Faculty Statutes, the FHC denied Dr. McAdams' arguments. It noted that the Faculty Statutes "do not have pretrial discovery rules in Section 307.07 comparable to those applicable in civil litigation. There is no obligation that each side turn over all material relevant to any party's claim or defense in preparation for the hearing, or to 'make available' witnesses for some sort of pre-hearing deposition that is nowhere mentioned in the statutes." (Boyden September 16, 2015 Letter at 6 (Trigg Ex. 4)). Instead, the context of Section 307.07 ¶ 11 made it clear that "witnesses and documentation" referred to where those that would be submitted at the hearing, "since the entirety of Section 307.07 concerns the procedures for the hearing." (Id.) Reading a general discovery obligation into Section 307.07 ¶ 11 would give the faculty member a lopsided pre-hearing opportunity to obtain information, with the University only able to review what the faculty member submits to the FHC. (Id.). The correct reading was to give the faculty member a chance to submit documents and call witnesses at the hearing itself. (Id.). But Dr. McAdams had not requested the presence of a witness at the hearing who would not be attending, and "the pre-hearing availability of witnesses is not required under the statutes." (Id. at 7). His document request, furthermore, "appears to have been a general request for everything conceivably

relevant" and it did not appear that he had requested any specific document necessary for his defense. (Id. at 7). "Trawling for loose language [was] outside the scope of the hearing procedures." (Id.). Finally, it declined to order discovery mechanisms like searching through Ms. Abbate's email accounts as it would violate the privacy expectations of faculty and students, and it did not believe "such far-ranging discovery is warranted under the Faculty Statutes." (Id.).

Thus, as the FHC noted, Marquette fully complied with the requirements of Section 307.07 ¶ 11 by allowing Dr. McAdams to review the evidence submitted to the FHC, and it went beyond what was required by making the witnesses it called at the hearing and under its control available for interviews. Beyond that, Dr. McAdams was afforded approximately nine months to obtain witnesses and documents to support his defense. The AAUP subsequently told Dr. McAdams that the process afforded Dr. McAdams comported in essential respects with AAUP-recommended standards. (Trigg Ex. 24).

Dr. McAdams now claims that he was denied the right to cross examine witnesses because Marquette submitted statements and other documents authored by individuals that it did not also call as witnesses. (McAdams Br. at 33). But this argument ignores: (1) the Faculty Statutes specifically provide that the FHC process is not bound by legal rules of evidence, so hearsay is admissible (Section 307.07 ¶ 17); and (2) Dr. McAdams received all of the documents submitted to the FHC ahead of time and was free to call additional witnesses if he wanted to follow-up on those statements. To the extent those witnesses were under Marquette's control, it would have been obligated to assist (and would have assisted) in securing their attendance.

Dr. McAdams has now renewed his challenge to the procedures afforded by the Faculty Statutes, claiming that because of the unfair interpretations by Marquette and the FHC, he was denied access to documents necessary for his defense. But nothing Dr. McAdams discusses in this

section changes what is at issue. The essential facts about what occurred are not in dispute. The FHC found that Dr. McAdams had acted unprofessionally in writing his blog post naming Ms. Abbate and linking to her contact information. Nothing in Dr. McAdams' brief changes this fundamental point.

Furthermore, Dr. McAdams' argument regarding access to documents works both ways. While he claims certain documents that have been produced in discovery would have been helpful during the FHC hearings, so too certain documents that he has produced in discovery would have been helpful to Marquette. For instance, Marquette now has evidence of the dedicated and sustained effort Dr. McAdams engaged in to draw attention to his attack on Ms. Abbate. (*See* McAdams Depo. Ex. 81 (Trigg Aff. 3 Ex. 3) (detailing Dr. McAdams extensive efforts promoting media attention, including multiple appearances on TV and talk radio)). In addition, Marquette did not get to show the FHC that Dr. McAdams' longtime mentor told Dr. McAdams that he had "erred in your approach to the Abbate matter (should not have named names . . .)" to which Dr. McAdams responded "[i]f I had had any inkling that the whole thing would go national and result in Abbate getting hate mail, I would not have used her name." (McAdams Depo. Ex. 78 (Trigg Aff. 3 Ex. 10)).

In addition, Dr. McAdams' claim of the need to depose the various witnesses before the FHC hearing rings hollow since in this case he has only taken one deposition (Dr. Lowell Barrington). The parties had arranged and scheduled the depositions of Drs. South, Holz, Snow and Callahan, President Lovell and Ms. Abbate, but counsel for Dr. McAdams cancelled them all. Thus, despite now actually having the power to depose these individuals, Dr. McAdams has not used the power.

Dr. McAdams also complains about the emails he has now received that he was not entitled to during the FHC process. None of these emails evidences any problems with the FHC process. For instance, he claims that in her efforts to defend herself, Ms. Abbate prompted some of the publicity she received. (McAdams Br. at 32). But the specific linkages between individual blog posts and national publicity is unknowable and irrelevant. We do know now that Dr. McAdams worked very hard to draw local and national attention to Ms. Abbate, and it worked. (McAdams Depo Ex. 81 (Trigg Aff. 3 Ex. 3)). Dr. McAdams' brief oddly blames Ms. Abbate for trying to defend herself, but they do not explain, and it is not apparent how any of this plays into his breach of his professional obligations.

In addition, Dr. McAdams asserts that the documents show Ms. Abbate did not leave Marquette because of the blog post fall out, but instead because she wanted to leave and go to a better program. Dr. McAdams wants the Court to believe he did Ms. Abbate a favor in putting her name and contact information on the internet. Here is a sampling of what the blog post brought down on Ms. Abbate:

(MARQ-010477 (Trigg Aff. 3 Ex. 4))

From: Matthew Jackson <mejackson303@gmail.com>
Sent: Saturday, November 22, 2014 8:01 PM
To: Abbate, Cheryl
Subject: Support

Just kidding. You fucking CUNT!! Anyone who disagrees with you is not entitled to their opinion? You call yourself an American? Damn I would hate to be you right now. You fucking homo loving DYKE!!!! I hope you die a horrible death!!! BITCH CUNT DYKE!!! You probably support ISIS as well don't you? Oh wait I'm sorry for criticizing you. I thought I had a right to disagree with you according to the Constitution. According to you I don't.

(MU-000112 (Trigg Aff. Ex. 13)). Perhaps most chilling was an email in which the sender eerily included her photograph and promised to follow her "career" at Colorado-Boulder:

From: Bob Andrews <rcaatl@att.net>
Sent: Wednesday, December 17, 2014 12:42 PM
To: Abbate, Cheryl
Subject: Re: Cheryl, you certainly have made a name for yourself...

Cheryl, people just will not forgive you will they.

Internet posts/comments today:

"Wow...Her flower pot, her tape dispenser, and her head...all neatly lined up in a row and EMPTY."
"Ah yes, liberty as defined by liberals means never having to defend your nasty habits in an ethics class."
"And there it is folks. The homosexual agenda is not about equality. It is about being superior and stifling ALL speech that they may find offensive or contrary to their goals."
Teaching assistant Cheryl Abbate likes to wear the jackboots of a femi/homo-nazi."
"Remember when college campuses were the place for open discussions about any topic or theory no matter how loopy? Today, they are bastions of closed-mindedness and thought police."

Remember, we will be following your "career" at Boulder.

(MARQ-011646 (Trigg Aff. 3 Ex. 11)).

It cannot be reasonably disputed that Dr. McAdams' blog post had profound negative effects on Ms. Abbate. She feared for her safety and began suffering negative mental and physical effects, she was forced to abandon her dissertation and to repeat many graduate courses, which set back her PhD by years. (FHC Report at 87-89; Tr. Vol. I at 83:10-84:8; 85:22-25; 86:1-88:19; 157:3-22; 174:22-175:13; 176:1-25; 178:14-180:4). None of that is (or can be) disputed by Dr. McAdams. All Dr. McAdams can point to is an email from Dr. South reflecting his own frustrations with Philosophy Department Chair Dr. Nancy Snow. Dr. South's view of what happened, and the reasons for Ms. Abbate leaving Marquette, is not competent evidence in light of Ms. Abbate's testimony on this issue directly to the FHC. If Dr. McAdams thought he could undercut that testimony in any way, he would have deposed her, but he did not. In the affidavit from Brian McGrath they point out a separate email in which Ms. Abbate is trying in an email to a friend to put a positive spin on her situation despite having had her career set back by years. Finally, although he notes the ranking of the Colorado Philosophy Department being higher than that of Marquette, Dr. McAdams fails to address the significant black mark on Ms. Abbate's career caused by his actions. As detailed in the report from Dr. Nancy Busch-Rossnagel, changing programs in the middle of pursuing her PhD is "seen as abnormal, and a red flag in the screening of faculty candidates," as is the increased time to complete her dissertation. (Trigg Ex. 27).

But once again, none of these points undermine the FHC process or the finding that Dr. McAdams had violated his professional obligations. Dr. McAdams can focus on specific documents that he did or did not have (as can Marquette), but nothing changes the essential facts of this dispute. Dr. McAdams took improperly obtained information and recklessly used it to cause Ms. Abbate easily avoidable and foreseeable substantial harm.[6]

[6] Dr. McAdams' ad hominem attacks in this section of his brief implying that Marquette must have interviewed additional individuals, combed through the files of every witness, and cherry-picked who and what it would submit

B. The FHC Correctly Determined that Dr. Turner Could Serve on the FHC.

Dr. McAdams also complains that one member of the FHC, Dr. Turner, was biased against him and should have recused herself from the panel. (McAdams Br. at 35-36). He bases this on an online open letter that she signed shortly after the dispute with Dr. McAdams arose. The faculty statues state that "[m]embers of the FHC who deem themselves disqualified for bias or interest will remove themselves from the case. In addition, either party may petition the FHC for recusal of a particular committee member on grounds of bias or interest. Removal of a member for bias or interest is at the discretion of the FHC." (Section 307.07 ¶ 8).

Dr. McAdams raised this letter as an issue, and requested that Dr. Turner recuse herself. The FHC applied its discretion and unanimously rejected his request. (Trigg Ex. 4 at 3-5). It interpreted the contract to only require recusal for actual bias or interest, not the potential for mere "appearance of bias" that Dr. McAdams had cited as sufficient for recusal. (Id.). Furthermore, "bias or interest" cold not mean anybody that had formed an opinion on a matter had to recuse themselves, as that would make it impossible to form a committee due to the likelihood that any dispute requiring an FHC was likely to be notorious. (Id.).

As the FHC saw it, the proper analogy is not to recusal standards for judges, but to that for jurors, given that the FHC is the finder of fact. (Id.). Under the test for juror disqualification, it is clear that Dr. Turner was not required to recuse herself, as she had not demonstrated an ingrained attitude about the particular case. (Id. at 5). Furthermore, none of the FHC members had taken a public position on whether Dr. McAdams conduct met the standard for dismissal in Section 306.03, and that was an issue which all seven committee members believed they could decide free of bias

to the FHC is unwarranted and unprofessional. Marquette properly submitted in accord with the Faculty Statutes to both the FHC and Dr. McAdams all of the documents on which it based its decision to bring disciplinary proceedings against Dr. McAdams. Dr. McAdams does acknowledge Marquette's request to interview him prior to the hearing was refused.

or interest. (Id.). Dr. McAdams also ignores the fact that the FHC decision needed only 4 of 7 votes, and it was unanimous. (Section 307.07 ¶¶ 7-8 (Trigg Ex. 2)).

C. Marquette Did Not Breach the Notice Provision.

Finally, Dr. McAdams argues that Marquette went beyond what evidence was permitted to be presented to the FHC. (McAdams Br. at 34-35). He again misreads the Faculty Statutes. Section 307.03(1) requires that in all dismissal proceedings, the University shall provide notice to the faculty member including "[t]he statute allegedly violated; the date of the alleged violation; the location of the alleged violation; a sufficiently detailed description of the facts constituting the violation including the names of the witnesses against the faculty member." In addition, the notice must also describe the nature of the University's contemplated action, with a specification on when it shall become effective, and be personally served. (Section 307.03(2)-(3)).

But that notice provision does not delineate the scope of evidence before the FHC. To the contrary, at least 120 days after that notice was sent Marquette was required to submit both the notice letter "as well as any and all evidence upon which the Administration has made its decision." (Section 307.07 ¶ 4). In addition, Section 307.07 ¶ 11 requires the Administration to cooperate with the FHC in "making available documentary or other evidence." Since the FHC is not constituted for any dispute until long after the notice is sent to the faculty member, and the FHC receives all evidence on which the administration based its decision at the beginning of the FHC process, this provision would have no meaning if the parties were not allowed to submit additional evidence.

Furthermore, Dr. McAdams is not being punished for the past incidents he discusses in his brief. But those prior incidents are important for assessing his fitness (which Dr. McAdams admits

requires looking at his entire record as a scholar) and what he knew, or did not know, as he sat down to right the blog post.

V. Marquette Did Not Breach the Duty of Good Faith and Fair Dealing.

Dr. McAdams argues that Marquette breached the implied duty of good faith and fair dealing in four different ways. First, he argues that Dr. South led a biased investigation because he was a friend and mentor to Ms. Abbate and helped her draft her complaint to the University. (McAdams Br. at 37). But Dean Holz's decision to conduct an investigation merely initiated the process that followed and the FHC was clear that it "in no way relied on that investigation in reaching its conclusions." (FHC Report at 19). More importantly, Dean Holz testified how he supervised Dr. South's fact-finding, including discussing with him what to do, making suggestions about the investigation, and personally conducted the interviews with Ms. Abbate and Dr. McAdams. (FOF 141; FHC Tr. Vol. III 80:6-15). The Faculty statutes are completely silent about what any investigation must entail, and the duty of good faith and fair dealing "imposes a relatively limited obligation on the parties and is not a basis for creating rights not expressly included in the contract." *Cousin Subs Sys., Inc., v. McKinney*, 59 F. Supp. 2d 816, 821 (E.D. Wis. 1999).

Second, Dr. McAdams puts a false spin on a Marquette statement about the dispute, claiming Marquette implied Dr. McAdams was a threat to the safety of students (Complaint ¶ 27; FHC Ex. 107 (Trigg Aff. 3 Ex. 12)), Marquette said no such thing, as noted *supra* at 5. The discussion regarding safety and not putting students in harm's way refers to the undisputed threats to Ms. Abbate's safety and that the University took those threats seriously by, among other things, posting a public safety officer outside her classroom. (MARQ-017414-415 (Trigg Aff. 3 Ex. 5) FHC Ex. 14; Tr. Vol. I 85:18-25; 174:16-175:10). Dr. McAdams' strained interpretation to the contrary to make himself a victim cannot stand in light of the actual language of the document.

Third, Marquette allegedly allowed a biased member of the FHC, Dr. Turner, to remain on the FHC. (McAdams Br. at 37). But, as discussed above, *supra* at 32-33, recusal decisions are vested in the FHC's discretion, the exercise of which it explained at length in the prehearing ruling. (Trigg Ex. 4). Where one of the contracting parties complains of acts that are specifically authorized in the agreement, there is no breach of good faith and fair dealing as a matter of law. *M&I Marshall & Isley Bank v. Schleuter*, 258 Wis. 2d 865, 873-74, 655 N.W.2d 521 (Ct. App. 2002).

Fourth, Dr. McAdams claims Marquette refused to produce key documents within its control and make its own witnesses available so that Dr. McAdams could prepare his defense, and its conduct otherwise demonstrated that it never intended to give Dr. McAdams a fair hearing. (McAdams Br. at 38). This claim relies on various baseless and ad hominem attacks by opposing counsel that Marquette must have gamed the system with regards to witnesses and cherry-picked documents. But again this issue was addressed and resolved by the FHC, the record is clear that (1) Marquette provided Dr. McAdams with all of the required exhibits and evidence on which it based its decision to discipline him, as well as the interview notes he specifically requested; (2) went above and beyond the requirements by allowing Dr. McAdams's counsel to conduct prehearing interviews of the witnesses under its control; and (3) had no obligation to respond to Dr. McAdams requests for documents that were overbroad and otherwise objectionable even under the rules for discovery in civil litigation.

VI. Deference to FHC and Lovell Decisions.

Finally, Dr. McAdams argues that the Court should not defer to the findings and conclusions made by the FHC. (McAdams Br. at 38-39). For this he cites to decisions in *McConnell v. Howard University*, 818 F.2d 58 (D.C. Cir. 1987) and *Roberts v. Columbia College*

Chicago, 821 F.3d 855 (7th Cir. 2016) that properly understood do not support him given the facts at issue here. As Marquette demonstrated in its opening summary judgment brief, deference to faculty judgments on issues of (1) professional standards, (2) academic freedom, and (3) the value of a professor to a university has wide support in both case law and the standards of the AAUP. (Marquette Br. at 5-14). This is true even where the process, like Marquette's, involves a recommendation from a faculty committee to university leadership.[7] Marquette specifically addressed the two decisions Dr. McAdams relies upon, distinguishing *McConnell*, and demonstrating how *Roberts* actually supports Marquette's position. (Marquette Br. at 9, 12). Furthermore, the overwhelming evidence supported the decision by the FHC on Dr. McAdams' violations of his obligations and the lack of protection for his attack on Ms. Abbate. (Marquette Br. at 14-29).

President Lovell's letter conditioning Dr. McAdams' return to the faculty on his agreement to change his behavior and abide by the terms of his contract going forward is also entitled to deference. Like the hearing and report from the FHC, the parties agreed that President Lovell would make the decision implementing the FHC's report and findings. (Section 307.07 ¶¶ 1, 20). Vesting the final decision in the hands of President Lovell is consistent with the Marquette Faculty Statutes. (*See* Faculty Statutes Preamble, "Faculty members acknowledge that the ultimate responsibility for the operation of the University resides with the Board of Trustees and the President."); Section 1.01.1 (FHC reports directly to the University President) (Trigg Ex. 3)). In addition, this is consistent with the recommendations and statements from the AAUP, which

[7] *Yackshaw v. John Carroll Univ. Bd. of Trustees*, 624 N.E.2d 225, 239-240 (Ohio Ct. app. 1993) (Faculty Board of Review issued recommendation to Board of Trustees); *Traster v. Ohio N. Univ.*, 2015 WL 10739302, at *2 (N.D. Ohio Dec. 18, 2015) (faculty hearing committee report sent to Board of Trustees "which can sustain or overrule the committee."); *Haegert v. University of Evansville*, 977 N.E.2d 924, 931 (Ind. 2012) (recommendations from faculty committees forwarded to President for decision).

consistently refer to the findings of a faculty committee being transmitted to another decision maker. For instance:

- The AAUP 1940 Statements states that dismissal for cause "should, if possible, be considered by both a faculty committee and the governing board of the institution." (Trigg Ex. 11).

- The Recommended Institutional Regulations refer to transmittal of the faculty report to the President and governing board, and the different options each entity has regarding implementation or rejection of the report. (Trigg Ex. 13 at 5(16), 6).[8]

- The AAUP Committee A Statement on Extramural Utterances after noting the importance of faculty involvement in dismissal proceedings, states that "it will view with particular gravity an administrative or board reversal of a favorable faculty committee hearing judgment in a case involving extramural utterances." (Trigg Ex. 15).

- The AAUP Statement on Government of Colleges and Universities states that on issues of faculty status, "[d]eterminations in these matters should first be by faculty action through established procedures, reviewed by the chief academic officers with the concurrence of the board. The governing board and president should, on questions of faculty status . . . concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail." (Trigg Aff. 3 Ex. 13)

- This language is then reiterated in "On the Relationship of Faculty Governance to Academic Freedom. (Trigg Ex. 16).

In light of his institutional authority and the agreement of the parties, it was incumbent upon President Lovell to implement the FHC's decision and its frank condemnation of Dr. McAdams' lack of professional standards with appropriate consideration for Marquette as an institution and its obligations to the members of the community.

This is precisely what happened here. President Lovell's March 24, 2016 letter adopted and implemented the FHC's discipline recommendations, and in addition to summarizing the unanimous conclusion of Dr. McAdams' peers, it noted Dr. McAdams' refusal and unwillingness

[8] Marquette and its faculty have not adopted any provision regarding review of the FHC's decision by the Board of Trustees.

to embrace or follow the values of the University, and his lack of regret for his actions. (Trigg Ex. 5). Dr. McAdams' own expert agrees that it would make no sense to invite Dr. McAdams back without getting a commitment from him to change. (Marquette Br. at 33).

Finally, if the Court were to elect not to defer to Dr. McAdams' peers about his lack of professionalism and fitness and instead submit this case to a jury, then it will have to instruct the jury on these issues. The difficulty of having the jury adequately assess the standards of professionalism and fitness is no doubt why the model standards from the AAUP assign that judgment to a committee of professional peers with oversight by the executive officer or governing board. Thus, the Court should not send this to a jury when the parties agreed that a group of Dr. McAdams' peers would assess his professional fitness and Marquette's President adopted that assessment.

VII. No Breach Regarding Suspension (With Full Pay and Benefits) Pending the Faculty Hearing.

Finally, Dr. McAdams claims that Marquette suspended him from teaching and banished him from campus in violation of his contract on December 16, 2014. (McAdams Br. at 15-18). But his arguments in this section ignore the content of the Faculty Statutes and the facts of what actually occurred.

First, as discussed in Marquette's brief in support of summary judgment, the Faculty Statutes expressly provide that during disciplinary proceedings Marquette has the discretion to suspend faculty duty assignments. (Marquette Br. at 29-31, citing Sections 307.08 and 307.02). Marquette did not adopt language to the contrary contained in AAUP model regulations. Dr. McAdams also ignores that on January 2, 2015, the University sent him a detailed letter explaining the conduct that prompted the review by Marquette and how Dr. McAdams' actions demonstrated he would not respect and protect Marquette's students. (Holz January 2, 2015 Letter (Trigg Aff.

3 Ex. 14)). Therefore, at least as of January 30, 2015 (if not as early as January 2, 2015), the plain language of the Faculty Statutes gave Marquette the power to suspend Dr. McAdams' duties pending the faculty hearing so long as pay and benefits were continued in the interim (as here). Furthermore, as Dr. McAdams admitted to his blog readers, fall semester classes were over by December 16, 2014 so he had no teaching duties at the time and he characterized the suspension as "kind of a joke." (Trigg Ex. 19; Tr. Vol. III 34:2-7). All that leaves (at the most) is a short stub period between when spring semester classes began in mid-January 2015, and the receipt of the January 30, 2015 letter from Dean Holz. For that short time frame, Marquette balanced and gave greater weight to the interests of its students not to have Dr. McAdams teach one or two classes and then be replaced with a new teacher as Sections 307.02 and 307.08 expressly provide. As discussed in Marquette's opening brief, Dr. McAdams' claims on this basis are neither material nor the cause of any damages, as is required for a breach of contract claim. (Marquette Br. at 30-31).

Second, with respect to his alleged "banishment" Dr. McAdams again misstates what happened. While Dr. McAdams was instructed to stay off campus on December 16, 2014, that restriction was lifted in writing on February 13, 2015. (Compl. Ex. B; Weber February 13, 2015 Letter (Trigg Aff. 3 Ex. 15); Weber August 21, 2015 Letter (Trigg Aff. 3 Ex. 19); Tr. Vol. III 85:23-86:1; 87:3-20). Instead of returning to campus, Dr. McAdams chose to work from home, because he believed it would be too much of a hassle to have his materials moved to a new office. (FHC Tr. Vol. III 137:1-8; McAdams Depo. 159:19-161:1 (Trigg Aff. 3 Ex. 16)).[9]

Between December 16, 2014 and February 13, 2015 Dr. McAdams was told to remain off campus to allow for a cooling off period while the University completed its investigation. (FHC

[9] As Dean Holz testified, the political science department did not want him to come back during this time. (Tr. Vol. III 87:13-16). Dr. McAdams has never alleged that he is entitled to a specific office.

Tr. Vol. III 33:2-8, 36:8-16, 84:20-86:1). Even then he came to campus as needed during that timeframe with the prior approval of the University to access materials in his office and work on his manuscript. (*See* MARQ-001346; MARQ-003530 (Trigg Aff. 3 Ex. 17)).

Finally, Dr. McAdams claims (somehow) that he was prohibited from even contacting other members of the Marquette community. But the language of the December 16, 2014 Letter says no such thing. Instead it states that he was "relieved of all teaching duties and all other faculty activities, including, but not limited to, . . . any activity that would involve your interaction with Marquette students, faculty and staff." (Compl. Ex. B). Thus, the "interaction" language in the letter merely makes it clear that he was being relieved of all teaching duties and faculty activities. Then, as explained above, on February 13, 2015 he was specifically allowed back on campus and has been allowed on campus ever since that time. Indeed he has continued to email students seeking stories for his blog and advising students it is legal to make secret recordings. (Trigg Aff. 3 Ex. 18).

CONCLUSION

For the reasons discussed above, Dr. McAdams' motion for summary judgment should be denied.

Dated: January 9, 2017

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Exhibit A

Academic Freedom

What It Is, What It Isn't, and How to Tell the Difference

Donald A. Downs

MAY 2009 POPE CENTER SERIES ON HIGHER EDUCATION

The John William POPE CENTER FOR HIGHER EDUCATION POLICY

About the Author

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Donald A. Downs is a professor of political science, law, and journalism at the University of Wisconsin, Madison. An expert on academic freedom, he has advised several schools and organizations on academic freedom issues. He is the president of the Committee for Academic Freedom and Rights (CAFAR), a University of Wisconsin-based group of faculty dedicated to protecting academic freedom on campus and in the state of Wisconsin.

He has taught courses dealing with many aspects of law and politics. Three of his books—*Nazis in Skokie*, *The New Politics of Pornography*, and *Restoring Free Speech and Liberty on Campus*—have received national awards. Downs is currently writing a book entitled *Arms and the University: Military Presence and the Civic Education of Non-Military Students*. He has won numerous awards for teaching, including the university's Distinguished Teaching Award.

Downs has a Ph.D. in political science from the University of California at Berkeley, a master's degree from the University of Illinois, and a bachelor's degree from Cornell. He has also taught at the University of Michigan and Notre Dame.

Academic Freedom

What It Is, What It Isn't, and How to Tell the Difference

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ISSN 1935-3510

Executive Summary

Today's university is rife with competing claims about academic freedom. Although academic freedom is similar to the freedom of speech that all Americans enjoy, it has developed over time into a more specific guarantee for scholars and teachers. This paper explains what is meant by the term and to whom it applies. The paper places academic freedom in its historical, institutional, and legal contexts and offers guidelines for deciding when and where the protection of academic freedom should apply.

At its core, academic freedom is the freedom of scholars to pursue the truth in a manner consistent with professional standards of inquiry. It applies to institutions as well as scholars, and to students as well as faculty. It is bolstered by court cases and tradition and given particular strength by faculty tenure. The tenets have been discussed over the years through formal statements of the American Association of University Professors (AAUP).

As a First Amendment right, academic freedom applies only to scholars in public institutions because the U.S. Constitution protects liberty only against illegitimate governmental or state action and law. The Supreme Court has endorsed this protection, but has not given much guidance for its application.

Faculty have the freedom to teach or research as they wish, subject to accepted professional norms of competence and responsibility, but the school employing them has the right to determine acceptable teaching standards. The school also has the authority to evaluate the competence of the scholar for purposes of hiring, retention, and promotion. And recently, based on a 2006 Supreme Court case, lower courts have begun to give schools greater authority to curtail faculty speech conducted in the course of official duties.

Also holding academic freedom is the academic department, which has professional standards that it has a right to uphold. The student, too, has academic freedom. As stated in the AAUP 1967 statement on student freedom, students have a right to due process and free inquiry, which includes the right to take "reasoned exception" to data and views presented in class.

In the past, the academic freedom of the institution and the individual were largely in harmony. The contemporary university, however, is torn by a cultural clash between traditional notions of individual freedom and recently emergent ideologies that stress the need to be sensitive and caring, especially toward members of historically oppressed groups. Many institutions have adopted speech codes and related policies that restrict what faculty members and students can say about matters relating to race, gender, religion, sexual orientation, and the like.

The legal status of speech codes covering the faculty has not been decided, probably because courts have struggled to balance faculty freedom with the academic institution's power to determine teaching standards. Courts have been much more critical of student speech codes.

Thus, many academic freedom issues exist in an uncertain, gray area. Even so, there are principles that can guide one in judging who has the freedom in any particular circumstance. Professional responsibility requires that instructors and researchers abide by basic standards of intellectual integrity; they must not seek to indoctrinate students; and they must not present propagandistic or fraudulent material as truthful. At the same time, it is wise to make freedom the default position because an enlightened citizenry aspires to encourage honesty and courage in teaching and research.

Academic Freedom

What It Is, What It Isn't,

Today's university campuses are rife with confusion and competing claims over academic freedom. On campus, the freedom of scholars to pursue their ideas is threatened by those aggressively promoting diversity and protecting students against possible harassment through speech. Those efforts, usually from the left, have aroused reaction from outside academe, especially from conservatives who argue that codes against hate speech and verbal harassment violate fundamental rights. This countermovement has led some critics to call for legislatively mandated intellectual diversity to protect ideas that challenge liberal campus orthodoxy. Both of these movements pose threats to the academic freedom of individuals and institutions.

Given these conflicts, it is not surprising that the country is witnessing a spate of statements about academic freedom from organizations such as the American Association of University Professors (AAUP),[1] the American Academy of Arts and Sciences,[2] and the American Council of Education.[3]

Yet, in spite of these pronouncements, exactly what is meant by the term academic freedom and who can claim it are often misunderstood. Although academic freedom resembles the freedom of speech that all Americans enjoy, it is a more specific guarantee for those who explore and acquire ideas and knowledge in a professional academic context. This essay will place academic freedom in its historical, institutional, and legal contexts and offer some guidelines for deciding when and where the protection of academic freedom should apply. At the outset I would like to make my own position clear: academic freedom—like all freedoms—can prevail only if it is vigorously defended by individuals and groups who are in a position to make a difference. It is a matter of the mind, the heart, and the will.

In this essay, I will also consider practical ways of negotiating the tension between individual freedom and academic responsibility. Academic freedom is a professionally derived concept, which means that its freedoms also depend on fulfilling certain fiduciary responsibilities. It does not give instructors carte blanche to do what they want in the classroom or elsewhere. At the same time, academic institutions, which have a right to expect those responsibilities to be met, must also be trustworthy in disciplining faculty.

Defining Academic Freedom

At its core, academic freedom is the freedom of scholars to pursue the truth in a manner consistent with professional standards of inquiry. Liberal democracies protect academic freedom on the grounds that the open pursuit of knowledge and truth provides substantial benefits to society, and because freedom of thought is essential to the fulfillment of human nature.

Through tradition, court cases, scholarly commentary, and faculty contracts, academic freedom has become a complex concept with different dimensions. Sometimes these dimensions compete with one another, as when institutional academic freedom clashes with an individual's academic freedom. In general, academic freedom applies more fully to universities and colleges than to primary and secondary educational institutions. (Schools for young students have a greater interest in inculcating respect for traditional values and authority.[4])

As the essay proceeds, the reader will discover that while the basic principles are clear when considered in isolation, their application can be difficult because of the tension

that exists among competing principles and because higher education has been politicized in recent decades. The framework I provide can only serve as a compass, leaving the decision about how to proceed to a combination of judgment and, I hope, a strong commitment to intellectual freedom.

A fundamental distinction should be kept in mind. Academic freedom as a First Amendment right applies only to scholars in public or state institutions because the U.S. Constitution protects liberty only against illegitimate governmental or state action and law. Scholars in private institutions also usually possess academic freedom rights, but these derive from contractual agreements between scholars and their institutions or from protections granted by state law, not the Constitution. The content and scope of those contractual rights vary depending upon the nature of the contracts. (Contracts and state law can also influence the academic freedom rights of scholars in public institutions but cannot contravene basic First Amendment principles that apply to all public schools.)

In some key respects, academic freedom is narrower than the general freedom of speech under the First Amendment. For example, U.S. citizens are free to say things that are false unless their falsehoods constitute libel or slander, or some other clearly demonstrated harm.[5] They have a right to profess that the world is flat, but such expressions would be grounds for flunking a course in geography or astronomy or for terminating an instructor who taught such nonsense. The pursuit of truth in universities requires adherence to fundamental principles of intellectual integrity and responsibility—obligations that are not enforceable in the general marketplace of ideas.

In another respect, however, the protection of academic freedom is stronger than the general guarantee of freedom of expression in the First Amendment. That is because job tenure has historically been a bulwark of academic freedom. Although citizens have a right of free expression, that right does not include job protection. For tenured scholars, it usually does.

The Role of Tenure

Tenure is typically granted after a teacher or researcher has successfully completed a probationary period and performed with adequate distinction, as defined by the relevant institution. Tenure provides teachers and researchers with job protection—except in extraordinary circumstances such as severe financial distress—as long as they conduct themselves in a professional manner. A related right is the right of due process in discipline and dismissal decisions.

Such job protection is meant to ensure that faculty members will pursue the truth without fear of losing their jobs. Some critics doubt that tenure inspires such pursuit today, pointing to faculty members' reluctance to challenge speech codes and campus pressures to conform. Nonetheless, there is reason to believe that tenure remains a necessary, if not sufficient, means to protect free inquiry.[6]

Tenure is not a constitutional right per se, but courts will intervene if evidence shows that a faculty member has been denied tenure in violation of the employment contract (or other relevant legal rights provided by the institution), or if there is sufficient evidence of illegal discrimination by the department or the institution. In the absence of such

evidence, however, courts are leery of substituting their own judgment for those of the faculty member's academic peers.[7]

A recent U. S. Court of Appeals decision illustrates that a university's own documents are important in protecting tenure. The Inter-American University in Puerto Rico had dismissed Edwin Otero-Burgos, a tenured professor who fought (internally, not publicly) against the university's decision to give one of his students a special opportunity to raise his grade. The U.S. District Court of Puerto Rico ruled against the professor, holding that Puerto Rico Law 80 allowed the university to dismiss a faculty member as long as it provided a sufficient (though modest) severance payment. The appellate court reversed the decision, saying that the Faculty Handbook revealed a "substantial commitment" to its tenured faculty, and thus to Otero-Burgos.[8]

Faculty members who do not have tenure also enjoy basic due process and academic freedom protections, though generally less fully than faculty members who have tenure—mainly because they have limited-term contracts, and because the politics and folkways of campus life bestow more power upon tenured faculty members. Terminating the contracts of non-tenure-track faculty members before the specified end date for reasons other than financial emergency or incompetence could violate academic freedom if such individuals work at a state institution or their contracts require just cause for dismissal.

Many observers believe that the future status of tenure is in jeopardy, especially due to financial and other pressures. Already, the number of non-tenured teachers in higher education has surpassed the number of tenured teachers. Indeed, the fact that the court based Otero-Burgos's right on provisions in the faculty handbook, rather than the U.S. Constitution, may open the door to weakening tenure. Without a constitutional foundation, tenure can be limited by legislative or administrative action.

Who May Claim Academic Freedom?

In delineating the contours of academic freedom, two basic dimensions are most important. One is the type of person or group that may lay claim to academic freedom: individual teachers or researchers; academic institutions; departments and schools within institutions; and students. The other dimension is the professional context in which academic freedom can arise: teaching; researching; and extramural (outside the educational institution).

The U.S. Supreme Court has not provided much guidance in either area, leaving decisions largely in the hands of lower courts or the discretion of institutions. Peter Schmidt points out in a recent essay in the *Chronicle of Higher Education* that the Supreme Court has long held that the First Amendment protects academic freedom at public colleges and universities. "But it has left unanswered a host of key questions like what types of activities 'academic freedom' covers, or whether it affords individual faculty members speech rights beyond those of other citizens," he writes. Schmidt quotes Judge Harry T. Edwards of the U.S. Court of Appeals for the District of Columbia Circuit, who observed in a recent case upholding the Bush administration's restrictions on academic travel to Cuba, that it is unclear "whether academic freedom is a constitutional right at all."[9]

Let us begin with the first dimension—identifying who has a right to academic freedom, especially when rights conflict.

The Individual

The basic idea of intellectual freedom was born with Socrates and the philosophical schools of ancient Athens in the fourth century B.C. Devoted to pursuing the truth without regard for conformity and social pressure, Socrates chose to die by taking hemlock rather than cease "corrupting" youth by teaching philosophic thought. The

Socrates chose to die by taking hemlock rather than cease "corrupting" youth by teaching philosophic thought.

Socratic conception of intellectual freedom is inherently individual in nature. Though modern universities and colleges are large, often labyrinthine institutions, their essential meaning remains Socratic. As Allan Bloom wrote, "One cannot imagine Socrates as a professor, for reasons that are worthy of our attention. But Socrates is of the essence of the university. It exists to preserve and further what he represents."[10]

The *Otero-Burgos* case above appears to interpret academic freedom as an individual freedom. Teachers and researchers have the right to teach and pursue truth according to their own lights, subject only to accepted professional norms of competence and responsibility. The cases in which the U.S. Supreme Court forged the basic notion of academic freedom dealt with restrictions on individual instructors during the McCarthy era of the early 1950s. Governments had passed legislation calling for loyalty oaths and various restrictions on group membership as qualifications for teaching. Two cases in the aftermath of McCarthyism stand out.

Sweezy v. New Hampshire (1957) involved the firing of a lecturer for refusing to testify about his political beliefs before the state legislature; *Keyishian v. Board of Regents* (1967) dealt with New York laws that restricted the hiring of allegedly subversive teachers.[11] In ruling in favor of the instructor in each case, the Court emphasized both individual and institutional academic freedom. In *Sweezy*, for example, Justice Frankfurter's well-known concurring opinion invoked Socrates. And in his opinion for the Court in *Keyishian*, Justice Brennan issued one of the most famous statements in the lore of free thought:

> Academic freedom…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.[12]

The Institution

In those and similar cases, the threat to freedom emanated from outside academia, so institutional and individual academic freedom were more or less in harmony; accordingly, before the 1970s, the Court believed that institutional and individual academic freedom went hand in hand.

As law professor (and former chair of the Association of American University Professors' committee on academic freedom) David Rabban has written, the Court "agreed with the AAUP that the academic freedom of professors depends to a substantial extent on the independence of the university from the state." Rabban noted that Justice Felix Frankfurter's concurring opinion in *Sweezy* "emphasized the close connection between university autonomy and academic freedom. 'Any government intrusion into the intellectual life of a university,' he warned, would jeopardize the essential functions of professors."[13]

Yet the presumption of harmony between institutional and individual aspects of academic freedom dissipates when the threat to academic freedom comes not from outside the university, but from within. The contemporary university is torn by a cultural clash between traditional notions of individual freedom and more recently emergent ideologies that stress the need to be sensitive and caring, especially toward members of historically oppressed groups. Although this tension may have abated somewhat since the 1990s, it is still a powerful force on campus, rendering the status of academic freedom on campus murky and problematic.[14]

Indeed, institutional autonomy is, perhaps surprisingly, the most important of the four major types of academic freedom, at least in legal terms. It is predicated on the assumption that society's interests in attaining academic objectives are best secured by leaving substantive decisions about education in the hands of professionals chosen by their institutions.

This view of intellectual freedom was shaped during the fifteenth and sixteenth centuries in Europe as a means to protect the corporate interests of the rising universities from undue governmental interference. Some European countries such as Great Britain have long stressed the institutional dimension of academic freedom, and it has also carried significant weight in the United States, despite our nation's tradition of individualism and individual rights. Interestingly, Justice Frankfurter's opinion in the Sweezy case ultimately rested on institutional rather than individual academic freedom, the Justice's invocations of Socrates notwithstanding.

...institutional autonomy is, perhaps surprisingly, the most important of the four major types of academic freedom...

And in the famous 1978 *Bakke* affirmative action case, Justice Powell concluded that so long as it did not violate basic Fourteenth Amendment principles, the University of California was free to "determine for itself on academic grounds: 1) who may teach; 2) what may be taught; 3) how it shall be taught; and 4) who may be admitted to study." *Bakke* is often cited in support of institutional academic freedom.[15]

Accordingly, U.S. courts have often sided with the right of administrators. Their decisions can run counter to the decision in the *Otero-Burgos* case discussed above, as they bestow primary power in the institution rather than the individual instructor. Such emphasis makes sense when it comes to fundamental pedagogical responsibilities (such as competence in the subject matter, sticking to the subject matter of the course, not discriminating against students, and not using the classroom as a vehicle for proselytizing). It jeopardizes academic freedom, however, when institutions require pedagogical or scholarly conformity to ideas, values, and goals that comprise conventional wisdom on campus, such as diversity or other forms of moral orthodoxy.

Several cases illustrate the courts' support of institutional freedom. In *Edwards v. California University of Pennsylvania*, a federal court ruled against a professor who was suspended without pay for pushing his religious beliefs in lectures.[16] The court's ruling in *Edwards* was broad, holding that the university could control course content. "Our conclusion that the First Amendment does not place restrictions on a public university's ability to control its curriculum is consistent with the Supreme Court's jurisprudence concerning the state's ability to say what it wishes when it is the speaker." Similarly, the Seventh Circuit Court of Appeals has recognized that a university's "ability to set a curriculum is as much an element of academic freedom as any scholar's right to express a point of view."[17]

In *Edwards*, the court addressed the professor's academic freedom rights and the right of the university to set teaching standards. It concluded that the First Amendment does not give a public university professor the right to use curricula or teaching techniques that conflict with institutional pedagogical or policy requirements.

The court did not resolve grayer issues, however. What if the instructor made critical remarks about affirmative action in a class that dealt with equal protection under the Constitution? Or offered critical thoughts about the political or moral implications of certain religions? Such opinions could well conflict with the policy of the institution—but should not such opinions be protected if they are germane to the subject matter of the class?

In another case, *Hetrick v. Martin*, a federal court wrote that academic freedom "does not encompass the right of a non-tenured teacher to have her teaching style insulated from review by her superiors…just because her beliefs and philosophy are considered acceptable somewhere in the teaching profession."[18] As in *Edwards*, this case did not involve institutions dictating the substantive content of the course or the conclusions that a faculty member might reach in class; such interference would be much more threatening to the academic freedom of the individual instructors.

And in *Urofsky v. Gilmore*, a federal appeals court ruled against faculty members who challenged a new Virginia statute requiring state employees to get prior written approval before accessing information "having sexually explicit content" using computers owned or leased by the state. In a decision that presented a very restrictive view of individual academic freedom, the court majority stressed that academic freedom is historically an institutional right and that faculty members who do research on sexuality do not possess any greater rights than the general public, even in the context of the university.[19] *Urofsky's* logic has continued to influence judicial decisions, with such exceptions as *Otero-Burgos*.

One prominent case involving a clearly unjustifiable institutional violation of individual rights took place in late 2001 and 2002 at Brooklyn College in the City University of New York. The college denied the exceptionally qualified Professor Robert David "KC" Johnson tenure because he had objected to a hiring decision based on race and gender rather than merit. The case revealed a highly politicized campus and union that had much more regard for a political

agenda than academic responsibility. The tenacious Johnson fought back hard, utilizing political mobilization and lawyers, and compelled the college to reverse its decision within a couple of months. This case is among the clearest examples of an institution forsaking its commitment to the principles of academic freedom and responsibility, and it serves as a yellow light (or red light!) to those who place unquestioning trust in educational institutions to enforce these principles. Johnson, the individual, upheld the responsibilities of the profession in the face of institutional abnegation.[20]

The problem of giving too much power to the institution, illustrated by KC Johnson's case specifically, is revealed more broadly by the change in the campus environment regarding free speech. Beginning in the late 1980s, many institutions passed speech codes and related policies that restricted what faculty members and students can say (in class and on campus) about matters relating to race, gender, religion, sexual orientation, and the like. In numerous cases around the country, individuals—faculty and students—have been disciplined or investigated for saying things that clashed with reigning orthodoxies.

Courts have been more critical of student speech codes than of faculty speech codes. The legal status of speech codes covering the faculty is unclear, however. It appears that courts have struggled to balance the presumption of faculty freedom with the academic institution's power to determine standards for responsible teaching. Yet faculty codes can be very broad, and can, therefore, threaten academic freedom.

Troubling applications of a particularly broad faculty speech code sparked a political movement at the University of Wisconsin, Madison. This movement, led by the Committee for Academic Freedom and Rights (CAFAR), an independent group of 25 faculty members from across the political spectrum, persuaded the faculty senate at Wisconsin to abolish the code in 1999. It was the first instance of a major university abolishing a code without being ordered to do so by a court. This case suggests that academic freedom is best defended by conscientious political action on campus, rather than by reliance upon courts. CAFAR helped enact subsequent reforms at Wisconsin, one of which made academic freedom an "individual right" (as opposed to an "institutional right") in the university's official policies and regulations.[21]

I will conclude this section by addressing private schools and religious schools, which are generally not subject to the First Amendment. Unless these schools have bestowed academic freedom rights to their faculty through contract or charter, they possess the institutional right to circumscribe the freedom of students and faculty members, much like the power that any private corporation would enjoy.

Private schools are often established to strive toward a particular normative vision, and the right of a school to pursue this vision is an important component of freedom that may mean placing limits on the freedom of individual inquiry. It would be wrong to require a Christian college to hire a teacher who hated Christianity—although some such colleges might find it in their interest to do so. The point is that this decision lies within their discretion. In such cases, freedom properly accrues to the institution, not the individuals within the institution. Questionable restrictions of the freedom of students and faculty members in such institutions can be proper grounds for criticism, but not legal action.[22]

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men of the highest ability, of sound learning,
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Freedom of Professionals

The Declaration of Principles issued in 1915 by the American Association of University Professors (AAUP) has played an important role in guiding standards for academic freedom.[23] The AAUP was at one time the leading professional organization dedicated to academic freedom in higher education, although it has been overtaken by the Foundation for Individual Rights in Education (FIRE). Founded in Philadelphia in 2000, FIRE has responded to the rise of internal threats to academic freedom and been more willing than most other national organizations to protect individual academic freedom in an era in which threats are posed by the institution itself.[24] (The American Civil Liberties Union has been involved in several cases, as well.) In addition, academic freedom groups have arisen on individual campuses, such as Wisconsin's CAFAR.

Although the 1915 AAUP declaration seemed to embrace both individual and institutional academic freedom, it actually introduced a third realm of academic freedom. The declaration stated that "faculties hold an independent place" in higher education, a position essential "to enhance the dignity of the scholar's profession, with a view to attracting to its ranks men of the highest ability, of sound learning, and of strong and independent character."

This statement incorporated the power of academic professionals organized into departments or fields—like that of doctors, lawyers, and other professions—and backed by national organizations based on scholarly disciplines, such as the American Political Science Association or the American Historical Association.[25] These disciplinary fields have taken on guild-like powers, reflected in the right of departments and schools within universities to have the major (though seldom exclusive) say in who shall be hired and who shall be awarded tenure. Such power is not constitutionally based, but rather the result of policy decisions made by government bodies or institutions at their own discretion. The educational institution holds the ultimate power but often delegates many important decisions to departments out of deference to their professional expertise.

Departmental freedom—backed by the powers of the profession—should be construed as a type of academic freedom that lies between institutions and individuals—and is potentially in conflict with both. University deans or presidents may raise academic freedom issues by vetoing a hiring or tenure decision by a department. Or a department may refuse to give tenure to someone because of ideological or methodological differences, raising a question of academic freedom for the individual.

Who possesses the trump card in such disputes? Usually the rights and powers of individuals, departments, administrators, and regents or trustees are delineated in university procedures. Difficult decisions arise, however, when substantive differences of opinion exist.[26]

Freedom of Students

The fourth major kind of academic freedom concerns students. Speech codes pit institutional norms of sensitivity against students' rights to express insensitive or unorthodox thoughts. I have already noted that courts have generally rejected speech codes restricting what students can say on campus,[27] although universities have continued to enforce them.[28]

The issue is larger than speech codes, however. Student academic freedom is addressed in the AAUP's 1967 Joint Statement on Rights and Freedoms of Students.[29] Emphasizing the importance of developing critical judgment, this statement strongly supports students' rights to due process and free inquiry. These include a student's right to take "reasoned exception" to data and views presented in class. Not surprisingly, the academic freedom of students, teachers, and institutions can clash.

The most non-controversial student right is to be graded and treated fairly, without regard for such things as the students' "ascriptive" characteristics (e.g., race, gender, religion, sexual orientation, etc.) or political beliefs, military status, and the like. Many claims of politicized grading have been made by students in recent decades. If true, such claims would raise serious questions about the integrity of such institutions. (No one to my knowledge has conducted a systematic study of this issue.)

In a related vein, some students have objected to the intellectual orientations of some instructors. In 2004 and 2005, for example, many students at Columbia University publicly objected to what they considered ideologically slanted and bullying teaching in the Department of Middle East and Asian Languages and Cultures. Academic freedom advocates and experts found themselves on both sides of this controversy, torn between the rights of faculty to teach courses according to their lights and students' rights to fairness and counter-speech.[30] Students at other schools

have accused professors of harassment for expressing insensitive views about race, gender, religion, or sexual orientation.

One solution is for the department chair or dean to meet with the instructor to discuss the students' concerns and ask the instructor to show more respect for student critiques, including allowing critical responses in class. Justice Louis Brandeis, a great champion of free speech, wrote in a classic opinion that "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones."[31] Promoting student academic freedom is one way to honor Brandeis's wisdom.

In most cases, a faculty member will be responsive to such student claims. But if a professor introduces controversial material and forecloses debate or disagreement, this can be a violation of professional responsibility, and department chairs and deans will have grounds to question the professor and ask for more openness in the classroom. However, if administrators mandate openness too forcefully or thoughtlessly—rather than encourage it in a respectful manner—their pressure can become coercive and may raise concerns about the academic freedom of the professor.

We should not discourage professors from seeking truth and being honest about their thoughts in class. There is nothing inherently wrong with a professor taking a position in class, so long as he or she avoids falling into the trap of dogma (teaching a contested claim as absolute truth) or making students conform to a prescribed moral or political viewpoint. The issue of student free speech in the classroom can be a delicate one, requiring careful judgment. But we must not lose sight of the fact that students do indeed possess academic freedom rights.

A second approach is to allow students to critically evaluate professors. Such evaluations can be used in reviews for merit and pay raises, and in tenure decisions. If those evaluations are available to all students (as is usually the case today, often on-line), they can provide notice to other students when they choose their courses. Dogmatism in class is almost always wrong, but it is worse when the class is a required course and there is no exit.[32]

In recent years, conservative students have charged liberal or secularist teachers with being insensitive to their viewpoints. A national organization, Students for Academic Freedom (an offshoot of activist David Horowitz's Center for the Study of Popular Culture) has promulgated a Student Bill of Rights, which calls for legislative action, if necessary, to ensure intellectual diversity and protection of conservative ideas on campus.[33] The call for outside pressure in pertinent cases is understandable, but it can also threaten institutional and individual academic freedom, especially if it calls political authority into play. Many observers agree with Horowitz's assessment of the problem, but do not support his proposed remedy.

The tensions among liberal, conservative, sensitivity, and post-liberal or post-modern critical viewpoints on campus make it harder for university leaders to resolve disputes.

On the other side of the political spectrum, the traditional and once-dominant liberal view of freedom—which largely gave free rein to expressing one's views—is being countered by new "critical" and post-modern theories of freedom. These theories, along with the new "sensitivity" theories mentioned earlier, often maintain that liberal notions of individual freedom are a mirage, for individuals are ultimately shaped and influenced by various forms of social pressure and power. Such views are especially prevalent in some of the humanities and in administrative offices dealing with student life.[34]

The tensions among liberal, conservative, sensitivity, and post-liberal or post-modern critical viewpoints on campus make it harder for university leaders to resolve disputes. In terms of a governing philosophy, universities suffer from the condition Yeats depicts in his classic poem, "The Second Coming," in which "The falcon cannot hear the falconer; / Things fall apart; the centre cannot hold."

The Contexts of Academic Freedom

In addition to the question of who has rights to academic freedom, there is the question of the context in which freedom of expression is protected. The AAUP's 1940 Statement of Principles on Academic Freedom and Tenure, which reaffirmed the association's commitment to academic freedom, also affirmed duties and responsibilities relating to the three important contexts: research, teaching, and extramural activities.[35]

Research freedom should be expansive, but must not interfere with the adequate performance of a teacher's other academic duties, the statement said. Freedom in teaching must be assured, but the teacher "should be careful not to introduce into his teaching controversial matter which has no relation to his subject." And when expressing views outside the classroom (extramural), the teacher should be free from censorship or discipline but also strive to be accurate and to acknowledge that he or she is not speaking for the institution.

The next few paragraphs suggest some initial distinctions for determining which actions in these contexts are protected.

RESEARCH

The pursuit of knowledge should be even freer than teaching. Research is intended to push the frontiers of knowledge, so obligations to the sensibilities of students and colleagues are minimal or nonexistent. Research should be governed by professional standards of competence, subject to the collective judgment of peers and society but not to punishment or discipline unless it contravenes the law or ethical academic norms, as in the case of plagiarism. There should be no formal sanctions for ideas, however offensive. The doctrine of evolution deeply offends some religious sensibilities, for example, and discussions of the law and morality of abortion ruffle many feathers—but such discussions should never be off limits. The right to offend is an essential, indispensable ingredient of intellectual freedom.[36]

TEACHING

Teaching must be bound by the subject matter being taught, however broadly construed; and teaching necessarily involves a "captive" audience. Consequently, norms of civility are more properly part of teaching than research. Intellectual honesty—being honest and forthright about one's intellectual position—should be valued at all times, and such honesty will sometimes offend those who disagree with the teacher.[37] All ideas or beliefs germane to the subject matter of the class should be allowed for both teachers and students, regardless of how insensitive they might appear. But responsible teachers will avoid gratuitous offending remarks.

EXTRAMURAL EXPRESSION

The right to extramural expression by scholars in public institutions has traditionally fallen within general First Amendment protection. Thus, the institution has had less power to restrain it than elsewhere. When a teacher publicly expresses an opinion about a matter "of public concern," the Supreme Court has required administrators to provide evidence of demonstrable harm to the institution before allowing the teacher to be disciplined. In a key 1968 case, *Pickering v. Board of Education*, the Supreme Court overturned the dismissal of a public school teacher who had been fired for writing an editorial in the local paper charging his school board with wasting money. The right to speak out as a citizen on this matter of public concern outweighed any disruptive effect the editorial might have caused.[38] In 1983, the Court weakened *Pickering's* protections somewhat, limiting what kind of expression met the "public concern" standard.[39]

But in 2006 the Supreme Court changed the playing field, with potentially significant but still uncertain ramifications for scholars. In *Garcetti v. Ceballos*, the Court upheld the discipline of a supervising district attorney. He had recommended (in a disposition memorandum) that a case be dismissed because he thought a search warrant had been obtained on the basis of false representations.

Even though his comments raised important questions about the conduct of an important public office, the Court distinguished his speech from the speech in *Pickering*. Pickering had written about something beyond the ken of his duties as a teacher, but this attorney was acting in his official capacity. Justice Kennedy wrote, "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[40]

In a dissenting opinion, Justice Souter wrote, "I have to hope that today's majority does not imperil First Amendment

protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to official duties.'"[41] Souter's concern appears to have some validity, and some critics have sounded alarm bells.[42] Two other recent cases suggest that the *Garcetti v. Ceballos* case may be having an impact.

In the fall of 2007, the Seventh Circuit Court of Appeals held that a professor at the University of Wisconsin-Milwaukee acted in an official capacity when he contested the way that university administrators were handling a National Science Foundation grant that he and some colleagues had received. The university reduced his pay and returned the grant. The professor's speech did not meet the *Pickering* standard, the court concluded; he was speaking as an employee, not a private citizen.[43] In another recent case, a U.S. District Court in California ruled that a professor at the University of California at Irvine was not protected by the First Amendment when he criticized his department's hiring and promotion policies and its alleged overuse of graduate students rather than tenure-track professors as lecturers.[44]

In these cases, the faculty members did not take their claims to the public, as Pickering did; their speech was internal to the university, arguably dealing with matters related to the everyday functions of the job. In this sense, their speech was not exactly "extramural" in the normal sense of that term, so the courts' decisions in favor of the institutions had, perhaps, some justification. But these decisions nonetheless threaten academic freedom for two reasons.

First, at many universities, including Wisconsin, "public service" is one of the major criteria for tenure, promotion, and merit. Thus, speaking out in public is part of the job description. Yet such public expression could find itself outside the realm of First Amendment protection as a result of *Ceballos* and its progeny—at least until the Supreme Court clarifies matters.

Second, under *Ceballos* and related cases, the right to criticize the university could be in jeopardy—and perhaps even public speech unrelated to the university, depending on how a faculty member's duties are defined. This line of decisions casts a pall over the incentive to engage in internal criticism of university action and decisions. Given the campus political pressures and forces that I have discussed, this lack of protection could enhance campus orthodoxy.

If First Amendment protection in this domain is not availing, the only remedy is constructive mobilization on campus designed to make such protection part of the institution's own rules. In the long run, this form of protection might be preferable because it is earned by communal action rather than reliance on the beneficence of courts.

Four Examples of Academic Freedom Issues

To help apply the principles articulated above, I will describe four examples of conflicts over academic freedom and discuss the principles and practical issues they raise.

1. Controversial material that raises questions of scholarly competence or responsibility

In her book *History Lesson*, Mary Lefkowitz, a professor of classics at Wellesley, discusses the situation of a professor assigning material that is not just controversial but also very one-sided and non-scholarly.[45] The specific example she cites is the book *The Secret Relationship between Blacks and Jews*, published by the Historical Research Department of the Nation of Islam (1991), an anonymous inflammatory work assigned by one of her faculty colleagues.

This type of case, in which a professor uses a work that does not meet normal academic standards, can pit the freedom of the professor to choose material for the class against the institution's obligation to ensure professional responsibility. Student academic freedom rights can also be implicated, if students react to what they consider to be objectionably one-sided teaching.

Even if there is universal or strong agreement that the material is irresponsible scholarship, we should approach this case with caution. If departments or institutions are authorized to intervene in such cases, such authorization can set a precedent that will allow campus orthodoxies to be imposed on individual instructors who dissent from these views. I know of a prominent professor who has labeled as "evil" what I consider one of the best books on free speech, and which I assign whenever I teach the First Amendment—Jonathan Rauch's *Kindly Inquisitors: The New Threats on Free Thought*.[46] Rauch's book is noteworthy because it clearly shows why free speech and thought are essential to the advancement of knowledge and truth, and because it does the best job I have seen of delineating the most important contemporary threats to free thought. I would not feel secure having this moral critic of Rauch's book making administrative judgments about the books that I teach.

Furthermore, as Lefkowitz elucidates, concerned campus authorities should focus on not only one particular book that may be used in a course, but consider it in the context of the other readings for the course. In addition, what is the motive for assigning the book? Is the instructor using the book as an example of a questionable form of scholarship or as a representative argument of extremists? Or is the instructor using the book in order to engage in propaganda? If the latter situation prevails, then appropriate action is warranted.

The default position in this type of case should be to uphold the academic freedom of the instructor to choose the reading material that he or she wants and to utilize informal remedial mechanisms, if necessary, to persuade him to reconsider those materials when there are strong reasons to doubt their academic or pedagogical validity.

because they don't like what the professor stands for or because they have a viewpoint-neutral obligation to uphold professional standards of teaching and inquiry? If the primary motive is the former, then any action against the professor violates academic freedom. If the motive is the latter, then action is justified.

The underlying principle for department chairs and deans is to be skeptical in enforcing academic responsibility. Though institutions have the right—indeed, the duty—to insist on academic responsibility in clear cases of abuse by faculty members, they should be circumspect in exercising this power. Higher education today is beset by many political pressures. Laws are legitimate only if the state is fair and evenhanded in their enforcement. The same principle applies to higher education, and evenhandedness may be difficult to find.

We must rely upon a famous Russian motto regarding diplomacy that President Ronald Reagan often quoted: Trust (the professor's academic judgment), but verify.

But what if the instructor persists in using unscholarly material for illegitimate purposes, such as propaganda? Does academic freedom mean that institutions must remain helpless to enforce basic norms of scholarly responsibility? As discussed above, academic freedom exists within the broader context of professional standards and competence. At some point, departments and institutions must be able to deal forcefully with unprofessional teaching.

If instructors do use such material for intellectually invalid purposes, administrators should have the power to take appropriate action, which can range from mild sanctions to not letting the person teach the course, and even to termination in extreme cases, depending on the circumstances. (If the instructor has tenure, that complicates the matter, but the principle remains the same.) Taking such action under the right circumstances is justified, so long as the decision-makers act with respect for the rights and responsibilities of academic freedom.

In such cases, department chairs and deans must ask themselves a fundamental question: Are they taking action

At the same time, it would be a severe mistake to forsake well-recognized standards of academic responsibility, for without such standards, universities lose their claim to special status in our society. We must rely upon a famous Russian motto regarding diplomacy that President Ronald Reagan often quoted: Trust (the professor's academic judgment), but verify.

2. Insensitive remarks

Let's consider the narrower problem of faculty members' insensitive remarks in class. The distinction between gratuitous and non-gratuitous offense provides a starting point.

In my own department of political science at the University of Wisconsin, a teaching assistant was told in the late 1980s that he would be terminated from teaching the class if he continued to make disparaging remarks about the religion of one of the students, who was a Catholic. The remarks were not germane to the course and were precipitated each week by the student's wearing a necklace with a cross. In serving on the committee that made this

decision, I stressed that the situation would have been different had the teaching assistant made a critical, non-personal comment about Catholicism in a class dealing with religion and politics, for all views germane to the subject matter must be allowed. Had the class itself "piled on" the student in discussions about religion, then the instructor would have a responsibility to maintain basic civility, but higher education must not be in the business of saying that only non-offensive ideas may be presented. This point is especially important in an age in which skins are already so thin. Indeed, teaching students to have tougher skins is one way to prepare them for the rigors of constitutional citizenship.[47]

One recent example of the threat of improper sanctions in this context is the case of economist Hans-Hermann Hoppe at the University of Nevada-Las Vegas in 2005. In a class dealing with the propensity to save for the future, the well-known economist referred to homosexuals as an example of a group with a lower time horizon for saving (apparently because they generally do not have children). A homosexual student in the class considered the comments demeaning. Rather than meeting with the instructor to discuss the matter (always the preferred route), he filed a harassment complaint. The administration then embarked upon a formal investigation that involved oppressive scrutiny.

The case wore on until the American Civil Liberties Union got involved on Hoppe's behalf, and the university eventually dropped the investigation. Hoppe's case appears pretty straightforward: his remarks were made to illuminate the matter under discussion, rather than gratuitously. Therefore, Hoppe's remarks were protected by academic freedom.[48]

Had Hoppe made disparaging comments about homosexuality for their own sake, such remarks would have fallen outside the umbrella of basic academic freedom principles. Even if that had been the case, he should not necessarily have been punished for such statements, absent repetition of them. That is because it is a good idea to provide breathing space for academic freedom by erring on the side of freedom.

In the famous 1964 Supreme Court case *New York Times v. Sullivan*, the Court gave substantial First Amendment protection to the libel of public officials even though such expression is not in principle worthy of protection.[49] The Court stressed the prudential need to give breathing space to speech that is critical of the government. The same principle should apply to classroom speech. Coercive sanctions should not be applied to demeaning remarks unless they are clearly gratuitous and degrading.

3. Extramural Comments

Some interesting cases involve comments made by faculty members outside of the classroom. A classic example is Arthur Butz, a professor of engineering at Northwestern University. Butz has been outspoken in denying the accepted understandings of the Holocaust in public commentary and on his personal Web page at work, causing embarrassment to his university. But he has been careful to keep such commentary out of class, where it has no relevance. (Indeed, the university has made a point of requiring this posture in class.)

Due to pressure from inside and outside the university, Northwestern considered shutting down Butz's Web site (or not letting him express his views about the Holocaust on it), especially after he began posting versions of his work *Hoax of the Twentieth Century*. In the end, the university decided that the Web site is a personal forum entitled to free speech protections (regardless of the fact that Northwestern is a private school). Butz possesses the same right as any other citizen to express his views about this matter.

At the same time, the university has publicly distanced itself from Butz's views, which is its institutional right under basic free-speech principles. As mentioned above, faculty members have more rights to free expression in such extramural contexts than they do in the classroom (so long as they meet the narrowing *Pickering* and *Ceballos* standard). Butz has a right to free expression in his research about the Holocaust, but his colleagues possess the institutional academic freedom to evaluate and to reward him—or to not reward him—based on their judgment of the quality of his work. If they based their decision on their moral disagreements with his position on the Holocaust, they would run afoul of academic freedom principles.

Interestingly, while Butz maintains his teaching position because he does not address the Holocaust in his electrical engineering class, the university did not renew the contract of an engineering teaching assistant who brought Holocaust material to class that affirmed the actuality of the Holocaust. The institution had the right to prohibit the introduction of irrelevant material into the class.[50]

Although faculty members cannot normally be fired because of extramural comments unless they clearly demonstrate

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intellectual irresponsibility and seriously disrupt or harm the institution on that account, such commentary can legally affect institutions' decisions to hire in the first place, or to renew contracts, if such comments cast legitimate doubts on the competence or professionalism of the instructor. Hiring decisions typically involve consideration of the overall ability of the candidate, and extramural commentary can provide information in this regard. If, for example, an otherwise worthy candidate had written editorials claiming that the earth is flat, or that astrology is more scientific than astronomy, such commentary would indeed be relevant to hiring in geology and astronomy departments, and perhaps others, as well. Highly intemperate screeds in the media could also cast light upon a person's fitness to be a member of a department, at least when it comes to hiring decisions. Termination of someone with tenure or a contract presents a significantly higher hurdle in this context and is presumptively beyond the pale, as the Butz case shows. We must remember that the right to engage in extramural speech is strong, and that it is one of the few areas in which individual academic freedom has actually received constitutional protection from the Supreme Court, the *Ceballos* decision notwithstanding. Faculty members should speak their minds honestly, and with passion, if need be.

4. Research

Research also possesses strong protection unless it is conducted in an academically irresponsible manner. Poor research can lead to one not being hired in the first place, to not being rehired, or to not obtaining tenure. The academic freedom and judgment of the department or institution must be respected when it comes to determining who shall join the ranks, unless the decision is clearly based on bias. If a faculty member has tenure, it is much more difficult to terminate him or her for poor research (though pay raises, teaching choices, and other privileges can be affected in such situations), unless the contract specifies the expectation of growth in research.

Institutions may punish or dismiss researchers if their work constitutes academic fraud. A couple of years ago, the University of Colorado fired the controversial tenured professor Ward Churchill despite his voluminous writings because a professional committee appointed by the chancellor concluded that he was guilty of several counts of plagiarism. Already notorious for his scathing criticisms of America, Churchill earned his greatest fame for his comments in the immediate wake of the September 11 attacks on the Pentagon and the World Trade Center, in which he accused the workers in the Towers of being "little Eichmanns." In reaching its decision, the committee that investigated Churchill had to be careful not to base its decision on the public's hostility to his views. Were the decision to rest on this ground, Churchill would have an academic freedom claim. But no institution worth its salt can tolerate plagiarism or other forms of academic fraud. Academic freedom does not extend to passing off the work of others as one's own.

Another example of academic fraud allegations is the case of Emory University professor Michael A. Bellesiles, who resigned in 2002 after a panel from three major universities released a report that criticized the research for his book *Arming America: The Origins of a National Gun Culture*, which dealt with the history of guns in the United States. The panel accused Bellesiles of falsifying his data about the historical use of guns in order to buttress his position, one that was uncongenial to advocates of the right to bear arms. Bellesiles's research misconduct was clearly beyond the pale of academic freedom, so sanctions would have been in order had he not chosen to resign. No researchers have a right to make up or falsify data.[51]

Concluding Thoughts

As this overview shows, the principle of academic freedom is not as simple as many of its advocates assume. It involves both rights and responsibilities in a professional context, and it has both individual and institutional dimensions that can sometimes be in tension.

The heart of academic freedom is the protection of the right of teachers, students, and researchers to express

their ideas with intellectual honesty and without fear of reprisal. But professional responsibility requires that instructors and researchers abide by basic standards of intellectual integrity; they must not seek to indoctrinate students, and they must not present propagandistic or fraudulent material as truthful. At the same time, institutions also have responsibilities which they have not always lived up to in recent decades, as we saw in the KC Johnson case at Brooklyn College. This problem makes navigating the waters of academic freedom more difficult than it should be.

Controversies involving academic freedom often arise in gray areas, requiring practical wisdom if they are to be resolved. In such cases, it is wise to make freedom the default position because an enlightened citizenry depends on honesty and courage in teaching and research. At the same time, those who hold academic freedom, whether individuals or institutions, must recognize that violations of intellectual integrity undermine the justifications that have led society to bestow special protections upon the academic profession. Academic freedom is a fiduciary responsibility that individuals and institutions must honor in their thoughts, speech, and deeds.

Endnotes

1. AAUP, Freedom in the Classroom (2007). June 2007. Online: **http://www.aaup.org/AAUP/comm/rep/A/class.htm**.
2. American Academy of Arts and Sciences, Statement on Academic Freedom. Online: **http://www.amacad.org/projects/freedom.aspx**.
3. American Council of Education. Statement on Academic Rights and Responsibilities. 2005. Online: **http://www.acenet.edu/AM/Template.cfm?Section=HENA&CONTENTID=10677&TEMPLATE=/CM/ContentDisplay.cfm**.
4. See *Bethel School District no. 403 v. Fraser*, U.S. 675 (1986).
5. The Supreme Court has stated that "there is no such thing as a false idea under the First Amendment." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), at 339.
6. A comparison of the intellectual products of tenure-granting institutions with the products of comparable non-tenure granting institutions would be helpful in evaluating the consequences of tenure, but I have not heard of such a study.
7. See, e.g., *Gutzwiller v. Fenik*, 860 F.2d 1317, 1333 (6th Cir.1988).
8. *Otero-Burgos v. Inter-American University*, U.S. Court of Appeals, 1st Circuit, No. 07-2501 (February 19, 2009), at 24–5. Online: **http://www.ca1.uscourts.gov/pdf.opinions/07-2501P-01A.pdf**.
9. Peter Schmidt, "Balance of Power: Professors' Freedoms under Assault in the Courts," *Chronicle of Higher Education*, February 27, 2009. Online: **http://chronicle.com/free/v55/i25/25a00103.htm**.
10. Allan Bloom, *The Closing of the American Mind: How Higher Education Has Failed Democracy and Impoverished the Souls of Today's Students* (New York: Simon and Schuster, 1987), p. 272. Bloom's next sentence strikes a note of pessimism, however. "In effect, it hardly does so anymore." But Socrates' ideal is what the university is when it is true to itself, so it must be held up as an aspiration.
11. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Keyishian v. Board of Regents* 385 U.S. 589 (1967).
12. *Keyishian*, at 603.
13. David M. Rabban. "Academic Freedom, Individual or Institutional? Most Federal Courts Agree that Academic Freedom Is a First Amendment Right. But Whose Right Is It?" *Academe Online*, November-December, 2001. Online: **http://www.aaup.org/AAUP/pubsres/academe/2001/ND/Feat/Rabb.htm**.
14. See, e.g., Harvey A. Silverglate and Alan Charles Kors, *The Shadow University: The Betrayal of Liberty on America's Campuses* (New York: Free Press, 1998); Donald Alexander Downs, *Restoring Free Speech and Liberty on Campus* (New York: Cambridge University Press and Independent Institute, 2006).
15. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), at 312. See also *Grutter v. Bollinger*, 539 U.S. 306 (2003).
16. *Edwards v. California University of Pennsylvania*, 156 F.3d 488 (1998).
17. *Webb v. Bd. of Trustees of Ball State Univ.*, 167 F. 3d 1146 (7th Cir. 1999), at 1149.
18. *Hetrick v. Martin*, 480 F. 2d 705 (6th Cir. 1973), at 709.
19. *Urofsky v. Gilmore*, 216 F. 3d 401 (2000).
20. There is a copious literature on the KC Johnson case. See, e.g., Robert David "KC" Johnson, "Why I Was Denied Tenure," History News Network, November 25, 2002, online: **http://hnn.us/articles/1122.html**; and Ronald Radosh, "The Sandbagging of Robert 'KC' Johnson," History News Network, November 25, 2002, online: **http://hnn.us/articles/1116.html**.
21. I discuss this successful movement in chapters 6 and 7 of my book *Restoring Free Speech and Liberty on Campus* cited in note 14 of this essay. I am also the president of the Committee of Academic Freedom and Rights. On how courts are often unreliable agents of change and the protection of rights, making political action preferable, see Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (University of Chicago Press, 1991). The Wisconsin case supports Rosenberg's thesis.

22. See Michael W. McConnell, "Academic Freedom in Religious Colleges and Universities." *In Freedom and Tenure in the Academy,* ed. William van Alstyne, Walter Metzger, Judith Thomson, and Robert O'Neill (Durham, NC: Duke University Press, 1993), pp. 303-24.

23. AAUP, General Report of the Committee on Academic Freedom and Tenure (1915), *AAUP Bulletin 17*. Washington, DC.

24. See the copious material (including cases) on FIRE's Web site: **www.theFIRE.org**.

25. The academic profession, like other professions such as medicine, law, and library science, comes replete with its own professional organizations, which form a network of standards, support, and advocacy. There are a host of general organizations such as the AAUP and the American Council on Education, and numerous organizations based on particular scholarly disciplines. A guild-like network of support exists that constitutes a web of power and influence. The building of such networks and webs is a historic ingredient of a profession's rise to recognition. See, for example, Paul M. Starr, *The Social Transformation of American Medicine* (New York: Basic Books, 1982).

26. See, e.g., Judith Jarvis Thomson, "Ideology and Faculty Selection." *In Freedom and Tenure in the Academy*, ed. William Van Alstyne et al., id., pp. 155-76.

27. Prominent cases of courts striking down student codes include the University of Michigan, *Doe v. Michigan*, 721 F. supp. 852 (E.D. Mich. 1989); Stanford University, *Corry et al. v. Stanford University*, Santa Clara County Court, No. 740309 (February 27, 1995); and the University of Wisconsin system, *UWM Post v. Board of Regents of the University of Wisconsin*, 774 F. Supp. (1989).

28. See Jon B. Gould, *Speak No Evil: The Triumph of Hate Speech Regulation* (University of Chicago Press, 2005).

29. AAUP (and other organizations), Joint Statement on Rights and Freedoms of Students, June 1967. Online: **http://www.aaup.org/AAUP/pubsres/policydocs/contents/stud-rights.htm**.

30. On the Columbia University case, see Miriam Felton-Dansky, "Ivory Tower Angst: Israel Advocates Are Battling Bias in the Classroom. Is Academic Freedom at Stake?" *New Voices* (November/December 2004), pp. 9–13.

31. *Whitney v. California*, 274 U.S. 357 (1927), at 375.

32. On how the possibility of member "exit" enhances the quality of organizations and protects liberty, see Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms*, Organizations, and States (Cambridge, MA: Harvard University Press, 1970).

33. See Sara Hebel, "Patrolling Professors' Politics: Conservative Activists and Students Press Campaigns against Perceived Bias on Campuses." *Chronicle of Higher Education*, February 13, 2004. Online: **http://chronicle.com/free/v50/i23/23a01801.htm**.

34. For an insightful discussion and critique of the influence of post-modern and "constructivist" thinking on higher education today, see Anthony Kronman, *Education's End: Why Our Colleges and Universities Have Given Up on the Meaning of Life* (New Haven: Yale University Press, 2007).

35. AAUP, 1940 Statement of Principles on Academic Freedom and Tenure. Online: **http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm**.

36. See Jonathan Rauch, *Kindly Inquisitors: The New Attacks on Free Thought* (University of Chicago Press, 1993).

37. On the importance of intellectual honesty as a central academic virtue, see Jarislov Pelikan, *The Idea of the University: A Reexamination* (New Haven: Yale University Press, 1992).

38. See *Pickering v. Board of Education*, 391 U.S. 563 (1968).

39. *Connick v. Myers*, 461 U.S. 138 (1983).

40. *Garcetti v. Ceballos*, 547 U.S. 410 (2006), 421.

41. *Garcetti v. Ceballos*, 547 U.S. 410 (2006), 438.

42. See *Garcetti v. Ceballos*, 547 U.S. 410 (2006). And Peter Schmidt, "Balance of Power," (see note 9 in this essay).

43. See *Renken v. Gregory*, 7th Circuit Court of Appeals, No. 07-3126, December 4, 2008.

44. *Hong v. Grant*, 516b F. Supp. 2d 1158 (2007).

45. Mary Lefkowitz, *History Lesson: A Race Odyssey* (New Haven, CT: Yale University Press, 2008).

46. Rauch (see note 36 in this essay).

47. There is copious literature on how the development of such toughness is an important ingredient of citizenship. See, for example, Lee C. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (New York: Oxford University Press, 1986) and Richard Sennett, *The Fall of Public Man* (New York: Vintage, 1978). This is also a major theme of Rauch's *Kindly Inquisitors* (see note 36 in this essay).

48. On the Hoppe case, see Donald A. Downs, "Free Speech on Campus: Under Attack from Both Directions?" Independent Institute Newsroom, March 28, 2005. Online: **http://www.independent.org/newsroom/article.asp?id=1484**.

49. *New York Times v. Sullivan*, 376 U.S. 254 (1964). For an illuminating article on this important point, see Lillian BeVier, "The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle." *30 Stanford Law Review 299* (1978).

50. This information was provided to me by academic freedom scholar and activist Robert M. O'Neil, former president of the University of Wisconsin system and the University of Virginia, and founder of the Thomas Jefferson Center for the Protection of Freedom of Expression. O'Neil also discusses the Butz issue in an informative new book on academic freedom, *Academic Freedom in the Wired World: Political Extremism, Corporate Power, and the University* (Cambridge, MA: Harvard University Press, 2008). See also Scott Jaschik, "A Holocaust Denier Resurfaces," *Inside Higher Education*, February 8, 2006. Online: **http://www.insidehighered.com/news/2006/02/08/butz**.

51. On the Churchill case, see "CU Fires Ward Churchill," TheDenverChannel.com, July 24, 2007. Online: **http://www.thedenverchannel.com/news/13742972/detail.html**. On the Bellesiles case, see HNN Staff, "Summary of the Emory Report on Michael Bellesiles," History News Network, October 25, 2002. Online: **http://hnn.us/articles/1069.html**.

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Academic Freedom

What It Is, What It Isn't, and How to Tell the Difference

Donald A. Downs

Although the term academic freedom is tossed about almost with abandon, many people do not know exactly what it means. This paper defines academic freedom, explains to whom it applies, and places it in its historical, institutional, and legal contexts. This paper also offers guidelines for deciding when and where the protection of academic freedom should apply.

The author, Donald A. Downs, is a professor of political science, law, and journalism at the University of Wisconsin, Madison. An expert on academic freedom, he has advised several schools and organizations on academic freedom matters. He is the president of the Committee for Academic Freedom and Rights (CAFAR), a University of Wisconsin-based group of faculty dedicated to protecting academic freedom on campus and in the state of Wisconsin.

The paper is published by the John W. Pope Center for Higher Education Policy, a nonprofit institute dedicated to improving higher education. A copy of this paper—along with other Pope Center research papers—is available on the center's Web site at **www.popecenter.org**.

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