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# Academic Freedom and Academic Contexts

Irwin H. Polishook\*

## I. Introduction

To many people inside and outside higher education, the concept of academic freedom seems to hold near universal acceptance.<sup>1</sup> As it is commonly defined,<sup>2</sup> academic freedom seems to be established. Although critics have mounted attacks on academic freedom,<sup>3</sup> it has withstood many challenges in its varied history.<sup>4</sup> Its virtues are so self-evident,<sup>5</sup> and its rightness has been affirmed and reaffirmed so often<sup>6</sup> that it infrequently ap-

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\* Professor of History, Lehman College, City University of New York; President, Professional Staff Congress, City University of New York, 1976-95; B.A., Brooklyn College, City University of New York, 1956; M.A., Brown University, 1958; Ph.D., Northwestern University, 1961.

1. See *infra* text accompanying notes 35-37. For a statement that tenure for professors is under attack but academic freedom remains an accepted professional standard, see, e.g., Roger W. Kimball, *Bennington [University] Lost*, LINGUA FRANCA, July-Aug. 1994, at 66. Kimball, the managing editor of a noted "neoconservative" journal, *New Criterion*, is a partisan in the debate about tenure. *Id.* at 68; see also generally ROGER W. KIMBALL, *TENURED RADICALS: HOW POLITICS HAS CORRUPTED HIGHER EDUCATION* (1990) (assaulting tenured professors who he believes abuse their right to academic freedom).

2. Academic freedom has been defined as the "freedom of a teacher to discuss or investigate any controversial social, economic, or political problems without interference or penalty from officials, organized groups, etc." RANDOM HOUSE UNABRIDGED DICTIONARY 9 (2d ed. 1993).

3. Most critics question whether academic freedom is too often used to protect the proverbial "deadwood" among professors or whether the continuous appointment known as "tenure" is needed to secure the scholarly vocation.

4. See ELLEN W. SCHRECKER, *NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES* 12-23 (1986); Walter P. Metzger, *1940 Statement of Principles on Academic Freedom and Tenure*, 53 LAW & CONTEMP. PROBS. 3, 3-5 (1990); Walter P. Metzger, *Academic Freedom in America: A Historical Essay*, in FACULTY TENURE: A REPORT AND RECOMMENDATIONS BY THE COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION 93, 94 (1973); Julius G. Getman & Jacqueline W. Mintz, *Foreward: Academic Freedom in a Changing Society*, 66 TEX. L. REV. 1247, 1247-1264 (1988).

5. See Fritz Machlup, *In Defense of Academic Tenure*, in ACADEMIC FREEDOM AND TENURE 306, 328-332 (Louis Joughin ed., 1969).

6. See Metzger, *1940 Statement of Principles on Academic Freedom and Tenure*, *supra* note 4, at 3-5; Walter P. Metzger, *Profession and Constitution: Two*

pears to bear further discussion, let alone concern. Nevertheless, the defense of academic freedom continues to be necessary.

## II. The Historical Development of Academic Freedom

Academic freedom has always been more an ideal than a fully implemented reality. The ideal may be perceived, without too much strain, in Plato's "Apology," where Socrates defended before the Athenian people his right to discuss controversial topics with others that those in power found unacceptable.<sup>7</sup> Yet even he insisted that his teaching was self-constrained by—and served—his belief in God.<sup>8</sup> The church that was the custodian of medieval schooling and scholarship through the Middle Ages never claimed to offer intellectual freedom, either from within or beyond the territory of theology.<sup>9</sup> As late as 1628, any dissent from the Thirty-Nine Articles of the Church of England<sup>10</sup> was prohibited at Oxford and Cambridge, effectively delimiting controversy over much that mattered at both universities.<sup>11</sup>

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*Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1266 (1988); Metzger, *Academic Freedom in America: A Historical Essay*, *supra* note 4, at 155.

7. PLATO, THE APOLOGY in DIALOGUES OF PLATO 5-40 (Justin D. Kaplan ed., B. Jowett trans., 1951). The so-called "Apology" is Plato's account of Socrates' defense against charges of subverting the youth of Athens, for which he was subsequently convicted and sentenced to death in 399 B.C. *Id.* In one passage, Socrates states:

Some one will say: Yes, Socrates, but cannot you hold your tongue, and then you may go into a foreign city, and no one will interfere with you? Now, I have great difficulty in making you understand my answer to this. For if I tell you that to do as you say would be a disobedience to the God, and therefore that I cannot hold my tongue, you will not believe that I am serious; and if I say again that daily to discourse about virtue, and of those other things about which you hear me examining myself and others, is the greatest good of man, and that the unexamined life is not worth living, you are still less likely to believe me. Yet I say what is true, although a thing of which it is hard for me to persuade you.

*Id.* at 34.

8. *Id.* at 23 ("Men of Athens, I honour and love you; but I shall obey God rather than you, and while I have life and strength I shall never cease from the practice and teaching of philosophy . . .").

9. C. R. S. HARRIS, DUNS SCOTUS I 40-47 (1927). This church tradition was exacerbated by the onset of the Protestant Reformation. See G. R. ELTON, 2 NEW CAMBRIDGE MODERN HISTORY 433-35 (1958).

10. BENET'S READER'S ENCYCLOPEDIA 972 (3d ed. 1987). The articles of faith of the Church of England, originally issued in 1551 as forty-two, were modified and reduced to their present number in 1563. *Id.*

11. RICHARD HOFSTADTER, ACADEMIC FREEDOM IN THE AGE OF THE COLLEGE 74-75 (1955).

The religious liberty that spread in the American colonies in the seventeenth century did not extend to the teaching function in the early history of Harvard and our other colleges.<sup>12</sup>

Academic history is filled with assertions of faculty autonomy.<sup>13</sup> In 1873, for example, the president of Williams College proclaimed, "Professors are sometimes spoken of as working for the college. They are the college."<sup>14</sup> Yet in the 1890s, professors and presidents of American colleges and universities were still being dismissed for such offenses as "advocating free trade and greenbacks,"<sup>15</sup> participating in a Populist convention,<sup>16</sup> speaking out against monopolies,<sup>17</sup> favoring free silver,<sup>18</sup> opposing imperialism,<sup>19</sup> and delivering a pro-labor speech.<sup>20</sup>

It was not until the organization of the American Association of University Professors (AAUP)<sup>21</sup> in 1915 that the principles of academic freedom<sup>22</sup> were clearly articulated, codified and

12. *Id.* at 111. The hegemony of the Church of England was broken at colonial colleges by their tolerance of other theological influences. *Id.* Nevertheless, "the evidence that is available shows no sign that anything quite like modern notions of intellectual freedom had yet been formulated. Still less is there a specific justification for academic freedom. Men often spoke of liberty of conscience but never applied it to the teaching function." *Id.*

13. ROY J. HONEYWELL, *THE EDUCATIONAL WORK OF THOMAS JEFFERSON* 99 (1964). Thomas Jefferson declared that the University of Virginia would be founded on "the illimitable freedom of the human mind. For here we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it." *Id.* (footnote omitted).

14. HOFSTADTER, *supra* note 11, at 274 (quoting College President Paul Ansel Chadborne, Inaugural Address at Williams College (1873)).

15. WALTER P. METZGER, *ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY* 146 (1955).

16. *Id.* at 147.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 145.

21. AAUP was formed by the perceived need of the professoriate to defend its individual members in cases of violations of academic freedom and to speak for the academy. The organizational initiative was taken by eighteen full professors at John Hopkins University in a call to a conference addressed to the faculties of nine leading institutions. The delegates to that conference appointed a committee on organization that defined the structure of the association. When 867 distinguished professors accepted the invitation to join, they became AAUP's charter members. Its original restriction to "distinguished specialists" and its subsequent constitutional requirement of ten years in a position of teaching or research were gradually relaxed to welcome all college and university teachers. *Id.* at 202-03.

22. See *id.* at 133-38, 206-16. Metzger outlines the following principles:

asserted in a systematic way.<sup>23</sup> One of AAUP's founders, John Dewey, envisioned that academic freedom could not "be more than an incident of the activities of the association."<sup>24</sup> His expectation was frustrated, however, when the association was immediately inundated with allegations of violations.<sup>25</sup> Since then, the designated "Committee A on Academic Freedom and Tenure" has been the organization's trademark function.<sup>26</sup> AAUP's professional life became inseparable from its defense of academic freedom. AAUP's achievements in protecting academic freedom have been due in part to the association's definition of academic freedom,<sup>27</sup> its eloquent arguments for the

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The first attempt of the AAUP to work out the scope and limits of academic freedom was Committee A's Report on Academic Freedom and Academic Tenure of 1915 . . . . Briefly, its fundamental premises were that academic freedom was a necessary condition for a university's existence; that trustees occupied the position of public officials discharging a public trust; that the only exception to this was when they served private propagandistic purposes, in which case those purposes ought to be made explicit; that in the classroom professors were limited by the norms of neutrality and competence; that outside the university professors had the same right as any other citizens to freedom of utterance and action, limited only by the obligation to observe professional decorum.

*Id.* at 206.

23. *Id.* at 194.

24. *Id.* at 204.

25. *Id.* at 204-05. Metzger outlines the following allegations:

Distress signals came from the University of Utah, where seventeen professors resigned in protest when four of their colleagues were unceremoniously removed; from the University of Colorado, where a law professor believed he had been fired for testimony given before a government commission; from Wesleyan University, where a professor believed he had been removed because of anti-Sabbatarian remarks delivered at a nearby club; from the University of Pennsylvania, where Scott Nearing, in a case that achieved great notoriety, was removed from the Wharton School; from the University of Washington, where three professors had been discharged.

*Id.* at 205.

26. For an overview of the Committee's defense of academic freedom and tenure, see AAUP, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, 76 *ACADEME: BULLETIN OF THE AAUP* 37 (May-June 1990), reprinted in *AAUP POLICY DOCUMENTS AND REP'TS* 1, 3 (7th ed. 1990) [hereinafter *1940 Statement*]. "From its inception in 1915, the main work of the Association has been in the area of academic freedom and tenure." *Id.* at 1.

27. The AAUP defines academic freedom as the following:

(a) Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

principle's basic importance in the life of the academy,<sup>28</sup> and the close connection<sup>29</sup> it established between due process and tenure as the means to the end of academic freedom.

AAUP's involvement in the creation of the doctrine of academic freedom has led to its ongoing redefinition and widespread acceptance. Committee A's Report on Academic Freedom and Academic Tenure,<sup>30</sup> which was replaced by the Statement on Academic Freedom and Tenure, promulgated in

(b) Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. . . . Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment. . . .

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

*Id.* at 3-4 (citations omitted).

28. For examples of such arguments, see *id.* at 3. Such arguments include:

Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition. . . . Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning.

*Id.* (footnotes omitted).

29. METZGER, *supra* note 15, at 207 ("Academic freedom was the end: due process, tenure, and establishment of professional competence were regarded as a necessary means."); see also *1940 Statement*, *supra* note 26, at 3. The statement outlines the following uses of tenure:

Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

*Id.*

30. METZGER, *supra* note 15, at 133-38.

1925,<sup>31</sup> was revised, jointly with the Association of American Colleges, in 1940,<sup>32</sup> and appended with interpretive comments in 1970.<sup>33</sup> The 1990 edition of AAUP's "Red Book," which contains the Statement along with other policy documents, lists 143 endorsers, including many professional disciplinary associations and such bodies as the Association of American Law Schools, the American Council of Learned Societies and the American Association of Higher Education.<sup>34</sup>

### III. Current Issues on Academic Freedom

A consensus has formed around the viability and desirability of academic freedom. It is written into the faculty manuals and handbooks of most American colleges and universities.<sup>35</sup> Since the late 1960s, due process and the protections of academic freedom and tenure have been incorporated in the contracts of the faculty unions of the American Federation of Teachers and the National Education Association, as well as AAUP.<sup>36</sup> In 1967, the Supreme Court explicitly brought academic freedom under the aegis of the First Amendment:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special con-

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31. Am. Assoc. of Univ. Professors, *1925 Conference Statement on Academic Freedom and Tenure*, AAUP BULLETIN, Spring 1959, at 110 n.1.

32. *1940 Statement*, *supra* note 26, at 3.

33. *Id.* at 5.

34. *Id.* at 3-10.

35. *Id.* at xi.

36. The preamble of the first contract between the Legislative Conference (a predecessor of the Professional Staff Congress) and the City University of New York (in 1969, the largest university to become unionized) cites and incorporates "the concept of Academic Freedom as expressed by the AAUP." Preamble to Agreement between the Board of Higher Education and the City of New York and the Legislative Conference (Sept. 15, 1969) at 1 (on file with author). The Professional Staff Congress ("PFS") was originally affiliated with the American Federation of Teachers ("AFT") and the National Education Association ("NEA"). It is now an affiliate of the AFT and the AAUP. The preamble of the 1987-90 contract between the Professional Staff Congress and the City University of New York ("CUNY") states that both parties "see to maintain and encourage, in accordance with law, full freedom of inquiry, teaching, research and publication of results" and thus "subscribe to Academic Freedom for faculty members." Preamble to Agreement between the Professional Staff Congress and the City University of New York (July 6, 1988) at 3 (on file with author).

cern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.<sup>37</sup>

The protections of academic freedom have been sustained not only after they have been violated, but also by the reversal of its violations. More important, they have, by the force of almost universal acceptance, deterred untold numbers of violations that may otherwise have been perpetrated. This established acceptance sometimes prompts professors and laymen alike to consider the subject somewhat moot.

Yet it is not, since questions of academic freedom still embroil the academy. A random sampling of articles from two weekly issues of the *Chronicle of Higher Education* in late 1993 and early 1994 and the New York Times exemplifies the continuing controversy surrounding academic freedom. For example, the president of Wellesley college denounced a book by a professor of Africana studies, amid demands that the professor's tenure be reviewed.<sup>38</sup> A professor of leisure studies at Western Illinois University was appealing his dismissal from a tenured position for attitudes that a faculty panel had found "too laid back."<sup>39</sup> A teacher of communications at the University of New Hampshire was suing the university for violating his academic freedom when it suspended him from his tenured position for remarks that allegedly created a hostile classroom environment for women.<sup>40</sup> The annual meeting of the American Historical Association heatedly debated the quality of research on the relations between Blacks and Jews.<sup>41</sup> Against demands that he resign for practicing alchemy, a distinguished professor of chemistry at Texas A&M University defended his right to conduct research that would turn mercury into gold.<sup>42</sup> On the rec-

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37. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), quoted in *1940 Statement*, *supra* note 26, at 5.

38. Denise K. Magner, *A Charge of Anti-Semitism*, *CHRON. HIGHER EDUC.*, Jan. 12, 1994, at A14.

39. *'In' Box*, *CHRON. HIGHER EDUC.*, Jan. 12, 1994, at A14.

40. Courtney Leatherman, *U. of New Hampshire Wrestles With Issue of Sexual Harassment in Wake of Professor's Suspension*, *CHRON. HIGHER EDUC.*, Jan. 12, 1994, at A18. For a discussion of Professor J. Donald Silva's suit against the University of New Hampshire, see *infra* text accompanying notes 50-67.

41. Karen J. Winkler, *Debating the History of Blacks and Jews*, *CHRON. HIGHER EDUC.*, Jan. 19, 1994, at A11.

42. Katherine S. Mangan, *A&M's 'Alchemy Capers'*, *CHRON. HIGHER EDUC.*, Jan. 19, 1994, at A19.



ommendation of its academic freedom committee, the academic senate of San Francisco State University reinstated a professor to a biology course from which he had been barred for teaching creationism.<sup>43</sup> Campus communities in New Jersey were torn over controversial speeches by an aide of Louis Farrakhan, the leader of the Nation of Islam.<sup>44</sup> A professor of classics at Wellesley rejected "the notion that tenured faculty members enjoy complete autonomy, [with] no obligation even to discuss in their classrooms the recognized facts of science and history."<sup>45</sup>

From this random sampling, it is apparent that academic freedom is, as ever, easier to profess than to apply to a given instance. It is especially difficult to apply when it confronts other cherished values, such as the controls of scholarship, or conflicting taboos, including racial, religious or sexual offenses.<sup>46</sup> Surely time makes a difference; the onset of such historical forces as the civil rights movement and feminism has altered the perception of what should be the boundaries of professional conduct at American universities.

This is not new. Academic freedom has always been delimited. It is not license. Like free speech in general, it forbids libel or efforts to incite violence.<sup>47</sup> Within the university, more controls are recognized.<sup>48</sup> A professor may be constrained from introducing irrelevant material in the classroom, from using abusive or profane language, from discriminating against students or colleagues on the basis of race, religion, sex, and so on or on the basis of their viewpoints, and from violating current standards of decency and civility.<sup>49</sup>

What are new are current standards of permissible conduct, expanded definitions of campus decorum, discrimination against women, and a reexamination of the role of the professor

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43. Michele N-K. Collison, *Biologist's Theory of Creation Gets Him into Hot Water at San Francisco State U.*, CHRON. HIGHER EDUC., Jan. 19, 1994, at A20.

44. Jon Nordheimer, *Divided by a Diatribe; College Speech Ignites Furor Over Race*, N.Y. TIMES, Dec. 29, 1993, at B1.

45. Mary Lefkowitz, *Combating False Theories in the Classroom*, CHRON. HIGHER EDUC., Jan. 19, 1994, at B1, B2.

46. See *supra* notes 38-45 and accompanying text.

47. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 7 (1993).

48. *Id.* at 199.

49. *Id.* at 199-200; see also AAUP, *Liberalism, Speech Codes, and Related Problems*, 79 ACADEME: BULLETIN OF THE AAUP 14, 16-25 (July-Aug. 1993).

that has prompted renewed debates about the nature of academic freedom. One example of this current debate is *Silva v. University of New Hampshire*.<sup>50</sup>

In 1992, J. Donald Silva, a professor of communications at the University of New Hampshire, illustrated the concept of writing "focus" to a technical writing class with this metaphor: "Focus is like sex. You seek a target. You zero in on your subject. You move from side to side. You close in on the subject. You bracket the subject and center on it. Focus connects experience and language. You and the subject become one."<sup>51</sup> Six female students complained that this and other remarks by Professor Silva were vulgar, degrading and offensive.<sup>52</sup>

A campus sexual harassment hearing panel found Professor Silva guilty of violating the university's sexual harassment policy.<sup>53</sup> In April 1993, an appeals board upheld the finding of

50. *Silva v. Univ. N.H.*, Civil No. 93-533-SD, 1994 U.S. Dist. LEXIS 13281 (D.N.H. Sept. 15, 1994).

51. *Id.* at \*7.

52. *Id.* at \*15-16. Silva allegedly made comments in addition to the "focus" comment quoted in the text, but as a finding of fact, the court adopted only the following: "Belly dancing is like jello on a plate with a vibrator under the plate." *Id.* at \*8. Silva used this metaphor in an attempt to illustrate the use of concrete differentia and metaphor. *Id.* The court noted that the contents of the student complaints differed from the court's findings as to the contents of the classroom statement. *Id.* at \*14. As a result, it found the student complaints to be in error and did not adopt their contents as findings of fact. *Id.*

53. *Id.* at \*49. The University System of New Hampshire [USNH] Sexual Harassment Policy States:

#### SEXUAL HARASSMENT

All faculty, staff and students have the right to work in an environment free of discrimination, including freedom from sexual harassment. It is the policy of the University System of New Hampshire that no member of the University System community may sexually harass another. The intent of this policy is not to create a climate of fear but to foster responsible behavior in a working environment free of discrimination.

Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

- such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating a hostile or offensive working or academic environment.
- submission to or rejection of such conduct by an individual is used as the basis for employment or academic decisions affecting that individual.
- submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or academic work. (Section 1604.11 of the EEOC's Guidelines on Sexual Discrimination)

the panel and suspended Silva from his tenured position without pay for a period of at least one year, ordered him to begin counseling sessions at his own expense with a counselor selected by the university, and forbade him from making any attempt to "contact or retaliate against" any of the students who filed the complaints or testified against him.<sup>54</sup> In October 1993, he filed suit in federal district court for the District of New Hampshire, seeking a declaratory judgment that the university's conduct violated his right to freedom of speech under the First and Fourteenth Amendments, as well as damages under 42 U.S.C. § 1983 for the alleged violation of his First Amendment right to freedom of speech and his Fourteenth Amendment right to due process.<sup>55</sup>

The basis of the sexual harassment charge was the allegation that Silva, by his remarks, had created a "hostile and intimidating academic environment."<sup>56</sup> When given the opportunity to transfer out of Silva's courses, twenty-six of approximately seventy-five technical writing students chose to do

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Examples of conduct which may, if continued or repeated, constitute sexual harassment are:

- unwelcome sexual propositions
- graphic comments about a person's body
- sexually suggestive objects or pictures in the workplace
- sexually degrading words to describe a person
- derogatory or sexually explicit statements about an actual or supposed sexual relationship
- unwelcome touching, patting, pinching or leering
- derogatory gender-based humor

Such conduct whether intended or not constitutes sexual harassment and is illegal under both State and Federal law. Violations of this policy will not be permitted. Any faculty, staff or student who violates this policy will be subject to discipline up to and including dismissal.

*Id.* at \*4-5.

54. *Id.* at \*49.

55. *Id.* at \*3. Silva also sought declaratory judgment that the university's conduct denied him his civil rights under the color of state law in violation of 42 U.S.C. § 1983; a permanent order enjoining the university from acting to prevent him from teaching at the university or from otherwise punishing him on the basis of protected speech; damages under New Hampshire law based on allegations of breach of contract and breach of contractual duty of good faith and fair dealing; and an award of reasonable costs and attorneys' fees pursuant to 42 U.S.C. § 1988. *Id.*

56. *Id.* at \*48.

so.<sup>57</sup> Yet Silva was not without his supporters. One of his colleagues called him “a professor who probably exercised poor judgment in searching for a way to grab his students’ attention” and argued that while he didn’t “know anybody who doesn’t think [what Silva did] was a mistake,” the requirements of sexual harassment were absent. Silva’s remarks were not directed at the individual complainants, were not repeated, and he had not been warned that the complaining students had taken offense.<sup>58</sup>

One reporter detected a spirit of “overzealousness” on campus.<sup>59</sup> As one of its expressions, he cited a letter circulated to campus organizations by an associate professor of women’s studies, which said, in part:

The AAUP, indeed, academia itself, has traditionally been dominated by white heterosexual men[,] and the First Amendment and Academic Freedom (I’ll call them FAF) have traditionally protected the rights of white heterosexual men. Most of us are silenced by existing social conditions before we get the power to speak out in any way where FAF might protect us. So forgive us if we don’t get all teary-eyed about FAF. Perhaps to you it’s as sacrosanct as the flag or the national anthem; to us strict construction of the First Amendment is just another yoke around our necks.<sup>60</sup>

It was against this charged and polarized background that the federal district court for the District of New Hampshire heard Silva’s case. The court found that the application of the university’s sexual harassment policy to Silva’s classroom statements violated the First Amendment.<sup>61</sup> While the court recog-

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57. *Id.* at \*46. Silva normally taught three or four sections of the technical writing class with twenty-six students per section. Richard Bernstein, *Guilty if Charged*, N.Y. REV. BOOKS, Jan. 13, 1994, at 11. At the time the comments were made, Silva was teaching three sections. *Silva*, 1994 U.S. Dist. LEXIS at \*9.

58. Bernstein, *supra* note 57, at 12.

59. *Id.* at \*11. Bernstein’s reporting did not go unanswered for its challenging the feminists attacking Silva and exposing the lack of due process in Silva’s case. See, e.g., ‘*Guilty If Charged*’: *An Exchange* N.Y. REV. BOOKS, Mar. 24, 1994, at 59 (letters from Professors Mary Clark and Barbara H. White). Professor Clark observed: “The issue that underlies the Silva case is important and difficult: where to draw the line between the right to free speech and the right of people to go about their business without discrimination and harassment.” *Id.*

60. Bernstein, *supra* note 57, at 14.

61. *Silva*, 1994 U.S. Dist. LEXIS at \*55.

nized that the university's policy as applied to classroom speech in general sought to address the legitimate pedagogical concern of providing a congenial academic environment, it ruled that the policy as applied to Silva's classroom speech was not reasonably related to this purpose because it employed an impermissibly subjective standard that failed to take into account the nation's interest in academic freedom.<sup>62</sup>

The court used three factors to determine whether a regulation is reasonably related to a legitimate pedagogical concern: the age and sophistication of the students involved; the relationship between the teaching method in question and the valid educational objective involved; and the context and manner of the presentation.<sup>63</sup> The court weighed all three of these factors in Silva's favor. First, it found that all of the students involved were "exclusively adult college students" who were presumed to possess the sophistication of adults.<sup>64</sup> It then determined that Silva's "classroom statements advanced his valid educational objective of conveying certain principles related to the subject matter of his course."<sup>65</sup> Finally, the court concluded that Silva's statements were "made in a professionally appropriate manner as part of a college class lecture."<sup>66</sup> After weighing all three factors, the court stated that "Silva's classroom speech was subject to discipline *simply* because six adult students found his words to be outrageous."<sup>67</sup> The court then noted that "an 'outrageousness' standard runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse impact on the audience."<sup>68</sup> The court then cited *Keyishian*:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of

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62. *Silva*, 1994 U.S. Dist. LEXIS at \*1.

63. *Id.* at \*57.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* (emphasis added).

68. *Id.* at \*58.

suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.<sup>69</sup>

Academic freedom and the First Amendment have thus locked horns with the Fourteenth Amendment and a fiery determination to assert women's rights and their integrity: the right of the individual to free speech versus the right of others to be protected from it. We have here new currents of history demanding the redefinition or the renewed application of what can no longer be regarded as conventional principles.<sup>70</sup>

The conflict between the First and Fourteenth Amendments is also exemplified by the promulgation of speech codes and campus regulations that forbid the expression of racist, sexist, homophobic, or ethnically demeaning speech.<sup>71</sup> Such codes have been provoked by incidents of students hurling epithets at others<sup>72</sup> and by professors espousing theories that are repug-

69. *Id.* at \*58-60 (quoting *Keyishian*, 385 U.S. at 603 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957))). After declaring its intention to appeal the decision of the district court, the University of New Hampshire settled the case by reinstating Silva to his teaching position, and providing \$60,000 in back pay and \$170,000 for legal expenses. *Professor Accused of Harassment is Reinstated*, N.Y. TIMES, Dec. 4, 1994, at 35. The university's interest in the appeal focused on its attempt to reverse the district court's rejection of a claim of qualified immunity for personal liability in the suit. See Press Conference Remarks by Board Member and Legal Advisor Sherilyn Burnett Young, Oct. 12, 1994, at 2 (on file with *Pace Law Review*); Press Conference Remarks by Chancellor W.J. Farrell, Oct. 12, 1994, at 2 (on file with *Pace Law Review*); see also Press Conference Remarks by Trustee Chairman Donald G. O'Brien, Oct. 12, 1994, at 2 (on file with *Pace Law Review*). The National AAUP censured the University of New Hampshire for violations of academic freedom and due process in the application of its sexual harassment guidelines. See AAUP, *Report: Academic Freedom and Tenure: University of New Hampshire*, 80 ACADEME: BULLETIN OF THE AAUP 78, 78-80 (Nov.-Dec. 1994).

70. See *Silva*, U.S. Dist. LEXIS at \*59.

71. AAUP, *On Freedom of Expression and Campus Speech Codes*, 78 ACADEME: BULLETIN OF THE AAUP 30, 30 (July-Aug. 1992) [hereinafter *On Freedom of Expression*]. See also ARATI R. KORWAR, *WAR OF WORDS: THE FREEDOM FORUM* 26-30, 32-56 (1994) (presenting a recent study with a compendium of information about campus speech codes and their legal implications).

72. See Michele N-K Collison, *Hate-Speech Code at U. of Wisconsin Voided by Court*, CHRON. HIGHER EDUC., Oct. 23, 1991, at A1, A37; Nancy Gibbs, *Bigots in the Ivory Tower*, TIME, May 7, 1990, at 104-05; Christopher Shea, *The Limits of Speech: Colleges are Still Trying to Mold Harassment Codes that Don't Infringe on Rights*, CHRON. HIGHER EDUC., Dec. 1, 1993, at A37; Robin Wilson, *Colleges' Anti-Harassment Policies Bring Controversy Over Free Speech Issues*, CHRON. HIGHER EDUC., Oct. 4, 1989, at A3.

nant to members of the campus community.<sup>73</sup> Colleges and universities are, after all, communities, as well as institutions of higher learning. The unfettered expression of thought desirable in a learning institution may be undesirable in a community that now includes diverse populations, many of whom have been previously underrepresented in higher education. According to the proponents of speech codes, students' academic progress itself suffers from slurs and insults that make their environment inimical to learning.<sup>74</sup> Opponents of the codes, sympathetic as they are to these genuine sensibilities, contend that "free speech is not simply an aspect of the educational enterprise to be weighed against other desirable ends. It is the very precondition of the academic enterprise itself."<sup>75</sup> Speech codes have been struck down by the courts at a number of institutions, usually because the code was unclear, overly broad, and violated the First Amendment.<sup>76</sup> As a result, other codes have been liberalized or implemented sparingly, or both.<sup>77</sup> But the issue of free speech endures.<sup>78</sup>

One of the most complex dimensions of free speech is speech or writing by professors that presumes to be scholarly and otherwise professional and that others consider scientifically careless or invalid, excessively tendentious, and/or hateful. It may be a book,<sup>79</sup> or a classroom presentation.<sup>80</sup> Or it may be an article or a speech delivered off campus.<sup>81</sup> Among the issues

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73. See William Douglas, *Jeffries Prober Named*, NEWSDAY, Sept. 5, 1991, at 3; M. P. McQueen, *Levin's Rights Violated: Judge Rules City College Wronged Controversial Prof*, NEWSDAY, Sept. 5, 1991, at 3; *In His Own Words: Text of Levin Speech*, NEWSDAY, Sept. 5, 1991, at 3; *Text of Jeffries' July Speech*, NEWSDAY, Aug. 19, 1991, at 3.

74. *On Freedom of Expression*, *supra* note 71, at 30.

75. *Id.* at 31.

76. *Judge Strikes Down Michigan Anti-Bias Plan*, CHRON. HIGHER EDUC., Sept. 6, 1989, at A2; Collison, *supra* note 72, at A37.

77. Scott Heller, *U. of Michigan Scales Back Its Rules on Discrimination and Harassment*, CHRON. HIGHER EDUC., Sept. 27, 1989, at A3.

78. Shea, *supra* note 72, at A37.

79. ANTHONY MARTIN, *THE JEWISH ONSLAUGHT: DESPATCHES FROM THE WELLESLEY BATTLEFRONT* (1993). For a discussion of the controversy surrounding Martin's book, see, e.g., Irene Sege, *Teaching History or Hate*, BOSTON GLOBE, Feb. 24, 1994, at 51.

80. Collison, *supra* note 43, at A20.

81. See, e.g., *In His Own Words: Text of Levin Speech*, *supra* note 73; *Text of Jeffries' July Speech*, *supra* note 73.

raised in these situations is a central one: the role of the professor.

Traditionally, professors have been expected to assume a number of responsibilities. To their academic subject, they are required "to state the truth as they see it," to develop and improve "their scholarly competence," "to exercise critical self-discipline and judgment in using, extending, and transmitting knowledge."<sup>82</sup> To their students, professors have, among other obligations, to "hold before them the best scholarly and ethical standards of their discipline" and to be their "intellectual guides and counselors."<sup>83</sup> The classroom should not be used for political advocacy or to indoctrinate students,<sup>84</sup> either in dealing with contemporary issues or other forms of ideological and social advocacy. Violations of academic responsibilities may be looked on as academic license, as abuses of academic freedom rather than its exercise.<sup>85</sup>

A vocal minority of the American professoriate rejects this premise.<sup>86</sup> This posture ranges from the trivial to the philosophical. They perceive the academic enterprise as having, historically, taught and advocated "Things As They Are"<sup>87</sup> and they now demand the right to assert their view of such things, as well as things as they should be—yes, in the classroom, as else-

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82. AAUP, *Statement of Professional Ethics*, 73 ACADEME: BULLETIN OF THE AAUP 49 (1987), reprinted in AAUP POLICY DOCUMENTS & REP'TS 75, 76 (7th ed. 1990) [hereinafter *Statement of Professional Ethics*]; see also AAUP, *A Statement of the Association's Council: Freedom and Responsibility*, 56 ACADEME: BULLETIN OF THE AAUP 375 (1970), reprinted in AAUP POLICY DOCUMENTS & REP'TS, *supra*, 71 at 77-78; Mary Lefkowitz, *Combatting False Theories in the Classroom*, CHRON. HIGHER EDUC., Jan. 19, 1994, at B1, B2. Lefkowitz states:

Another reason why faculties permit lies to be taught is that many academics subscribe to the widely prevalent notion that there is no such thing as the "truth." Rather, they believe that there are (at best) many different truths, and that the prevailing truth may not be any more valid than other truths — but simply subscribed to by more powerful people. Since other versions of the truth might be equally valid, faculty members have been reluctant to criticize or scrutinize the work of colleagues in different fields of study.

*Id.*

83. *Statement of Professional Ethics*, *supra* note 82, at 76.

84. RUSSELL KIRK, ACADEMIC FREEDOM 117, 118-23 (1955).

85. See *Statement of Professional Ethics*, *supra* note 82, at 76.

86. Bernstein, *supra* note 57, at 14.

87. KIRK, *supra* note 84, at 118.



where.<sup>88</sup> They dismiss the decorum implicit in the traditional paradigm, both to their subject and to their students. They “don’t get all teary-eyed” about such values as critical self-discipline and scholarly objectivity although they certainly believe they are stating “the truth as they see it.”<sup>89</sup> Prominent among them are many proponents and teachers of multicultural studies.<sup>90</sup> But not all of them agree. One professor of ethnic American literature, for example, stated, “I am persuaded that the subject can be taught objectively, sensitively, and above all in an intellectually respectable way.”<sup>91</sup> Others see no need to make such a claim.<sup>92</sup>

Today, such fundamentals as the responsibility to historical facts are matters of controversy. The English historian Eric Hobsbawm, for one, is compelled to justify that responsibility because of

the rise of “postmodernist” intellectual fashion in Western universities, particularly in departments of literature and anthropology, which imply that all “facts” claiming objective existence are simply intellectual constructions. In short, that there is no clear difference between fact and fiction. But there is, and for historians, even for the most militantly antipositivist ones among us, the ability to distinguish between the two is absolutely fundamental. We cannot invent our facts. Either Elvis Presley is dead or he isn’t. The question can be answered unambiguously on the basis of evidence, insofar as reliable evidence is available, which is sometimes the case.<sup>93</sup>

How these issues are resolved or adjudicated will influence the direction of American intellectual life. Yet, wherever we stand on the issues and however they are played out, it is useful

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88. *See id.* at 118-19.

89. Bernstein, *supra* note 57, at 14.

90. Evelyn Avery, *Introduction: Multicultural Studies: Can They Be Made to Work?*, ACADEMIC QUESTIONS, Winter 1993-94, at 46, 46-48.

91. *Id.* at 47.

92. STANLEY FISH, *THERE IS NO SUCH THING AS FREE SPEECH AND IT’S A GOOD THING, TOO* 201-02 (1993). Fish contends that all speech, including the opinion of the professor, is already captive to convention and position. For this reason, teaching is inherently “political” and never neutral. *Id.*

93. Eric Hobsbawm, *The Threat to History*, N.Y. REV. BOOKS, Dec. 16, 1993, at 63. For examples of Hobsbawm’s works on Marxism, see ERIC HOBSBAWM, *THE AGE OF EMPIRE, 1875-1914*, (1987); ERIC HOBSBAWM, *THE AGE OF CAPITAL, 1848-1875* (1984); ERIC HOBSBAWM, *THE HISTORY OF MARXISM* (1982).

to recognize their immutable dynamics. Political correctness is not an innovation of the late twentieth century. What is politically correct today may be different from what was so a decade or a century ago, but at any point in history there always have been both prevailing and dissenting sets of ideologies.<sup>94</sup> Similarly, academic freedom can never be championed as an absolute right. Where its bounds may be set is ever the question. In the 1950s, the dominant issue was McCarthyism.<sup>95</sup> In the 1990s it may be the politicization of the professoriate. The academy is turned inward today for the resolution of novel challenges to academic freedom: the termination of every manifestation of sexual discrimination and harassment, the sensibilities of minority students, advocacy research and teaching, hate speech, and speech codes.

#### IV. Conclusion

Whether academic freedom is more or less difficult to practice today is arguable. It does seem that currents of freedom and autonomy within today's university, which promote academic freedom, may be impugned when the professional obligations of scholarship are abandoned either by the shock waves of professors' statements or claims that some believe are tantamount to academic license. But then the people in a republic may always claim the right to exercise authority, and sometimes tyranny.<sup>96</sup> It was to the people, after all, that Socrates appealed in 399 B.C.<sup>97</sup>

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94. For a discussion of the same debates in primary and secondary schools, see Millicent Lawton, *Differing on Diversity: The 'Political Correctness' Movement Has Made Substantial Inroads in Precollegiate Education as Millions of Students and Educators Struggle to Balance Competing Ideological Views*, EDUCATION WEEK, Dec. 1, 1993, at 23-24.

95. C. Vann Woodward, *The Siege*, N.Y. REV. BOOKS, Sept. 25, 1986, at 3.

96. PLATO, *supra* note 7, at 5-40.

97. *Id.* at 2.