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Threats to Academic Freedom and Tenure

Burton M. Leiser*

I. Introduction

The concept of academic freedom came into existence centuries ago with the establishment of the first European universities. German universities recognized the right of students to learn, of faculty members to teach, and of universities to control their internal affairs without interference from any outside group, governmental or otherwise.¹ Academic freedom was introduced to the United States in the second decade of the twentieth century by the fledgling American Association of University Professors (AAUP), was adopted by the Association of American Colleges (AAC), and was subsequently endorsed by virtually every major scholarly organization in the United States² and by hundreds of colleges and universities throughout the nation. Tenure, a permanent contract of employment for university professors after a probationary period (usually six years), intended to guarantee intellectual freedom and independence and to shield faculty members from the threat of termination for arbitrary or doctrinal reasons, was introduced at about the same time at the behest of the AAUP, and has been an important feature of American academic life ever since.³

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1. For a full explanation of the ramifications of these three aspects of the German concept of academic freedom see Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1270-72 (1988).

2. Among the earliest endorsers was the Association of American Law Schools (1946). American Ass'n of Univ. Professors, *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 REPORTS 3, 7 (1990) [hereinafter 1940 Statement].

3. See *infra* part III.A.

There have always been complaints about tenure, especially from university administrators who are frustrated by the difficulty they have in removing obstreperous, troublesome, and insubordinate faculty members. The principal thesis of this article is that the inconveniences and embarrassments associated with the institution of tenure are a small price to pay for the benefits that flow from it. However, tenure was never intended to protect against every offense an academic might commit. This article shall examine the limits of academic freedom and behavior that are not properly deemed to be academic and should not be shielded by tenure. By exploring the disadvantages of tenure and its limitations, and through an examination of three recent cases that are paradigmatic of current attacks on tenure and academic freedom, it asks how outrageous a faculty member's views may be. This examination will focus specifically on allegations of racism and sexual harassment. After an exploration of the meaning of academic freedom, particularly as it has been understood by the courts, the article turns to the "outer limits" of academic freedom. This entails an analysis of the distinction between education and indoctrination, and the extent to which heretical views must be tolerated in an academic setting. Finally, the article considers some forms of behavior that ought to be regarded as non-academic and ought to subject a university professor who persists in engaging in them in the classroom to appropriate sanctions.

Recent complaints, from persons both within and without the academy, about the alleged infirmities of the system of granting tenure to university professors do not differ significantly from those that were made early in this century, when tenure was first advanced as a right that ought to be extended to college and university instructors in American institutions of higher learning. Then, as now, there was concern that the "privilege" of tenure would be abused by incompetent or unscrupulous members of the teaching profession; that it would serve as a shield to protect charlatans with outlandish, outrageous, or evil ideas against the sanctions that would be imposed upon them if they were subject to the rules that prevail in any self-respecting business or profession; and that with the fear of termination removed, unscrupulous individuals would use their respected academic positions as platforms from which to spread

corrupt and subversive doctrines to the public at large, and more insidiously, to the naive and impressionable young people who were entrusted to their tutelage. Then, as now, there was concern that once granted, tenure would enable slothful faculty members to shirk their duties and to pursue their avocations without fear of adverse consequences affecting their employment or their livelihood. Moreover, there has always been some suspicion that morally corrupt faculty members have used their tenured positions to exploit their students sexually and otherwise.

As almost every faculty member can attest from his or her personal knowledge, these concerns are not altogether groundless. Some faculty members *have* exploited their close contacts with students, the prestige with which they are endowed by their positions, and the power that they have to affect students' grades and career opportunities to satisfy their own sexual appetites and their desires for unconditional admiration by young persons who enroll in their classes. Tenure was never intended to protect such individuals. Indeed, from the very beginning, moral turpitude has been one of the grounds for dismissal of a tenured professor.⁴ Dismissals of faculty members who are guilty of sexually harassing their students or others occur and are generally upheld by the courts.⁵

4. See 1940 Statement, *supra* note 2, at 4, 7 (commenting on the 1940 Statement's provision that tenured professors "who are dismissed for reasons not involving moral turpitude" should receive a year's salary whether or not they are reinstated).

The concept of "moral turpitude" identifies the exceptional case in which the professor may be denied a year's teaching or pay in whole or in part. The statement applies to that kind of behavior which goes beyond simply warranting discharge and is so utterly blameworthy as to make it inappropriate to require the offering of a year's teaching or pay. The standard is not that the moral sensibilities of persons in the particular community have been affronted. The standard is behavior that would evoke condemnation by the academic community generally.

Id. at 7.

5. See, e.g., *Palo Verde Unified Sch. Dist. v. Hensey*, 88 Cal. Rptr. 570 (Ct. App. 1970). The court upheld the dismissal of a "permanent teacher" at a junior college on grounds of unfitness for service and immoral conduct. *Id.* at 576. The teacher had removed a portion of the fire alarm and bell system from his classroom, in front of his students, stating that it sounded like a worn-out phonograph in a "whorehouse." *Id.* at 572. He directed crude remarks about "super-syphilis" to his Mexican-American students. *Id.* While accusing the district superintendent of "licking up the board," he licked his classroom wall up and down with his tongue.

Virtually every institution of higher learning in America employs tenured faculty members who are believed by their colleagues to be "deadwood." Utterly unproductive, they demonstrate no likelihood of ever producing anything of any scholarly merit. Some of them declare that they have no intention of doing so. They might be forgiven for not contributing anything to their fields by way of publishable scholarship. Indeed, a word of gratitude might be owed them for not cluttering learned journals with more worthless, unreadable surplusage. But there should be no forgiveness for those who are also mediocre teachers. Yet they go on, year after weary year, not producing anything in return for their academic freedom, and boring or misinforming generations of students.

Some students are blessed with the good fortune of never encountering such instructors. These students sit awe-inspired through the lectures of stimulating faculty members whose every word is a pearl of wisdom, who are vibrant and exciting, and whose scholarly work is at the cutting edge of their fields. Such professors are intimately familiar with the contents of the books they have assigned because they wrote them. They convey to their students the excitement of discovery, sharing with them the insights they have recently gained through their sci-

Id. He said that the walls of the building in which he taught looked as though "someone had peed on them and then smeared them with baby crap." *Id.* The court found, with regard to most of his vulgar statements, that although they did not rise to the level of immorality, they had a bearing on his fitness to teach. *Id.* at 576.

See also *Lehman v. Board of Trustees of Whitman College*, 576 P.2d 397 (Wash. 1978), in which the court upheld the dismissal of a tenured professor who had made sexual advances toward female students, faculty, staff, and wives of faculty and staff. In *Board of Trustees v. Stubblefield*, 94 Cal. Rptr. 318 (Ct. App. 1971), the court upheld the dismissal of a tenured faculty member after a policeman had discovered him in a parked car, undressed, with a student. *Id.* at 320. The situation was aggravated by the fact that he had jumped out of the car, assaulted the police officer, and attempted to escape. *Id.* at 322. But cf. *Texton v. Hancock*, 359 So. 2d 895 (Fla. 1978). Ms. Texton was a tenured instructor of psychology. The evidence indicated that "she had discussed the personal problems and grades of students with other [students]; advised her students to overrule another teacher," *id.* at 896; used profanity and erotic terms regularly; asked one student to have an affair with her ex-husband; and visited the home of at least one student after midnight, brought beer, and passed out. *Id.* The court overturned the school's dismissal of Ms. Texton on the ground that her students were in a junior college and were mature adults, and in view of the "more liberal, open, robust" surroundings of a college. *Id.* at 897.

entific experiments or observations, their literary analysis, or the inferences they have made from discoveries introduced by others. And they do all of this gracefully and articulately, bringing their students along with them step by step so that not a nuance is lost. *Some* students have such intellectual adventures, and look back on them years later as among the most inspiring and awesome experiences of their lives.

But others, alas, are not so fortunate. They go hour after hour to classes that they feel are no more than extensions of their high school courses. Their instructors are tired and plodding. The cliché about the professor who teaches out of the same yellowed notes year after year is, sadly enough, all too true. The dullness of his lectures is surpassed only by the arrogance of his manner and his high-handedness when dealing with students, secretaries, and other university personnel. He has no time to see students because he is eager to return to the faculty lounge, where he can catch up on the latest university gossip and dabble in university politics. He has not had an original thought in years. He has not read anything on new approaches to pedagogy because he is convinced that what he is doing is right. After all, this is how it has always been done. He is usually opposed to proposed changes in curriculum, but most especially if he thinks they might encroach on his "territory." He is incensed when an old book goes out of print because he might have to make slight adjustments to his courses. But he finds a ready solution: The bookstore will order used books from the Nebraska Book Company, which buys them for a song from students of other professors of the same ilk. Despite protestations to the contrary, such "professors" are not at all difficult to find on almost any campus in America. They seem to have been attracted to some institutions as iron filings to a magnet—and by virtue of the power of tenure, they adhere just as tightly.

Those who argue that tenure should be abolished, as it has been in England,⁶ contend that only through such measures can such deadwood be removed. But they have other points as well. Thousands of bright, enthusiastic young people receive their

6. Andrew Adonis, *Law Lords Reject Plea by Don on Job-for-Life Right*, FIN. TIMES, Dec. 4, 1992, at 10.

graduate degrees every year. For demographic reasons, university enrollments have been contracting for well over a decade.⁷ Consequently, universities have had to become far more selective in hiring than they were in the past. Some departments, and some entire colleges and universities are so thoroughly "tenured in" that no positions are available for the vast majority of these young scholars. The placement centers, or as they have come to be called, the "meat markets," at the major conventions of such professional societies as the American Philosophical Association, the American Psychological Association, the Modern Language Association, the Association of American Law Schools, and others are depressing spectacles at which hundreds of young and not-so-young⁸ scholars jockey for position and compete with one another for the small number of jobs that are available. Tenure works to keep older people in the positions they have held for years, whatever their current qualifications may be and however unlikely it is that they would be hired if they were seeking the same position today, and to keep younger aspirants out of the field, however excellent they might be as teachers, scholars, and colleagues. Young Ph.D.s drive taxicabs and make french fries at McDonald's, while older faculty members rest secure in their tenured positions, making minimal contributions to their students' enlightenment and even less to the world of scholarship. For many, tenure guarantees lifetime employment to the incompetent person who already has a university position, and unemployment to the talented individual who does not.

What is it about tenure that enables such professors to continue to draw their salaries? Does tenure necessarily guarantee lifetime employment to the incompetent? Not according to

7. John Chandler, *State College Enrollments Drop Slightly*, L.A. TIMES, Dec. 26, 1994, at B2; Carol Chastang, *State is Closely Monitoring Finances at Santa Monica College*, L.A. TIMES, Dec. 29, 1994, at J3; Larry Gordon, *Colleges Dig Deeper into Freshman Waiting Lists*, L.A. TIMES, July 2, 1990, at A1; Valerie Strauss, *Howard Campus Shaken In Wake of Major Layoffs*, WASH. POST, Dec. 3, 1994, at B1.

8. One of the saddest sights of all is the faculty member who has been forced out of his or her position by financial exigency or the closing of a department at a major university. Because of tight finances, such individuals, despite excellent qualifications, such as numerous high-quality publications, are shut out in favor of younger, less experienced persons who will accept lower salaries or are not perceived to be "over-qualified."

those courts that have upheld dismissals of tenured faculty members on the ground that they were poor teachers, consistently unprepared for classes, had poor relations with their students,⁹ and who were shown by the evidence to be incompetent, inefficient, and insubordinate.¹⁰ Mediocrity may be tolerable, but incompetence is not. Part of the problem, of course, is the fact that the burden of proof is always upon the university if it chooses to dismiss a tenured faculty member for cause, and the faculty member challenges the dismissal in court. But in appropriate cases, such as those just cited, the courts have deferred to the judgments of college or university administrations.

Insubordination and neglect of duty are sufficient reasons for dismissal of tenured faculty members, at least according to some courts. For example, one faculty member was dismissed after he refused to supply his department chair a list of his publications, failed to post and keep office hours, and systematically refused to open mail from his department chair.¹¹ The court did not agree with the faculty member's contention that the facts found did not constitute adequate cause for dismissal.¹² His failure to supply a list of his publications when a reasonable request was made by his department chair for such a list constituted "insubordination and dereliction of duty."¹³ As to his contention that compliance with such demands was nowhere written as a requirement of his job, the court observed that "not showing up for class naked is not a written job requirement either. Some things go without saying."¹⁴ Dereliction of duty may take many forms, including boycotting faculty workshops and commencement exercises,¹⁵ failure to submit required reports,¹⁶ missing or refusing to teach assigned classes,¹⁷ or tak-

9. *See, e.g., Jawa v. Fayetteville State Univ.*, 426 F. Supp. 218, 221 (E.D.N.C. 1976).

10. *See, e.g., Saunders v. Reorganized Sch. Dist. No. 2 of Osage County*, 520 S.W.2d 29 (Mo. 1975).

11. *Garrett v. Mathews*, 474 F. Supp. 594 (N.D. Ala. 1979).

12. *Id.* at 600-01.

13. *Id.* at 599.

14. *Id.*

15. *See Shaw v. Board of Trustees of Frederick Community College*, 549 F.2d 929 (4th Cir. 1976).

16. *See Bates v. Sponberg*, 547 F.2d 325 (6th Cir. 1976).

17. *See Smith v. Kent State Univ.*, 696 F.2d 476 (6th Cir. 1983); *Stastny v. Board of Trustees of Cent. Wash. Univ.*, 647 P.2d 496 (Wash. Ct. App. 1982).

ing an unauthorized leave of absence.¹⁸ In each of these situations, the courts upheld termination of the tenured faculty member's employment. Indeed, some courts have sanctioned termination of tenured faculty members who were disruptive or insubordinate, and have not accepted the argument that their "bickering"¹⁹ or "inability to cooperate with and maintain harmony among the staff"²⁰ was speech protected by the First Amendment.²¹ It is reasonable to conclude, then, that there *are* limits to the protections afforded to faculty members by tenure. But in many situations, it is extremely difficult, if not impossible, to anticipate how the courts will rule.

However, the issue is not always dependent upon what courts may decide. Most respectable colleges and universities have a faculty grievance procedure that is governed by rules and procedures promulgated by the faculty itself. To a large degree, such issues are determined by faculty committees. Faculty members rightly insist on their right to be self-governing.²² However, when it comes to making the hard decisions, especially those that entail dismissal of colleagues, they often tend to let personal friendship, sympathy, and cowardice stand in the way of objective judgment.

II. How Outrageous Can a Faculty Member's Views Be?

A. *The Harmful Impact of Faculty Indiscretions*

From time to time, a faculty member attains considerable notoriety because of the outrageousness of his views and the manner in which he expresses them. When such situations are brought to the attention of the general public, and the controversy spills outside the walls of the academy, concerns tangential to but clearly touching upon the faculty member's right of academic freedom and tenure come into play. Most notable

18. See *Kalme v. West Virginia Bd. of Regents*, 539 F.2d 1346 (4th Cir. 1976); *Akyeampong v. Coppin State College*, 538 F. Supp. 986 (D. Md. 1982).

19. See *Jawa v. Fayetteville State Univ.*, 426 F. Supp. 218, 230 (E.D.N.C. 1976).

20. See *Kelly v. Kansas City, Kansas Community College*, 648 P.2d 225, 230 (Kan. 1982).

21. See also *Smith*, 696 F.2d at 479; *Stastny*, 647 P.2d at 502-03.

22. See 1940 Statement, *supra* note 2, at 117-41 (discussing college and university government).

among the possible deleterious effects of the publicity accompanying such incidents are:

- An adverse impact on the reputation of the college or university in the community at large;
- Serious declines in student enrollment and retention, with a concomitant drop in tuition income;
- Threats by alumni and other potential donors to refuse to contribute to the institution's endowment;
- The possibility of a reduction or withdrawal of support from the state legislature;
- The threat of direct or indirect action by state or federal administrative agencies or legislative committees which might launch investigations of the institution (thus bringing about even more bad publicity), enact sanctions against it, or interfere with its academic or scholarly activities;
- Interjection of governing boards into the day-to-day management of the institution;
- An escalation in the number and prominence of reports in the media, generating even more threats of the type described above;
- Demands by alumni, legislators, supporters, trustees, and editorial writers that the offending professor be removed.²³

With the turn toward liberalism, at least in the civil liberties areas, in the United States generally and in universities in particular, one would have predicted that threats to academic freedom and tenure would have virtually disappeared. The evidence suggests, however, that precisely the opposite may have happened. One seldom encounters demands that college professors be dismissed from their posts because they are alleged to be disloyal to the United States, because they belong to such subversive organizations as the Communist Party, or because they harbor supposedly immoral ideas (e.g., that homosexual behavior should not give rise to criminal penalties or that men and women should be free to cohabit without benefit of marriage), or because they express opinions deemed to be contrary to the best interests of their employers, such as letters or speeches critical

23. This effect is, of course, not tangential to the professor's rights at all, but is as direct as it can be.

of the university administration or its trustees. All of these *have* been invoked by university presidents and trustees in the past as sufficient reasons for terminating the employment of professors,²⁴ but are seldom encountered today. Other threats to academic freedom abound, however, and it is with these that the remainder of this article will deal.

B. *Outrageous Racial Theories*

1. *Levin v. Harleston*²⁵

Michael Levin had been a tenured professor of philosophy at City College, a major institution within the New York City University system, for more than sixteen years when a number of students began to disrupt his classes because of their belief that his views on affirmative action and the relative intelligence of blacks and whites were racist.²⁶ In several articles he had written, particularly one in a relatively obscure Australian philosophical journal, he had made denigrating comments about the intelligence and social attributes of blacks.²⁷ He claimed that "[i]t has been amply confirmed [that] . . . on average, blacks are significantly less intelligent than whites,"²⁸ and that "black representation in a field can be expected, absent any discrimination, to decrease as the intellectual demands of the field increase."²⁹ College officials, agreeing with student complaints that "his views are odious, and rightly denounced,"³⁰ revised the course offerings in his department in order to insulate and protect students from being exposed to his ideas.³¹ Once these views became common knowledge on the City College campus, students began to hold loud demonstrations outside his classrooms.³² They barged into his classes chanting through megaphones, making it impossible for him to teach his students,

24. See generally American Ass'n of Univ. Professors, *Committee A Statement of Extramural Utterances*, 51 AAUP BULLETIN 29 (1965), reprinted in AAUP POLICY DOCUMENTS AND REPORTS 32 (1990).

25. 770 F. Supp. 895 (S.D.N.Y. 1991), *aff'd in part*, 966 F.2d 85 (2d Cir. 1992).

26. *Levin*, 770 F. Supp. at 898.

27. *Id.* at 901-02.

28. *Id.* at 902.

29. *Id.* at 903.

30. *Id.* at 898.

31. *Id.*

32. *Id.* at 903.

burned documents affixed to his office door, and issued threats, such as one that read: "We know where you live you Jewish bastard your time is going to come."³³

Professor Levin was asked by his dean and his department chairman to withdraw from teaching his classes, because they were concerned about disruptions by demonstrators, and because some students might feel uncomfortable being taught by a person holding the views he had published.³⁴ Students enrolled in his classes the following semester were informed in a letter from the dean that Professor Levin had expressed "controversial views" and that a newly opened "shadow" or "parallel" section of the required course that he taught would be taught by another instructor, presumably one who held less controversial views.³⁵

The president of the university testified that he approved of the decision to offer the "shadow" classes because students should not be "held hostage to a particular point of view that by its nature impugns numbers of them."³⁶ After failing to win faculty senate support for an investigation of Professor Levin, City College President Harleston initiated his own investigation, appointing an ad hoc committee consisting in significant part of faculty members who had signed a petition critical of Levin's published views, and no one from his own field of philosophy.³⁷ Harleston was quoted in the student newspaper as saying that "[t]he process of removing a tenured professor is a complicated one,"³⁸ and that "[Levin's] views are offensive to the basic values of human equality and decency and simply have no place here at City College."³⁹ Soon afterward, Harleston appointed a committee of seven faculty members who were asked "to review the question of when speech both in and outside the classroom may go beyond the protection of academic freedom or become *conduct unbecoming a member of the faculty, or some other form of misconduct*."⁴⁰ The italicized phrase appeared in

33. *Id.*

34. *Id.* at 907.

35. *Id.*

36. *Id.* at 909.

37. *Id.* at 911.

38. *Id.*

39. *Id.*

40. *Id.* (emphasis added).

the professional staff contract then in effect and in the university's by-laws.⁴¹ In those documents, "misconduct" and "conduct unbecoming a faculty member" are grounds for discipline of a faculty member, including revocation of tenure.⁴²

In its report, the committee, after affirming its dedication to academic freedom, declared that "utterances by faculty, even outside of class, . . . can have a detrimental impact on the educational process,"⁴³ and that "statements denigrating the intellectual capability of groups by virtue of race, ethnicity or gender have the clear potential to undermine the learning environment and to place students in academic jeopardy."⁴⁴ Despite the fact that "unfamiliar" or "controversial" ideas are "an inherent aspect of an open, vigorous learning environment,"⁴⁵ the committee concluded that members of the faculty must "exercise appropriate restraint so as not to belittle a student, to prophesy the likelihood of his/her poor performance, or to, in any manner, undermine the equal educational opportunities of all students."⁴⁶ Since, in the committee's view, Professor Levin's published remarks on the intellectual inferiority of blacks "clearly have the potential to harm the process of education in his classes,"⁴⁷ the committee concluded that the college should "continue to carefully implement ways to protect the students from such harm."⁴⁸

Levin filed suit in federal court, seeking full reinstatement and injunctive relief against further harassment, including the abolition of the "shadow" sections of his courses and protection against disruption of his classes.⁴⁹ The court concluded that the committee's findings amounted to a condemnation of Levin's conduct as unprofessional, inappropriate, and harmful to the educational process, and that it was therefore reasonable for

41. *Id.*

42. *Id.*

43. *Id.* at 912.

44. *Id.*

45. *Id.* at 913.

46. *Id.*

47. *Id.* at 914.

48. *Id.* The committee graciously recommended that the president not institute disciplinary proceedings against Professor Levin. *Id.*

49. *Id.* at 898.

Levin to believe that they constituted an attack on his tenure and that he was vulnerable to being fired by the president.⁵⁰

The court held, moreover, that these actions by the president, the dean, and the ad hoc committee, founded as they were solely upon the expression of ideas that were protected by the First Amendment, were "impermissible,"⁵¹ that they were in retaliation for Levin's expression of those ideas,⁵² that they had a chilling effect upon Levin's exercise of his First Amendment rights of free expression,⁵³ and that they were intended to do so.⁵⁴

The court found an apt comparison between *Levin* and *Pickering v. Board of Education of Township High School District 205*,⁵⁵ in which a teacher was dismissed for having sent a letter to a local newspaper just prior to a vote on school taxes criticizing the school board and the superintendent for the manner in which they had handled earlier school board proposals and their allocations to athletic programs as against educational programs.⁵⁶ The school board was incensed by what it construed to be false charges in Pickering's letter and by its belief that he had impugned the "honesty", "integrity", and "competence" of the school board and the administration.⁵⁷ Claiming that the letter was "disruptive of faculty discipline" and tended to "foment 'controversy, conflict and dissension' among teachers, administrators, the Board of Education, and the residents of the district,"⁵⁸ and that the letter was "'detrimental to the best interests of the schools.'" ⁵⁹ The school board authorized Mr. Pickering's dismissal.⁶⁰ The United States Supreme Court found that some of the statements made in Pickering's letter were false.⁶¹ Nevertheless, the Court held that in writing his letter,

50. *Id.* at 914.

51. *Id.* at 918.

52. *Id.*

53. *Id.*

54. *Id.*

55. 391 U.S. 563 (1968).

56. *Id.* at 564, cited in *Levin*, 770 F. Supp. at 920.

57. 391 U.S. at 566-67.

58. *Id.* at 567.

59. *Id.*

60. *Id.* at 566.

61. *Id.* at 570-72.

Pickering was acting as a private citizen and was therefore entitled to First Amendment protection.⁶² Justice Marshall wrote:

[I]t is apparent that the threat of dismissal from public employment is . . . a potent means of inhibiting speech. . . . [I]n a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.⁶³

In light of these principles, the *Levin* court concluded:

[T]enure is more than the right to receive a paycheck. Academic tenure, if it is to have any meaning at all, must encompass the right to pursue scholarship wherever it may lead, the freedom to inquire, to study and to evaluate without the deadening limits of orthodoxy or the corrosive atmosphere of suspicion and distrust⁶⁴

The court concluded that Levin was entitled to the relief he had requested, including permanent injunctions against further harassment and mandating the removal of the "shadow" classes and the taking of reasonable steps to prevent disruption of Levin's classes.⁶⁵

62. *Id.* at 574 (citing *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964), in which the *New York Times v. Sullivan*, 376 U.S. 254 (1964), test was applied to a district attorney who had been convicted of criminally defaming judges before whom he regularly appeared).

63. *Id.*

64. *Levin*, 770 F. Supp. at 925 (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

65. *Id.* at 927. On appeal, the Second Circuit vacated the district court's order that the college take "reasonable" steps to prevent disruption of Levin's classes on the ground that it was vague and that in this respect, although the disruptive students were condemned as "shouters," "intimidators," and "bullies," *Levin v. Harleston*, 966 F.2d 85, 90 (2d Cir. 1992), these disruptions were treated in the same way as the college had treated other disruptions, and therefore, however unwise the college's policy might be, it did not constitute a violation of Professor Levin's constitutional rights. The court upheld the permanent injunction against "shadow" sections, on the ground that "[a]ppellants' encouragement of the continued erosion in the size of Professor Levin's class if he does not mend his extracurricular ways is the antithesis of freedom of expression." *Id.* at 88. Although the court found that there was no error in the district court's finding that Harleston's actions conveyed a "chilling threat" to Levin, *id.* at 90, on technical grounds it held that Levin was not entitled to a permanent injunction. *Id.* However, it accomplished the same result by awarding him declaratory relief that "the commencement, or threat thereof, of disciplinary proceedings against Professor Levin

2. Jeffries v. Harleston⁶⁶

Leonard Jeffries, a professor and chairman of the Department of Black Studies at City College of the City University of New York,⁶⁷ had spoken both on and off campus about his theory that the human species is composed essentially of two types of people: the "ice people,"⁶⁸ who are light-skinned, and the "sun people,"⁶⁹ who are dark-skinned. Jeffries alleged that because of a greater concentration of melanin in the "sun people," they are endowed with more warmth of personality and accordingly have finer personal attributes than the "ice people," who have a propensity for cruelty that is not found in the "sun people."⁷⁰ In general, Jeffries advocated the view that white people are genetically inferior to black people.⁷¹ He also peppered both his classroom lectures and his public speeches with allegations that were widely perceived to be anti-Semitic.⁷² Among other things, he alleged that Jews in general had a history of oppressing blacks,⁷³ that "rich Jews" financed the African slave trade,⁷⁴ and that "Jews and Mafia figures in Hollywood had conspired to 'put together a system of destruction of black people' by portraying them negatively in films."⁷⁵ These and other similar statements led to demands that Jeffries be fired by the City University, and provoked the president of the University and its Board of Trustees to replace him as chairman of the Department of Black Studies.⁷⁶ Jeffries then sought relief in federal court.⁷⁷ The district court found that the university's action was constitutionally impermissible, despite the "hateful, poisonous and

predicated solely upon his protected speech outside the classroom violates his First Amendment rights." *Id.*

66. 828 F. Supp. 1066 (S.D.N.Y. 1993), *aff'd in part*, 21 F.3d 1238 (2d Cir. 1994), *cert. granted and judgment vacated by* 115 S. Ct. 502 (1994).

67. *Jeffries*, 828 F. Supp. at 1072-73.

68. *Id.* at 1098.

69. *Id.*

70. *Id.* at 1097-98.

71. *Id.*

72. *Id.* at 1097.

73. *Jeffries v. Harleston*, 21 F.3d 1258, 1242 (2d Cir. 1994).

74. *Id.*

75. *Id.*

76. *Jeffries*, 828 F. Supp. at 1071.

77. *Id.* at 1077.

reprehensible statements made by the professor" in the course of a speech he had given off campus.⁷⁸

The court went out of its way, however, to add that if the university had offered convincing proof "that either the consequences of the speech disrupted the campus, classes, administration, fund-raising or faculty relations, or that the professor had turned his classroom into a forum for bizarre, shallow, racist and incompetent pseudo-thinking and pseudo-teaching,"⁷⁹ the result might have been different.⁸⁰ After finding that there was enough evidence for the jury to infer that Jeffries was removed from his position in large part because of his speech,⁸¹ the court concluded that the legal issue in the case was "whether a University may deny a professor a department chairmanship because of the professor's out-of-class speech, when the professor's speech substantially involved matters of public concern and where the speech caused no actual interference with the functioning of the University."⁸²

In answering this question, the court cited *Rankin v. McPherson*,⁸³ which involved the discharge of an employee of a law enforcement agency who expressed disagreement with the president's policies and the hope that if another assassination attempt were made on him, the attempt would be successful.⁸⁴ The Court held that absent a showing that the government employee's statement had concrete negative effects on the functioning of the office of her employer, she could not be fired for her remarks.⁸⁵ Despite the fact that the court found that Jeffries's comments were "vulgar, repugnant, and reprehensible,"⁸⁶ and his behavior was "thuggish, and incompatible with the civilized discourse and conduct expected of tenured professors,"⁸⁷ the principle laid down in *Rankin* left little doubt that this was

78. *Id.*

79. *Id.*

80. *Id.*

81. *See, e.g., id.* at 1080 n.17.

82. *Id.* at 1086.

83. 483 U.S. 378 (1987), *cited in Jeffries*, 828 F. Supp at 1086.

84. 483 U.S. at 381-82.

85. *Id.* at 388-89, 392.

86. *Jeffries*, 828 F. Supp. at 1090.

87. *Id.* at 1094.

not sufficient to justify retaliatory actions against him. The Court in *Rankin* said:

The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern. [D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected.⁸⁸

The court in *Jeffries* observed that the First Amendment imposes certain costs upon us, and that among them is the fact that viewpoints that most of us consider to be "morally reprehensible and racist"⁸⁹ are protected by it. Nevertheless, the court noted that the university had the "full and unqualified right and the responsibility to discipline the plaintiff in response to improprieties or behavior deemed unworthy of a Department Chair or a tenured professor, as long as in so doing [it does] not violate the United States Constitution."⁹⁰ The court admonished the university and its counsel that their failure to develop evidence of such improprieties at trial, upon which the university could have acted without violating the Constitution, was inexplicable and "perhaps cowardly."⁹¹ The students of the City University and the citizens of New York, the court said, "are entitled to a higher standard of decision-making on the part of its public officials."⁹²

The court further observed that nothing in the Constitution prevents a university from invoking disciplinary measures against a professor who "engages in a systematic pattern of ra-

88. *Id.* at 1090 (quoting *Rankin*, 483 U.S. at 387) (quotation marks and internal citations omitted).

89. *Jeffries*, 828 F. Supp. at 1096.

90. *Id.* at 1096-97.

91. *Id.* at 1097.

92. *Id.* The court cited as an example an incident in which Jeffries made anti-Semitic and racist remarks to a candidate interviewing for a position as director of the international studies program. Because of Jeffries's remarks, the candidate withdrew from consideration. "In the face of what seems to be totally unacceptable behavior for a Department Chair," the court wrote, "the CUNY administrators allowed Professor Jeffries to retain his Chairmanship, only sending him a letter of reprimand." *Id.* at 1097 n.50.

cist, anti-Semitic, sexist, and homophobic remarks *during class*.⁹³ Abusive behavior toward students, indecent language, and profanity “tend[s] to silence rather than promote the free exchange of ideas, and to destroy rather than enhance academic diversity.”⁹⁴

Finally, the court assured the university that its order did not require it “to disserve its own students by subjecting them in class to the bigoted statements and absurd theories of any of its professors.”⁹⁵ The First Amendment does not protect a geography professor who wants to teach that the earth is flat, for example,⁹⁶ nor, presumably, would it protect an astronomy professor who insisted on teaching the Ptolemaic theory of the universe or a physics professor who taught her classes that phlogiston⁹⁷ is the cause of combustion.⁹⁸ One may safely assume that the court was broadly hinting that Jeffries’s melanin theories are of the same ilk.

C. *Outrageous Language and Sexual Innuendoes*

Levin and *Jeffries* have much in common. The chief complaint against each of these professors was that he had expressed views that were deemed by some to be racist. Both of them were subjected to sanctions imposed by the university administration as a direct result of the views they had expressed.⁹⁹ Threats by alumni and others to withdraw their support, and student demonstrations and disruptions, distressing as they must have been to all concerned, were side issues. In both cases, the administration concluded that the opinions uttered by Levin and Jeffries adversely affected their students

93. *Id.* at 1097 (emphasis added).

94. *Id.*

95. *Id.* at 1098.

96. *Id.* at 1097 n.53.

97. Phlogiston is a fictional substance that early chemists assumed escaped from burning materials in the form of flames. Its existence was decisively refuted by Lavoisier toward the end of the 18th century. Lavoisier demonstrated that the end products of combustion were always heavier than the substance had been prior to its being burned (which did not square with the theory that something had escaped during combustion), and that oxygen accounted for the added weight. ISAAC ASIMOV, CHRONOLOGY OF SCIENTIFIC DISCOVERY 217-18 (1989).

98. *Jeffries*, 828 F. Supp. at 1097.

99. For a discussion of the *Levin* case, see *supra* part II.B.1. See *supra* part II.B.2 for a discussion of the *Jeffries* case.

and their ability to communicate with those students.¹⁰⁰ By their utterances, they had allegedly created a "hostile atmosphere" in which at least some students felt, or might have felt, uncomfortable.¹⁰¹ The creation of a hostile environment is a crucial element in sexual harassment cases.

1. *Silva v. University of New Hampshire*¹⁰²

The University of New Hampshire, like many universities around the country, had adopted a "Sexual Harassment Policy" which stated, *inter alia*:

All faculty, staff and students have a right to work in an environment free of discrimination, including freedom from sexual harassment. . . .

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

. . . sexually degrading words to describe a person.

. . . derogatory gender-based humor.

Such conduct whether intended or not constitutes sexual harassment and is illegal under both State and Federal law. . . .

Any faculty, staff or student who violates this policy will be subject to discipline up to and including dismissal.¹⁰³

Professor J. Donald Silva, in explaining to his students how to focus the thesis statement of a technical report, compared it to a sexual relationship between people. The relationship of writer to subject, he said, is like that of a sexual relationship between two people: There is a "long probation, adjustment, centering, a back and forth, give and take . . . until the writer and the subject are connected and fused as one."¹⁰⁴ On another occasion, he explained that a writer's 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. . . . You and the subject become one."¹⁰⁵ On a third occasion, he used a simile in which he compared a definition to belly dancing, and explained that belly dancing is "like jello on a

100. See *supra* text accompanying notes 43-50, 72-78.

101. See *supra* text accompanying notes 34, 95.

102. No. CIV. 93-533-SD, 1994 WL 504417 (D.N.H. Sept. 15, 1994).

103. *Id.* at *1-2.

104. *Id.* at *2.

105. *Id.* at *3.

plate with a vibrator under the plate.”¹⁰⁶ A number of students complained about Professor Silva’s sexual references on the ground that they were “vulgar,” “degrading,” and “offensive.”¹⁰⁷

Without offering Silva a hearing, academic administrators began to discuss replacing him in the classroom, and eventually, they created “shadow classes” to which any of his disaffected students could transfer.¹⁰⁸ Shortly thereafter, Silva was given a “draft” letter of reprimand stating that the students’ complaints were “altogether credible,”¹⁰⁹ and that Silva’s behavior was “in violation of University policy prohibiting sexual harassment . . . and will not be tolerated.”¹¹⁰ This draft letter became a formal letter of reprimand when Silva did not respond to it.¹¹¹ Silva filed a grievance letter with his dean, and was then suspended without pay for failing to meet the requirements set forth in the letter of reprimand.¹¹² He was subsequently informed that he would not be scheduled to teach any classes during the following semester.¹¹³

At a later stage of the process, the university’s sexual harassment board recommended, *inter alia*, that Professor Silva be suspended without pay for one year, and that he not be permitted to return to the classroom until he had reimbursed the university for all costs it incurred in connection with his alleged harassment.¹¹⁴ The board recommended further that he be required to participate in counseling sessions; that he not retaliate against the complaining students; and that he apologize in writing to each of them for having created a “hostile and offensive environment.”¹¹⁵ The university adopted each of these recommendations, and Silva was in fact suspended without pay.¹¹⁶

106. *Id.*

107. *Id.* at *5-6.

108. *Id.* at *26.

109. *Id.* at *8.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at *9.

114. *Id.* at *13.

115. *Id.*

116. *Id.*

Silva brought an action in federal court against the university, seeking injunctive relief among other remedies.¹¹⁷ The court found that the statements to which Silva's students objected were not sexual in nature and that Silva was not accorded the due process to which he was entitled under both the university's contract with the AAUP (the union representing faculty at the university) and the United States Constitution.¹¹⁸ Citing *Mailloux v. Kiley*,¹¹⁹ the court held that although the constitutional guarantee of free speech "does not grant teachers a license to say or write in class whatever they may feel like,"¹²⁰ the age and sophistication of the students, the context and manner of the presentation, and its relation to a valid educational objective must be taken into account in any attempt by an educational institution to regulate that speech.¹²¹

In response to the charge that Silva's speech was "outrageous," the court determined that "outrageousness" is inherently subjective and is therefore liable to be determined by a jury's tastes or views, or their "dislike of a particular expression."¹²² In *Shelton v. Tucker*,¹²³ the United States Supreme Court declared, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."¹²⁴ And in *Keyishian v. Board of Regents of New York*,¹²⁵ the Court stated that "[t]he 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.'"¹²⁶

117. *Id.* at *1. Silva also sought a declaratory judgment that the defendant's conduct violated his First and Fourteenth Amendment rights, damages, and reasonable costs and attorney's fees. *Id.*

118. *Id.* at *19.

119. 448 F.2d 1242 (1st Cir. 1971).

120. *Id.* at 1243, *quoted in Silva*, 1994 WL 504417, at *19.

121. 448 F.2d at 1243.

122. *Silva*, 1994 WL 504417, at *20 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982)).

123. 364 U.S. 479 (1960).

124. *Id.* at 487, *quoted in Silva*, 1994 WL 504417, at *21.

125. 385 U.S. 589 (1967).

126. *Id.* at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)), *cited in Silva*, 1994 WL 504417, at *21.

The court found that Silva's students were all adults and that his statements were reasonably related to his pedagogical purposes.¹²⁷ Consequently, in light of *Tucker* and *Keyishian* the court concluded that the University of New Hampshire employed "an impermissibly subjective standard that fail[ed] to take into account the nation's interest in academic freedom."¹²⁸ The court suggested that Silva's rights of substantive due process had been violated, but concluded that it was not necessary to rule on that issue, since its finding that his First Amendment rights were violated was enough to find in his favor.¹²⁹

The court found that Silva was likely to succeed in his First Amendment claim against the university, and that "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury."¹³⁰ Further, it held that his continued suspension without pay constituted irreparable harm.¹³¹ Therefore, the court granted Silva's petition for preliminary injunctive relief and reinstated him, ordering the university to permit him to resume teaching his classes, despite the university's plea that it would be difficult to do so in the middle of the semester.¹³²

As to the claim that the various university officials, including the students who served on the committee that heard the charges against Silva, were entitled to qualified immunity,¹³³ the court ruled that "a reasonable University official would not have believed his or her actions, in disciplining plaintiff because of his classroom statements, were lawful in light of this clearly

127. *Silva*, 1994 WL 504417, at *20.

128. *Id.* at *21.

129. *Id.* at *34. If a school's authorities make an "arbitrary and capricious decision significantly affecting a tenured teacher's employment status, [they] are liable for a substantive due process violation." *Newman v. Massachusetts*, 884 F.2d 19, 25 (1st Cir. 1989), *cert. denied*, 493 U.S. 1078 (1990), *cited in Silva*, 1994 WL 504417, at *33. It does not follow, however, that school authorities may not take appropriate actions against a tenured teacher if they have adequate reasons for doing so. *Id.*

130. *Silva*, 1994 WL 504417, at *34 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

131. *Id.*

132. *Id.* at *41. The court observed, with some irony, that the university had evidently had no great difficulty creating the "shadow" sections in the middle of the semester when these incidents began. *Id.*

133. *Id.* at *35.

established law."¹³⁴ Therefore, the court held that the individual defendants did not have qualified immunity as government officials.¹³⁵ By similar reasoning, it held that they did not enjoy the immunity conferred by the New Hampshire statute on persons who served as volunteers of nonprofit organizations or government entities.¹³⁶

Finally, as to Silva's claim that the university had breached its contract with him and with his union, the court cited an affidavit of William Van Alstyne, a professor at Duke University Law School and former general counsel, national president, and chair of Committee A (on academic freedom) of the AAUP.¹³⁷

Academic freedom, as it is generally understood in the University Community, encompasses rights of faculty to speak freely outside the classroom, to pursue research and to publish freely outside of the classroom, and to teach in the classroom without unreasonable interference. . . . At a minimum, this concept of academic freedom permits faculty members freedom to choose specific pedagogic techniques or examples to convey the lesson they are trying to impart to their students.¹³⁸

D. *An Analysis of Levin and Jeffries*

If the three principal cases discussed above can serve as paradigms, the conclusion to the question posed at the outset of this section (How outrageous can a faculty member's views be?) would seem to be: There are virtually no limits at all to the outrageousness of what a professor may say, either on or off campus. However, upon further examination, the cases—especially *Levin* and *Jeffries*—suggest that that might be just a bit too facile.

134. *Id.* at *36 (citing *Hazlewood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1987); *Connick v. Myers*, 461 U.S. 138 (1983); *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1974); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Mailloux v. Kiley*, 448 F.2d 1242 (1st Cir. 1974)).

135. *Id.*

136. *Id.* at *37. See N.H. REV. STAT. ANN. § 508:17 (Supp. 1994).

137. *Silva*, 1994 WL 504417, at *38.

138. *Id.* The university's trustees ultimately decided against appealing the court's decision and settled with Silva, reinstating him, paying him \$60,000 in back pay and damages and \$170,000 in legal fees and expunging from his records any reference to his suspension and the charges against him. *Professor Accused of Harassment is Reinstated*, N.Y. TIMES, Dec. 4, 1994, at 35.

Judge Conboy of the Southern District of New York heard both *Levin*¹³⁹ and *Jeffries*.¹⁴⁰ There is no reason to believe that he had any particular prejudice that might have led him to treat the cases differently. The fact is, however, that there are sharp differences between his opinions in the two cases. Despite their similar outcomes, in both cases, the court found that the university administration had violated the First Amendment rights of the plaintiff professors as well as their rights of academic freedom.¹⁴¹ However, in *Jeffries*, the court added some very harsh words about the ineptness of the administration in its handling of the case within the university, about the university counsel's presentation of evidence, and about Professor Jeffries's views and his competence.¹⁴² Some of the court's comments seem to amount to an open invitation to the university to renew its efforts to unseat Jeffries, but to exercise greater care not to taint the case with violations of his rights of free speech.¹⁴³ One must therefore ask whether there is any difference between the two cases that would justify such disparate treatment by the court.

Evidently the court saw Levin as having been victimized strictly because of his effrontery in expressing views contrary to those that are currently popular, or even acceptable, in most American academic circles. They are particularly unacceptable to members of the minority groups whose innate intelligence he questioned. These views, however, have been expressed by Nobel Prize winning scientists,¹⁴⁴ and although they might offend some people, they are legitimate expressions of opinion on topics of public interest and concern. Levin's crime, if one may so characterize it, was nothing more than heresy,¹⁴⁵ expressed exclusively in his publications. The First Amendment and aca-

139. *Levin*, 770 F. Supp. at 897.

140. *Jeffries*, 828 F. Supp. at 1071.

141. *Levin*, 770 F. Supp. at 899; *Jeffries*, 828 F. Supp. at 1072.

142. 828 F. Supp. at 1071-72.

143. See *supra* text accompanying notes 79-80, 89-92.

144. For example, William B. Shockley, who received the Nobel Prize in 1956 for his work in developing the transistor, has been prevented from speaking at college campuses because of his views on intelligence and race. For an account of some incidents involving Shockley, see BURTON M. LEISER, LIBERTY, JUSTICE, AND MORALS: CONTEMPORARY VALUE CONFLICTS 150-51 (3d ed. 1986).

145. The term currently in vogue for heretical utterances deemed incompatible with liberal orthodoxy is "politically incorrect."

democratic freedom were specifically created to protect expressions of heretical opinions and similar utterances.

Jeffries, on the other hand, had gone far beyond the mere expression of heretical views on the allegedly evil practices of white people in general and Jews in particular. Whether he had been abusive toward some of his students was at least an open question. There were indications that he had used his classroom as a propaganda forum. Faculty members are charged with the education of their students, not with their *indoctrination*. Although it may be difficult to draw clear lines between them, it may be vitally important in cases such as these to distinguish between education, which is the proper function of a university professor—and most especially one who teaches in a public, taxpayer-supported institution—and indoctrination, which certainly is not. Moreover, despite the fact that he was a tenured faculty member and chair of his department, Jeffries had not lived up to the scholarly standards of publication that are common throughout the academic world.¹⁴⁶

In short, the court seemed to suggest that there were ample grounds for the removal of Leonard Jeffries from his chairmanship or even for his dismissal from the faculty of City College. To be sure, he was a heretic. But he was far more than that. He was incompetent, abusive to students and colleagues, unproductive as a scholar, and possibly unworthy of being called a scholar. There was evidence that he used his classroom as a platform for indoctrination rather than education. If the faculty and administration at City College had been more attentive and more courageous, if the university's counsel had prepared his case more carefully, and if it had not been tainted by violations of Jeffries's First Amendment rights, the university might have been able to terminate his employment with impunity. That the university might have been able to do so is reinforced by a recent decision of the United States Supreme Court.¹⁴⁷

On November 14, 1994, the Supreme Court granted certiorari and remanded the *Jeffries* case to the Court of Appeals for

146. See, e.g., Nathan Glazer, *Academic Freedom? Academic Farce*, N.Y. TIMES, May 21, 1993, at A2.

147. *Waters v. Churchill*, 114 S. Ct. 1878 (1994).

the Second Circuit "for further consideration in light of *Waters v. Churchill*."¹⁴⁸

In *Waters*, a nurse, Cheryl Churchill, was discharged by her employer, a public hospital, allegedly because of statements she had made to other employees that were critical of her employer and were deemed disruptive. Some of her comments about fellow employees were described as "unkind," "inappropriate," "negative," and "insubordinate."¹⁴⁹ After her discharge, the president of the hospital rejected an internal grievance that she had filed.¹⁵⁰ Churchill then brought a federal civil rights action under section 1983¹⁵¹ in federal court, claiming that her rights under the First Amendment had been violated.¹⁵² The district court granted summary judgment to the defendants, holding that even if Churchill's speech had been on matters of public concern, its disruptive character "stripped it of First Amendment protection."¹⁵³ In a seven-to-two decision, the Supreme Court held that there is a significant difference between the government's duty, as sovereign, not to interfere with First Amendment freedoms, and its right, as employer, to "promot[e] the efficiency of the public services it performs through its employees."¹⁵⁴ The First Amendment demands of government as sovereign that it tolerate "verbal tumult, discord, and even offensive utterance,"¹⁵⁵ but as employer, the government "has far broader powers,"¹⁵⁶ and may "bar its employees from using . . . offensive utterance[s] to members of the public, or to the people with whom they work."¹⁵⁷ For example, although a private person has the constitutional right to criticize a governor's legislative program as robustly as she likes, there is no constitutional bar to the governor's firing a high-ranking deputy for doing the same thing.¹⁵⁸

148. *Harleston v. Jeffries*, 115 S. Ct. 502 (1994).

149. *Waters*, 114 S. Ct. at 1883.

150. *Id.*

151. 42 U.S.C. § 1983 (1988).

152. 114 S. Ct. at 1883.

153. *Id.*

154. *Id.* at 1884 (citing *Connick v. Myers*, 461 U.S. 138, 142 (1983)).

155. *Id.* at 1886 (citing *Cohen v. California*, 403 U.S. 15, 24-25 (1971)).

156. *Id.*

157. *Id.*

158. *Id.* (citing *Branti v. Finkel*, 445 U.S. 507, 518 (1980)).

The Court in *Waters* held that the key to First Amendment analysis of such cases is this:

The government's interest in achieving its goal as effectively and as efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.¹⁵⁹

In the instant case, the Court held that the potential disruptiveness of Churchill's speech was enough to outweigh any First Amendment value it might have had.¹⁶⁰ "Discouraging people from coming to work for a department certainly qualifies as disruption."¹⁶¹ Churchill's unkind and inappropriate criticisms of management "threatened to undermine management's authority" in the eyes of a fellow employee.¹⁶²

Finally, the Court concluded:

So long as [her employer] discharged Churchill only for the part of the speech that was either not on a matter of public concern, or on a matter of public concern but disruptive, it is irrelevant whether the rest of the speech was, unbeknownst to them, both on a matter of public concern and nondisruptive. . . . *An employee who makes an unprotected statement is not immunized from discipline by the fact that this statement is surrounded by protected statements.*¹⁶³

There are striking parallels between *Waters* and *Jeffries*. To be sure, the City University's president and trustees did not seek to discharge Jeffries. Consequently, the case concerned only the question of his status as chair of his department and his demands for equitable relief and damages. The Supreme Court's remand of *Jeffries* and its instructions to the Second Circuit on the applicability of *Waters* suggest that the Court would have been prepared to accept not only Jeffries's removal from his chairmanship, but also his discharge from employment at the university, despite his status as a tenured faculty mem-

159. *Id.* at 1888.

160. *Id.* at 1890.

161. *Id.*

162. *Id.*

163. *Id.* at 1891 (emphasis added).

ber, if the City University's case had gone that far. Even if the courts were to adhere to a higher standard of tolerance for the political speech of faculty members, in view of the principles of academic freedom and the traditional role of university professors as explorers of new and unpopular ideas, some of Jeffries's utterances might reasonably be deemed to have fallen far enough outside that protected zone to justify disciplinary action up to and including discharge. In addition to the Albany speech that precipitated the outcry against him, there was evidence that Jeffries had done the following:

- He threatened to kill a student reporter if the reporter revealed the contents of his interview with Jeffries.¹⁶⁴
- He called the chair of the African-American Studies Department at Harvard "a faggot and a punk."¹⁶⁵
- Upon learning that his department was being investigated, he wrote a letter to the dean giving notice that "if this faculty wants war it will get it."¹⁶⁶
- When the dean asked him to relinquish his chairmanship, Jeffries threatened to turn City College into "Crown Heights," referring to a three-day riot in which a Hasidic student was murdered.¹⁶⁷
- He referred to one of his colleagues as "head Jew at City College," and made similar disparaging remarks about other Jewish faculty members.¹⁶⁸
- He made anti-Semitic and racist remarks to a candidate interviewing for a position as director of the college's international studies program, causing the candidate to withdraw from consideration.¹⁶⁹

Any one of these incidents would appear to be sufficient, under *Waters*, to justify severe disciplinary action against Jeffries. Collectively, they constitute a damning indictment of his behavior, in Justice O'Connor's words in *Waters*, as unkind, of-

164. *Jeffries*, 828 F. Supp. at 1076.

165. *Id.* at 1076 n.8.

166. *Id.*

167. *Id.* at 1076. For a discussion of the Crown Heights incident, see Reuter, *Grand Jury to Meet on 1991 Killing*, WASH. POST, Jan 26, 1994, at A9; Lynne Duke, *Racial Violence Flares for Third Day in Brooklyn*, WASH. POST, Aug. 22, 1991, at A4.

168. 828 F. Supp. at 1091.

169. *Id.* at 1097 n.50.

fensive, negative, inappropriate, and—to say the least—disruptive.¹⁷⁰ His threats were clearly designed to coerce the college's administration into compliance with his demands, and thus undermine its ability to carry out the public functions for which the college was created and its credibility in the eyes of students, faculty, staff, and the general public. Moreover, it is difficult to defend any of these incidents as sufficiently *academic* to justify protection under academic freedom. They were simply the angry and irresponsible actions of an irascible employee who felt confident that his tenure, his faculty colleagues' propensity to loquacious inaction, and his student and community supporters would immunize him against any attempt by the administration to impose sanctions upon him. It remains to be seen whether the Second Circuit, on remand, will agree.

Such radical sanctions cannot be invoked, however, unless academic freedom is more clearly defined. Just what *is* academic freedom, and why should university professors, unlike virtually anyone else in our society other than federal judges, enjoy lifetime tenure in their jobs? After exploring this question, we will be in a better position to comment on *Silva*.¹⁷¹

III. The Meaning of Academic Freedom

Professor Van Alstyne defined academic freedom as follows:

"[A]cademic freedom" is characterized by a personal liberty to pursue the investigation, research, teaching, and publication of any subject as a matter of professional interest without vocational jeopardy or threat of other sanction, save only upon adequate demonstration of an inexcusable breach of professional ethics in the exercise of that freedom. Specifically, that which sets academic freedom apart as a distinct freedom is its vocational claim of special and limited accountability in respect to all academically related pursuits of the teacher-scholar: an accountability not to any institutional or societal standard of economic benefit, acceptable interest, right thinking, or socially constructive theory, but solely to a fiduciary standard of professional integrity. To condition the employment or personal freedom of the teacher-scholar upon the institutional or societal approval of his academic investigations or utterances, or to qualify either even by the immediate

170. 114 S. Ct. at 1890.

171. See *supra* part II.C.1 for a discussion of *Silva*.

impact of his professional endeavors upon the economic well-being or good will of the very institution that employs him, is to abridge his academic freedom.¹⁷²

This "freedom," Van Alstyne explains, is not an enforceable claim upon the assets of others, but a liberty, i.e., the absence of restraints or threats against its exercise.¹⁷³ Others may not use their power or authority to restrain the exercise of academic freedom, but they are not obliged to subsidize every academic's professional whims, however unenlightened such refusals might seem.

A. *The Courts, the AAUP, and Academic Freedom*

In *Shelton v. Tucker*,¹⁷⁴ the Supreme Court, striking down a state statute that required public school teachers to provide the names of every organization to which they had belonged or contributed during the previous five years, reasoned that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."¹⁷⁵ Where teachers are concerned, the Court said, inhibition of freedom of thought and of action upon that thought "has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers."¹⁷⁶ In an atmosphere of suspicion and distrust, the Court said, scholarship cannot flourish.¹⁷⁷

Academic freedom and tenure did not come easily to American colleges and universities. Until these concepts were officially recognized, colleges and universities were administered in much the same way as other corporations or businesses.¹⁷⁸

172. William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in *THE CONCEPT OF ACADEMIC FREEDOM* 59, 71 (Edmund L. Pincoffs ed., 1975).

173. *Id.*

174. 364 U.S. 479 (1960).

175. *Id.* at 487.

176. *Id.* (quoting *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952)).

177. *Id.* (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

178. As the director of public relations at Bennington College, which recently fired one-third of its faculty, including those who had its rather attenuated form of "tenure" (five-year renewable contracts), stated, "Businessmen don't have tenure. Why do academics need it?" The reporter who interviewed her added, "Who says, in other words, that professors should have lifelong job security, freedom to grow

Their presidents and boards of trustees freely exercised the power to hire and fire faculty members at will, often without the slightest semblance of due process and often for personal reasons having nothing to do with the professor's competence or professional accomplishments.¹⁷⁹ The presidents and trustees of some of our greatest institutions of higher learning treated faculty members like hired hands, firing them for conduct, both on and off campus, that we would now regard as unexceptionable, and dismissing them for saying or teaching things that were deemed to be blasphemous, disloyal, inconsistent with received truths, or disrespectful. Clarence Darrow's famous defense of a young public school teacher who was charged with violating Tennessee's laws against teaching the theory of evolution,¹⁸⁰ immortalized in the drama *Inherit the Wind*, was an example of a problem that permeated the entire American educational establishment for many decades. It was the same problem that brought an end to many academic careers when teachers and professors broached the subject of Darwinism in their classrooms or at public forums. The most eminent scholars could be instantly terminated or denied employment if they

prosperously lazy if they like, when no one else does?" Mark Edmundson, *Bennington College Means Business*, N.Y. TIMES MAGAZINE, Oct. 23, 1994, at 42, 62.

179. In a long career in the academy, I have personally experienced threats to my academic freedom more than once. During my second year of full-time college teaching, I was assigned to teach a course on contemporary social problems. As a murder trial was in progress at the local courthouse, I suggested to my students that it might be instructive for them to visit the court and sit in on some of the proceedings. At the conclusion of the trial, I invited the district attorney to discuss the prosecution with my class. On the day prior to his scheduled lecture, the college president called me to his office, and said, "You may think that this is a violation of your academic freedom, but I am ordering you to rescind your invitation to the district attorney." I assured him that I did consider it a violation of academic freedom, and refused to accede to his demand. (I should add that I was still an untenured instructor.) He angrily told me to leave his office and personally informed the district attorney that he would not be welcome to come to the campus.

On another occasion, as a tenured associate professor, I delivered a lecture on "The Miseducation of American Teachers" at the state university at which I was then teaching. The following morning, I was informed by the president that he had been inundated by demands from members of the faculty of education that I be fired. He fended off the irate faculty members, demonstrating to my satisfaction that faculty can be as great a threat to academic freedom as administrators, and that in some situations, conscientious administrators may serve as shields to protect faculty members against abusive colleagues who perceive them to be "trouble makers."

180. *Scopes v. Tennessee*, 289 S.W. 363 (Tenn. 1927).

were believed to harbor views inimical to received religion or morality. One of the most notorious cases occurred on the eve of World War II, when New York's City College refused to honor its employment agreement with the eminent British philosopher, Bertrand Russell, whose critics accused him of advocating "free love," among other things.¹⁸¹ Russell, unable to return to Britain because of U-boat activity in the Atlantic, had great difficulty finding alternative employment in the United States despite the fact that he was widely recognized as having made some of the most important contributions to his field in this century.¹⁸²

After a number of particularly egregious instances of such abuse of power over faculty members, a distinguished group of scholars, led by Arthur O. Lovejoy, a renowned philosopher at Johns Hopkins University, and John Dewey of Columbia University, formulated a set of principles of academic freedom which was presented at the first annual meeting of the American Association of University Professors (AAUP) in 1915,¹⁸³ and was adopted by it as a Declaration of Principles.¹⁸⁴ Over the years, this Declaration was refined and ultimately replaced by the "1940 Statement of Principles on Academic Freedom and Tenure,"¹⁸⁵ which was formally adopted both by the AAUP and the AAC.

181. See *infra* note 182.

182. For a full account of this shameful incident, see Paul Edwards, *How Bertrand Russell Was Prevented from Teaching at the College of the City of New York*, reprinted in BERTRAND RUSSELL, *WHY I AM NOT A CHRISTIAN* 207 app. (Paul Edwards ed., 1957). As Judge Conboy explained in *Levin*, 770 F. Supp. at 898 n.2, Russell

was denounced by the Episcopal Bishop of New York as a recognized propagandist against both religion and morality, who specifically defends adultery.' In a paroxysm of the most astonishing vilification of Russell from newspapers, pulpits, and politicians, the appointment was cancelled by a state judge in a shameful manipulation of procedural rules, over the objection of three hundred members of the City College faculty.

Id. (quoting Paul Edwards, *How Bertrand Russell Was Prevented from Teaching at the College of the City of New York*, reprinted in BERTRAND RUSSELL, *WHY I AM NOT A CHRISTIAN* 207 app. (Paul Edwards ed., 1957)).

183. For a good account of the history of this document, see Metzger, *supra* note 1, at 1267.

184. American Ass'n of Univ. Professors, *The 1915 Declaration of Principles*, 40 AAUP BULLETIN 89 (1954), reprinted in ACADEMIC FREEDOM AND TENURE 157 (Louis Joughin ed., 1967) [hereinafter 1915 Declaration].

185. 1940 Statement, *supra* note 2, at 3-7.

The 1915 Declaration set forth a broad definition of academic freedom under which it was deemed "undesirable" for any effort to be made to prevent academic scholars from "giving expression to their judgments upon controversial subjects" even when their comments were outside their special fields, or depriving them of the "political rights vouchsafed to every citizen."¹⁸⁶ Contrary to the prevailing assumptions, the 1915 Declaration held that faculty members were not the employees of the governing boards of the universities at which they served, but rather their "appointees," whose primary responsibility was to the public. Their relationship to the trustees was comparable, the Declaration said, to that of federal judges to the President, and they should enjoy the same independence of thought and utterance that judges in the federal courts enjoy.¹⁸⁷ A true university can flourish only if its faculty are free to experiment with ideas, even unpopular ideas. Anything less is not a university properly so called, but a "proprietary institution," a trade school, perhaps, devoted to the propagation of specific doctrines prescribed by those who pay the bills—like schools set up to promote socialism or specific religious dogmas.¹⁸⁸

Underlying this conception of the university was the idea that a proper university is one that is *neutral* as regards controversial issues, whether they be scientific, political, social, or religious. The neutral university did not necessarily have to hire faculty members representing every point of view on any given subject. It simply had to allow those faculty members it did hire to speak out as they saw fit on any subject they chose to discuss, so long as they did not represent themselves as speaking for the university itself. As the president of Harvard University said in 1917, if a university or college censors the utterances of its faculty, it thereby assumes responsibility for what it permits them to say. It is far better, he said, if the university assumes no responsibility at all for what its professors say "and leaves them to be dealt with like other citizens by the

186. See 1915 Declaration, *supra* note 184, at 172 n.6 (quoting Report of the Wisconsin State Board of Public Affairs, Dec. 1914).

187. *Id.* at 163.

188. *Id.* at 167-68.

public authorities according to the laws of the land.”¹⁸⁹ But the 1915 Declaration made it clear that the AAUP was not sanctioning undisciplined behavior or irresponsible utterances by faculty members: When speaking off campus, faculty members were admonished to “avoid hasty or unverified or exaggerated statements, and to refrain from intemperate or sensational modes of expression.”¹⁹⁰ The Declaration left open the possibility that in appropriate but rare cases, some academics might have to be disciplined by other members of the academic profession, since “in matters of opinion, . . . [lay] boards cannot intervene without destroying, to the extent of their intervention, the essential nature of a university. . . .”¹⁹¹ It then recommended that institutions award tenure after a certain trial period and that thereafter, a faculty member may not be subject to dismissal except for adequate cause and then only after she had appeared in her own defense before a panel of professional peers, which would have judicial powers in the case.¹⁹²

In *Adler v. Board of Education*,¹⁹³ the Supreme Court upheld a statute and accompanying regulations that authorized the firing of any public school teacher who belonged to a “subversive” organization or advocated the overthrow of the federal or state government by violence.¹⁹⁴ Public school teachers have the right to “assemble, speak, think and believe as they will,” the Court said.¹⁹⁵ However, the Court held, they do *not* have the right “to work for the State school system on their own terms,”¹⁹⁶ and if they are not willing to accept the system’s reasonable terms, “they are at liberty to retain their beliefs and associations and go elsewhere.”¹⁹⁷ In a dissenting opinion, Justice William O. Douglas, joined by Justice Hugo Black, gave one

189. Metzger, *supra* note 1, at 1281 n.35 (A. Lawrence Lowell, refusing, during the First World War, to discipline a German faculty member for his pro-German utterances).

190. 1915 Declaration, *supra* note 184, at 172.

191. *Id.* at 173. The Declaration acknowledged, however, that lay boards were competent to judge charges of “habitual neglect of assigned duties” and “grave moral delinquency.” *Id.*

192. *Id.*

193. 342 U.S. 485 (1952).

194. *Id.* at 490.

195. *Id.* at 492.

196. *Id.*

197. *Id.*

of the earliest and most vigorous defenses of academic freedom to appear in the reported cases of the Supreme Court:

What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. Supineness and dogmatism take the place of inquiry. A "party line"—as dangerous as the "party line" of the Communists—lays hold. It is the "party line" of the orthodox view, of the conventional thought, of the accepted approach. A problem can no longer be pursued with impunity to its edges. Fear stalks the classroom. The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipe line for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin.

. . . [I]t was the pursuit of truth which the First Amendment was designed to protect. A system which directly or inevitably has that effect is alien to our system and should be struck down. Its survival is a real threat to our way of life. We need be bold and adventuresome in our thinking to survive. . . . The Framers knew the danger of dogmatism; they also knew the strength that comes when the mind is free, when ideas may be pursued wherever they lead. We forget these teachings of the First Amendment when we sustain this law.¹⁹⁸

Since *Adler*, the courts have guarded academic freedom and provided some of the most cogent and persuasive arguments in its behalf. Justice Frankfurter, who dissented in *Adler* only because he felt that the case was not ripe for Supreme Court adjudication,¹⁹⁹ dealt with the substantive issues in a similar case, *Wieman v. Updegraff*,²⁰⁰ involving an Oklahoma loyalty oath that was prescribed for all state officers and employees.²⁰¹ *Wieman* was originally brought by some citizens seeking to enjoin state officials from issuing salary payments to state em-

198. *Id.* at 510-11 (Douglas, J., dissenting).

199. *Id.* at 497 (Frankfurter, J., dissenting).

200. 344 U.S. 183 (1952).

201. *Id.* at 185.

ployees—and most especially state university faculty members—who had refused to sign the loyalty oath.²⁰² In the oath, the state employee was required to declare that he or she was not a member of any party or organization that advocates the overthrow of the government of the United States or the State of Oklahoma by force or violence and did not advocate or teach revolution or any change in our system of government.²⁰³ In addition, the employee was required to promise not to become a member of any such organization in the future.²⁰⁴

Justice Frankfurter, in a separate concurrence, argued that such oaths constituted an “unwarranted inhibition upon the free spirit of teachers”²⁰⁵ and had a tendency to “chill that free play of the spirit which all teachers ought especially to cultivate and practice.”²⁰⁶ He warned that this would engender “caution and timidity” in potential teachers.²⁰⁷

He then went on to declare that education is the basis of hope for the survival of our democracy, and added:

To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of

202. *Id.*

203. *Id.* at 184 n.1.

204. *Id.*

205. *Id.* at 195 (Frankfurter, J., concurring).

206. *Id.*

207. *Id.*

worship are guaranteed by the Constitution of the United States against infraction by National or State government.²⁰⁸

He then cited with approval the words of Robert M. Hutchins,²⁰⁹ declaring that a university is established for the benefit of society, but cannot function properly unless it is a center of independent thought and criticism.²¹⁰ "Education," Hutchins said, "is a kind of continuing dialogue, and a dialogue assumes, in the nature of the case, different points of view."²¹¹ Indeed, he argued, our very civilization should be based upon dialogue rather than upon force.²¹² But that presupposes differences of opinion which may ultimately be resolved through the continuing process of discussion. A university, Hutchins concluded:

is a kind of continuing Socratic conversation on the highest level for the very best people you . . . can bring together, about the most important questions, and the thing that you must do to the uttermost possible limits is to guarantee those men the freedom to think and to express themselves.²¹³

Judicial recognition of the principle of academic freedom was further bolstered by *Keyishian v. Board of Regents*,²¹⁴ brought by a number of faculty members of the University of Buffalo, which had been a private university but was merged in 1962 into the State University of New York. As state employees, they came under the various statutes and regulations²¹⁵ which were designed to prevent the appointment or retention of "subversive" persons by state agencies. The plaintiffs had refused to sign a certificate declaring that they were not Communists, and had been notified that their failure to do so

208. *Id.* at 196-97.

209. Then associate director of the Ford Foundation. He had recently retired as chancellor of the University of Chicago, and would go on to become the director of the Center for the Study of Democratic Institutions at Santa Barbara, California.

210. *Wieman*, 344 U.S. at 197.

211. *Id.* at 197 (citing *Hearings before the House Select Committee to Investigate Tax-exempt Foundation and Comparable Organizations*, H.R. 561, 82d Cong., 2d Sess. (1952) (statement of Robert M. Hutchins)).

212. *Id.*

213. *Id.* at 197-98.

214. 385 U.S. 589 (1967).

215. These are set forth in the Appendix to the case, *Keyishian*, 385 U.S. at 610.

would require their dismissal.²¹⁶ The so-called Feinberg Law²¹⁷ imposed upon the State Board of Regents the duty to promulgate procedures for disqualifying and removing persons in the public school system who were guilty of "the utterance of any treasonable or seditious word or words"²¹⁸ or advocated or published material advocating the overthrow of government by force or joined any society advocating doing so.²¹⁹ Membership in any organization on a list of "subversive" organizations to be compiled by the Board of Regents would constitute *prima facie* evidence of disqualification for employment in any of the state's public schools.²²⁰ The Feinberg Law had been amended to bring personnel of all institutions of higher education operated by the Board of Regents under its aegis.²²¹

Although the Court had upheld the constitutionality of the Feinberg Law in *Adler*,²²² it had not decided whether the underlying statutes were void for vagueness.²²³ In *Keyishian*,²²⁴ the Court held that the statute was void for vagueness, for "[t]he teacher cannot know the extent, if any, to which a 'seditious' utterance must transcend mere statement about abstract doctrine, the extent to which it must be intended to and tend to indoctrinate or incite to action in furtherance of the defined doctrine."²²⁵ Indeed, the statute was so vaguely worded that the Court observed that a teacher who merely informed his students about "the precepts of Marxism or the Declaration of Independence" might be violating it.²²⁶ The Court found that such statutes were an "*in terrorem* mechanism"²²⁷ that would stifle "that free play of the spirit which all teachers ought to cultivate and practice."²²⁸ The Court, in an opinion written by Justice Brennan, then went on to declare:

216. *Id.* at 592.

217. N.Y. EDUC. LAW § 3021 (McKinney 1981 & Supp. 1994).

218. *Id.*

219. *Id.*

220. *Keyishian*, 385 U.S. at 594.

221. *Id.* at 595.

222. 342 U.S. at 496.

223. *Id.*

224. 385 U.S. at 599.

225. *Id.*

226. *Id.* at 600.

227. *Id.* at 601.

228. *Id.* (citing *Wieman*, 344 U.S. at 195).

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."²²⁹

The imposition of an intellectual straitjacket on teachers in our colleges and universities would "imperil the future of our Nation," Justice Brennan reasoned, for where there is suspicion and distrust, scholarship cannot flourish.²³⁰ And where scholarship cannot flourish, there is a danger that "our civilization will stagnate and die."²³¹

In a vigorous dissent, Justice Clark, joined by Justices Harlan, Stewart, and White, argued on grounds of *stare decisis* that *Adler* had disposed of this issue, and that the statutes and regulations were not vague at all, since the meaning of "subversive" is perfectly clear.²³² Anticipating by nearly three decades some of the arguments being made today by critics of tenure, the dissenters concluded:

[T]he majority has by its broadside swept away one of our most precious rights, namely, the right of self-preservation. Our public educational system is the genius of our democracy. The minds of our youth are developed there and the character of that development will determine the future of our land. Indeed, our very existence depends upon it. The issue here is a very narrow one. It is not freedom of speech, freedom of thought, freedom of press, freedom of assembly, or of association, even in the Communist Party. It is simply this: May the State provide that one who . . . is found to have willfully and deliberately advocated, advised, or taught that our Government should be overthrown by force or violence or other unlawful means; or to have willfully and deliberately printed, published, etc., any book or paper that so advocated and to have personally advocated such doctrine himself; or to have

229. *Id.* at 603 (citations omitted).

230. *Id.* (citing *Sweezy*, 354 U.S. at 250).

231. *Id.*

232. *Id.* at 626-27 (Clark, J., dissenting).

willfully and deliberately become a member of an organization that advocates such doctrine, is *prima facie* disqualified from teaching in its university? My answer, in keeping with all of our cases up until today, is "Yes!"²³³

The increasing recognition the courts and the academic community generally have given to the AAUP's guidelines on academic freedom and tenure has made those guidelines ever more important. The AAUP's rationale for academic freedom and tenure is that they are "essential" for the "free search for truth and its free exposition."²³⁴ The 1940 Statement declares that the advancement of truth is impossible without freedom of research, and that freedom in teaching "is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning."²³⁵ Tenure guarantees freedom of teaching and research "and of extramural activities," and offers the financial security necessary to attract men and women of ability. More specifically:

- (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 . . .
- (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 . . .
- (c) . . . When [college and university teachers] speak or write as citizens, they should be free from institutional censorship or discipline²³⁶

An official interpretation of the second paragraph above, adopted in 1970 by both the AAUP and the AAC, denies that the intent of the paragraph is to discourage controversial utterances.²³⁷ "Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject."²³⁸ An interpretive comment on (c) above explains that a

233. *Id.* at 628-29.

234. 1940 Statement, *supra* note 2, at 3.

235. *Id.*

236. *Id.* at 3-4.

237. *Id.* at 6.

238. *Id.*

faculty member's extramural utterances "cannot constitute grounds for dismissal unless [they] clearly demonstrate the faculty member's unfitness for [the] position."²³⁹

Nevertheless, it would be hard to find anywhere in the vast number of cases the AAUP's Committee A²⁴⁰ has considered, any instances in which the committee has recommended censure of a faculty member for having violated this or any other provision of its Statement. Perhaps this is as it should be, for it is difficult to imagine what criteria one would employ in attempting to determine whether a faculty member's extramural utterances were evidence sufficient to establish his or her unfitness to continue to serve as a faculty member. If those "utterances" were unpopular or offensive statements of the faculty member's opinions, they would presumably be protected by both the First Amendment and the AAUP's principles of academic freedom. If they were not, then, presumably, they would either be actionable at law, or they would reveal some gross moral defect that is not subject to the protection of either the First Amendment or academic freedom. An "utterance" such as an invitation to a minor student to have sexual intercourse, a plot to rob a bank, or a harangue urging a mob to set fire to the president's house is not an expression of opinion at all, but a criminal act, and is not protected by either the Constitution or academic freedom. "Utterances" that constitute fighting words, as in *Chaplinsky v. New Hampshire*,²⁴¹ are clearly not protected by the Constitution²⁴² and should not be protected by academic freedom. A faculty member may have the right, as a private citizen, to subject herself to legal liability for violating the law or public policy. But without first obtaining the consent of the institution by which she is employed, she certainly has no right to subject it to such liability. Thus, for example, one who sin-

239. *Id.* See also American Ass'n of Univ. Professors, *Committee A Statement on Extramural Utterances*, 51 AAUP BULL. 407 (1967), reprinted in AAUP POLICY DOCUMENTS AND REPORTS 32 (1990), and American Ass'n of Univ. Professors, *Statement on Professors and Political Activity*, 55 AAUP BULL. 388-89 (1969), reprinted in AAUP POLICY DOCUMENTS AND REPORTS 33 (1990).

240. Committee A investigates allegations of violations of academic freedom. Its findings are reported regularly in the AAUP's quarterly journal, currently entitled *ACADEME: BULLETIN OF THE AAUP*.

241. 315 U.S. 568 (1942).

242. *Id.* at 571-72.

cerely believes that Title VII of the Civil Rights Act should never have been enacted, and that he should have the right to subject women and members of racial or religious minorities to what would in any other context be considered a hostile working environment may not act on that belief and create such an environment. Academic freedom need not be construed so broadly as to sanction such behavior, and one who deliberately violates the rules must be prepared to pay the price. She cannot hide behind the shield of academic freedom, for that is not what it was designed to protect.

B. *Public v. Private Universities*

Due to their differences from public universities, private universities need special attention. A private university may properly adopt a "party line," and engage in as much propaganda or indoctrination as it wishes, provided, however, that it discloses what it is doing and does not fraudulently induce students to enroll under the assumption that they are going to receive a more conventional education. Thus, colleges affiliated with the Roman Catholic Church may insist that their faculty adhere to the church's teachings on such issues as immortality, birth control, abortion, the virgin birth, and the infallibility of the Pope. Fundamentalist colleges may insist that their instructors adhere to a belief in original sin and inculcate that dogma in their students. An orthodox yeshiva may insist that its faculty observe the Sabbath and the dietary laws in strict accordance with the Code of Jewish Law, and that they teach that Moses received the Torah from the hand of God at Mount Sinai in the midst of thunder and lightning over a period of forty days. Such institutions are under no obligation to subscribe to the AAUP's principles, and since they are private institutions, their employment practices vis-à-vis their faculty are not controlled by the First Amendment or any other provisions of the Bill of Rights, for state action is completely absent. The same would be true of private non-sectarian colleges and universities that chose to propagate a particular set of dogmas or doctrines, such as socialism, the inherent superiority of "sun people," or the ineffectiveness of conventional medicine and the need to adopt Asian diets and the healing techniques of witch doctors and voodoo ladies. So long as they violated no laws reg-

ulating conduct, their dismissal of faculty members who deviated from their accepted doctrines would be legal. They would evidently not be in violation of AAUP policies, either.²⁴³

Public institutions, however, are subject to all of the restrictions imposed by the Constitution upon all state agencies by virtue of the fact that whatever they do is construed to be state action. Private universities are generally exempt from constitutional prohibitions that govern the employment practices of public universities. Most, however, adhere to the AAUP guidelines by contract with their faculties or through policies and practices that are construed to be tacit adherence to those guidelines. Consequently, although employees of private institutions have somewhat less protection than those who are employed at public institutions, the difference is not as great as it might seem because of the adoption by most private colleges and universities of AAUP principles of academic freedom.

C. *Heresy, Indoctrination, and Academic Freedom*

The answer to the question posed at the beginning of Section I of this article, "How Outrageous Can a Faculty Member's Views Be?" appears to be, then, that in private institutions, which are not bound to adhere to the restrictions imposed upon the states by the Constitution, academic freedom may be as broad or as narrow as the school wants to make it. In times of tight professorial job markets, the economic power is almost entirely on the side of the employer, which is free to impose as many restrictions on speech—on and off campus—as the faculty will bear. But in public institutions, and in the private ones that have subscribed to the AAUP guidelines and incorporated them into faculty contracts, a faculty member's freedom to speak, on or off campus, is as broad as the First Amendment allows it to be. However, this is not the complete answer, for it only provides guidance as to what the *law* allows or requires. Equally important is the question of policy: How far *should* the

243. See American Ass'n of Univ. Professors, *Affirmative Action Plans: Recommended Procedures for Increasing the Number of Minority Persons Women on College and University Faculties*, 68 ACADEME: BULL. OF THE AAUP 15a (Jan.-Feb. 1982), reprinted in AAUP POLICY DOCUMENTS AND REPORTS 106 (1990): "[T]he AAUP recognizes, as does federal law, the right of religious institutions to formulate appointment policies based on religious affiliation . . ." *Id.* at 106 n.4.

right of faculty members to speak on controversial issues, or to speak hatefully or outrageously, go?

IV. Education, Heresy, and Indoctrination: The Outer Limits of Academic Freedom

Contrary to the trash can theory of education, which holds that the student's mind is an empty basket that the teacher is expected to fill with scraps of information, Socrates argued that the educator's task was to draw out of the student and help make him aware of the ideas that were already implanted in his mind in nascent form. The true educator, he said, was like a midwife, who does not plant the infant in its mother's womb, but merely helps it to emerge from her womb into the light of day.²⁴⁴ Similarly, one may argue that "the best education is one which develops within the individual the power, skill and resources necessary to self-education. . . . He who cannot learn from his own experiences and from the experiences of others without the benefit of teachers never outgrows the estate of the child."²⁴⁵

The task of the educator is *not merely* to provide information to the student, but also, and most importantly, to help the student to grow and to mature, intellectually and emotionally, into an independent, critical, thoughtful person. This means, among other things, that the student must be taught how to arrive at the truth—not through acquiescence in the dictates of authority (whether that authority be divine or human, institutional or doctrinal), but through observation, reason, and whatever objective, scientific method is appropriate to the subject matter at hand. By contrast, indoctrination is "the deliberate use of non-rational means, or the dishonest use of irrational means, to induce beliefs."²⁴⁶ While the first form of indoctrination may be justifiable in the early years of childhood, the second is *never* justifiable, however tempting it might be. Neither form of indoctrination can properly be called education, how-

244. The account of Socrates' defense against charges of atheism and corruption of the youth of Athens can be found in Plato, *Apology*, in *THE DIALOGUES OF PLATO* 95 (B. Jowett ed., 3d ed. 1892).

245. SIDNEY HOOK, *HERESY, YES—CONSPIRACY*, No 142 (1953). I am indebted to this fine book for many of the ideas that follow.

246. *Id.* at 145.

ever, because the student cannot possibly grow and mature into a rational, critical, thinking adult if she is merely expected to ape the master's doctrines, accepting them on faith and without rational analysis. The teacher whose repertoire includes the lavish use of discourtesy, bullying, superficiality, and dogmatism does a grave disservice to her students, for she should be a role model of humility in the great quest for truth. One would not expect the Grand Dragon of the Knights of the Ku Klux Klan to serve as such a role model, for he is convinced that he possesses all the truth anyone needs on questions of race, religion, and social policy. The same is true of members of other totalitarian movements, including the Communist Party and the Nazi Party. A critical search for the truth is not part of their programs of "education," because the truth is already known, and their only function is to enlist people to swell the ranks of the movement so that the truth might be spread even further abroad. Further, one need not be a member of an organized group to betray the educational vocation. An individual who is committed to a particular set of dogmas is unwilling to weigh the evidence objectively or to consider evidence that is inconsistent with his theories. The person who employs insults and other forms of verbal abuse to cow his students into accepting his doctrines is *not* an *educator* and has no place in a self-respecting university.

Every university is supported by the public, either directly through the allocation of tax funds, or indirectly, through exemption from the taxes that ordinary businesses must pay. The principal reason for this public support is the perception, largely correct, that universities are our best means of arriving at the truth and new knowledge and disseminating it to the next generation. Academic freedom enhances the prospects that new truths will be discovered and that new applications will be found for old knowledge, for without it, we are reduced to reiterating the beliefs of our predecessors. New knowledge in every field, from astronomy to physics to medicine, from sociology to psychology to economics, has been found to be beneficial to society as a whole. Discoveries are made, at least in part, because inquiring minds have an opportunity to challenge one another, to debate their methods and their conclusions, and to question their findings. Thus, academic freedom exists, not

only for the sake of the professor who is its immediate beneficiary, but also for the sake of the community, which ultimately benefits from a free, robust inquiry into every subject under the sun.

It follows that academic freedom is not merely the freedom to propound the truth. It must include the freedom to teach what is false, if one honestly believes, after careful investigation and inquiry, that it is true. If we had some way of being certain that some propositions were absolute truths, perhaps we would be justified in teaching them without bothering to inquire further about them. But we have no such certainty. Those "truths" that were once regarded as synthetic *a priori* truths (i.e., propositions that are true of the world and known to all without the necessity of checking them against sense experiences), such as Euclid's famous parallel postulate,²⁴⁷ which was believed for more than two thousand years to be irrefutable and obvious to every rational person, have been questioned and even denied. Entire logically consistent systems, such as the various forms of non-Euclidean geometry, have been constructed on the basis of alternative postulates.²⁴⁸ That is why it is so important to maintain a broad conception of academic freedom that has room for the most outrageous, unconventional views. That is why it is necessary to defend those who profess even the most abominable heresies against those who would interfere with their right to do so. That is why it is necessary to defend Michael Levin and Leonard Jeffries against the student protesters who would interfere with their classes and the Harlestons who would oust them from the academy *for no other reason than that they profess views that are deemed obnoxious by their critics*.

From this it does not follow that they, or any other academics, should be immune to criticism. On the contrary, every citizen enjoys the privilege of criticizing as harshly as he wishes any idea or doctrine that he finds disagreeable. Students and

247. That through a point outside a straight line, one and only one line can be drawn that is parallel to that line. Non-Euclidean geometries have been constructed on the premise that *no* such parallels can be drawn, and also on the premise that *more than one* such parallel can be drawn.

248. See, e.g., HENRI POINCARÉ, *SCIENCE AND HYPOTHESIS* 72-88 (1952); HENRI POINCARÉ, *SCIENCE AND METHOD* (Francis Maitland trans., [1914]).

colleagues who disagree with Levin or Jeffries have a right to subject them to ridicule if they wish, or, more constructively and more appropriately in the context of a respectable institution of higher learning, to produce learned critiques of their ideas, to debate them, and to subject them to the most searching analysis. If a professor's ideas, data, and theories do not measure up, that fact should be made public and one would hope that their proponents would repudiate them. On the other hand, if they survive critical scrutiny, perhaps their opponents would be willing to acknowledge that fact, and to change their own views accordingly. This, after all, is how all scientific and scholarly progress is made. Sidney Hook put it very well: The general community

expects the academic community to apply the same solvent of criticism to the conclusions of the heretical and orthodox, the traditionalist and the trail blazer, the bringer of glad tidings and the prophets of doom. Continuous, forthright criticism; vigorous, informed, and incisive discussion; that is the circumambient atmosphere in which ideas must make their way in the academic community.²⁴⁹

Justice Louis L. Brandeis once said, "Sunlight is the best disinfectant."²⁵⁰ This is an expression of a fundamental tenet of democracy: that the truth will eventually emerge if people have the freedom to engage in honest discussion, inquiry, and debate. But that is in turn contingent upon the honesty of the participants in the debate. The debaters must play by the rules. If one engages in empty rhetorical flourishes merely for the sake of "making points" with the audience, or lies, or falsifies evidence, or becomes abusive, then of course the chances of the truth's emerging are significantly reduced. In recent times, a number of bullies have attempted to make their own rules, but have eventually been revealed as the intellectual frauds they were. Unfortunately, because of the inattention of leaders who should have known better, or because of cowardice or reluctance

249. HOOK, *supra* note 245, at 165.

250. Louis L. Brandeis, *What Publicity Can Do*, HARPER'S WEEKLY, Dec. 20, 1913, at 10, *cited in* Federal Election Comm'n v. Political Contributions Data, Inc., 943 F.2d 190, 191 (2d Cir. 1991). The same quotation is said to appear in Louis L. Brandeis, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* (1914), *cited in* A.G. Becker, Inc. v. Board of Governors, 502 F. Supp. 378, 388 (D.D.C. 1980).

to lead the charge against them, such frauds have sometimes succeeded in inflicting severe damage on others before they were finally defeated and removed from the scene.²⁵¹

I conclude, therefore, that there should be *no limit whatsoever* to the opinions a faculty member may express, however outrageous, obnoxious, or hurtful they might be.²⁵² If academic freedom means anything, it must mean that there can be no limits to the ideas a faculty member may express, and virtually none to the manner in which he expresses them. Thus, Professor Silva's rather tasteless similes are protected by academic freedom, despite the fact that some of his female students were offended by them. Matters of taste are, after all, ultimately subjective. Students cannot be given the power to censor their professors. Nor can their parents or the general community. Once the power to determine the *manner* of a professor's lecture is conferred upon or usurped by someone else, it is but a short step to their assumption of the right to determine its *content*, and to decide what books may be assigned for the course. Indeed, some groups have attempted to do precisely that, declaring that certain books are not suitable for study because they are racist, sexist, obscene, politically subversive, or historically or ideologically incorrect, and that others ought to be included because they portray women or members of certain minority groups in a favorable light, or because they were written by members of those groups.²⁵³ There may be legitimate reasons

251. One of the most telling examples from recent times is the late unlamented Senator Joseph McCarthy of Wisconsin, whose lies and deceptions under cover of senatorial immunity destroyed careers and the lives of many innocent people before he was finally exposed to the sunlight of television during the Army-McCarthy hearings. President Eisenhower could have brought McCarthy to his knees if he had spoken out, but he chose to remain silent, even after McCarthy falsely accused Eisenhower's greatest benefactor, General George C. Marshall. See STEPHEN E. AMBROSE, *EISENHOWER: THE PRESIDENT* (1984); MARQUIS CHILDS, *EISENHOWER: CAPTIVE HERO* 144-45, 152-54 (1958). Harry Truman accused Eisenhower of having committed "an act of unpardonable betrayal," and added, "I wish . . . that he had not so tarnished his own bright reputation as a commander of men." DAVID MCCULLOUGH, *TRUMAN* 910-12 (1992).

252. In this, I presume that the faculty member is acting independently as a scholarly investigator, and not as an instrument of propaganda or proselytization for some other organization or cause. See the discussion that follows.

253. See generally Stephen H. Balch & Herbert I. London, *The Tenured Left*, 82 COMMENTARY 41 (Oct. 1986); Joseph Epstein, *A Case of Academic Freedom*, 82 COMMENTARY 37, 39 (Sept. 1986); Michael Levin, *Feminism & Thought Control*, 73

for remonstrating with a faculty member or urging him to make some changes in his courses, but there are *no* good reasons for removing the power to make the ultimate decision from him.

A faculty member's right to speak out on matters of public concern is protected no less by the First Amendment than is any other citizen's. So long as she does not represent herself to be speaking on behalf of the university, she may speak freely on any subject she chooses, in or out of her field of expertise, and both the First Amendment (as applied to the states by the Fourteenth Amendment) and the university's commitment to academic freedom should shield her against any retaliation by her employer. Insofar as university personnel are devoted to the search for truth, the protection accorded them should certainly be no less than that which is enjoyed by journalists. Under the principles enunciated in *New York Times v. Sullivan*²⁵⁴ and its progeny, speech concerning public figures and matters of public concern that would otherwise have been defamatory is constitutionally protected unless uttered "with knowledge that it was false or with reckless disregard of whether it was false or not."²⁵⁵ Judge Learned Hand once declared that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."²⁵⁶ Citing Learned Hand, Justice Brennan concluded in *Sullivan* that we have "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."²⁵⁷ A constitutional protection that applies to journalists and other citizens in their speech about public figures and public issues should apply no less to academics.

The proper way to deal with tenured faculty members who propound heretical ideas, then, is to tolerate them, but not to

COMMENTARY 40 (June 1982); Elizabeth Lilla, *Who's Afraid of Women's Studies?*, 81 COMMENTARY 53 (Feb. 1986).

254. 376 U.S. 254 (1964).

255. *Id.* at 279-80.

256. *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

257. *Sullivan*, 376 U.S. at 270.

ignore them. They must be answered and exposed. But they should not be drummed off the academic platform for expressing their ideas, however false or despicable those ideas might be. To do so would be inconsistent with the open and robust search for truth that is the hallmark of science and the university. There is a difference, however, between professors who express heretical ideas and those who use their classrooms as pulpits to win converts to their causes or who have abandoned the academic enterprise altogether.

Students and members of the general community look to university professors with a certain awe and respect because they believe that professors have a degree of expertise in their fields that most people do not have. The trust that is placed in faculty members entails a reciprocal sense of responsibility, both to students and to the general public. Despite the fact that public mores have shifted in recent years so that people are inclined to overlook forms of behavior that would once have been severely condemned, faculty members nevertheless have a duty to the institutions that give them their professional homes, to their students and their students' parents, who repose great trust in them, and to the communities that pay for their salaries and the many amenities that they enjoy. Some are inclined to think that the academic freedom to which their institutions have subscribed is broad enough to permit them to do virtually anything that might be construed as speech, and that their tenured contracts will protect them against almost any claim of wrongdoing. But there are limits.

V. Conclusion: The Limits of Academic Freedom

The crux of the matter is that a scholar's first loyalty must be to the search for truth by means of objective methods that can be replicated by any other rational person. It *cannot* be to some predetermined set of dogmas that is not amenable to rational investigation and inquiry. Nor can a faculty member delegate the search for truth to some external organization whose leaders claim infallibility and whose followers are obliged to toe the party line. Anyone whose primary allegiance is to such a cause or organization has forfeited any right she might otherwise have claimed to membership in the community of scholars. Members of the Communist Party periodically re-

ceived official instructions from Moscow, via local party organizations, on the methods whereby they could best induct students into the Party and its various front organizations, and on the positions they were to take on "every question that is in line with the policies of the Party."²⁵⁸ Whether a professor was a philosopher or a physicist, once he became a member of the Party, he was obliged to criticize the ideas of non-Communist philosophers or physicists and to refrain from criticizing those of the Party.²⁵⁹ In the Soviet Union, scientists had no choice but to accept theories for no other reason than the fact that they were adopted by Stalin, the party leader.²⁶⁰ There is no meaningful difference between a professor who belongs to a totalitarian organization such as the Communist Party and one who belongs to the Ku Klux Klan. In either case, he is not a free agent, seeking the truth wherever the evidence and objective rational methods of investigation may lead, but a dogmatic advocate of a doctrine that is not derived from scholarly methods of inquiry, but from dogma and outside authority.

Anyone who submits to outside authority for instruction on the truth, who refuses to maintain an open mind, or who is unwilling to weigh the evidence or to acknowledge evidence con-

258. *Resolution of the Ninth Convention of the Communist Party of the U.S.A.* (1936), cited in Hook, *supra* note 245, at 182.

259. Hook, *supra* note 245, at 202-03.

A Communist physicist or mathematician was required, where it is possible for him to do so, to relate his subject to the growth of technology, its impact upon social and class divisions, the class uses to which the discovery is put, and the liberating role it can play in a Communist economy. The general theme is: science under capitalism makes for poverty, war and death; under communism, science makes for peace and abundance. Whatever his private beliefs may be, he cannot proclaim that there are any objective universal truths independent of country, class or even party, without running foul of the party line.

Id. They were of course expected to change their teachings as the official line from Moscow shifted, calling Roosevelt a fascist in 1934, a progressive in 1936, a war-monger and imperialist in 1940 (during the Hitler-Stalin pact), and a leader of the oppressed peoples of the world after Hitler invaded the Soviet Union in 1941. *Id.* at 203-04.

260. A typical example was the willingness of biologists who knew better to give in to Stalin's demand that they adhere to Lysenko's utterly wrong-headed genetic theories. *Id.* at 204-05. Of course, Soviet scientists had no choice in the matter, since they faced unemployment or death if they defied the dictator's will. Western scholars, however, faced nothing worse than expulsion from the party, but bowed just as readily to the orders that emanated from Moscow. *Id.*

trary to the theories he propounds cannot properly claim to be engaged in the academic enterprise. One who has abandoned scholarship cannot properly claim the protection of academic freedom and tenure when their only *raison d'être* is the preservation and encouragement of scholarship. Academic freedom cannot be invoked to protect non-academic enterprises. A professor entrusted with students and a classroom has a fiduciary duty to use the time he has with those students in *academic* pursuits, and not in indoctrination or other non-academic activities.

Behavior, including expressive behavior, that shocks the conscience of the community may lead to the imposition of sanctions by the university, for such behavior by faculty members tends to bring them and the universities with which they are affiliated into disrepute. Because universities depend for their sustenance and their very existence upon their reputation for integrity, they must maintain the good will of their constituencies. Faculty members ought to maintain a reasonable degree of dignity in their behavior outside the institution. Obscenity in speech and action is deleterious to the reputation of both the faculty member and his university. A professor who is discovered naked in a car with a student has brought disgrace upon himself and his university.²⁶¹ There is nothing academic about such behavior, and no reason why the invocation of academic freedom should give him any aid or comfort.

Similarly, non-academic activities should not be brought into the classroom except by way of example or passing comment. Most people would agree that a professor who used his classes to enlist students for the local klavern of the Ku Klux Klan, or to solicit donations for the support of its racist activities, would have misused his position and violated the trust reposed in him. Such solicitations are not academic and cannot possibly have anything to do with the intellectual content of the courses the professor is supposed to be teaching. Moreover, because students know that professors have considerable discretion in grading their work and are often consulted by prospective employers for recommendations, such solicitations are infected with an element of coercion that is none too subtle.

261. See *Board of Trustees v. Stubblefield*, 94 Cal. Rptr. 318 (Ct. App. 1971).

The point is readily seen when the beneficiary of the solicitation is the Klan, but when it is a cause that is deemed to be more worthy, the principle is less clear. A professor who asks her students to join the Sierra Club or to contribute to a drive for the search for a cure of multiple sclerosis is—perhaps unconsciously, and with the best of intentions—using her power and influence over her students, a captive audience, to further her pet causes. There is an unequal distribution of power between professors and students, and the advantage is all on the professor's side. The use of that power to foster the professor's non-academic causes is completely inappropriate. Such speech is not academic, should not be protected by academic freedom, and should be studiously avoided. No one would suggest that a tenured professor's position should be terminated for a single offense of this sort, but repeated violations might justify sanctions, up to and including dismissal.

The six-year probationary period for academics is generally long enough for colleagues to determine whether they are likely to be worthy of receiving the benefits of tenure. The responsibility for doing so rests ultimately on those best able to judge the candidates' scholarly abilities, pedagogical skills, and temperament. Mistakes may occur, and when they do, the university and the professor's department pay a heavy price—all the more reason to be exceedingly scrupulous in granting tenure. But once it has been made, the tenured faculty member must be accorded the widest possible leeway in the expression of his or her ideas. Without more, the geologist who argues that the earth is flat, the astronomer who believes that the planets revolve around the earth due to impulses transmitted to them by invisible angels, the historian who denies that the Holocaust ever occurred and insists that it is a gigantic hoax perpetrated by Zionists eager to establish a Jewish state in Palestine, and the Black Studies professor who insists that Jews and the Mafia have conspired in Hollywood to portray blacks in an unflattering light should have been identified before they were ever offered tenure. Once they have it, there is no cure but the sunlight that Justice Brandeis prescribed, for any other endangers the freedom of all and the benefits to society that flow from that freedom.