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Tenure, Speech, and the Jeffries Case: A Functional Analysis

Robert J. Spitzer*

I. Introduction

The concept of tenure is firmly and deeply established in the academic world. A 1972 tally reported that 94 percent of all college and university faculty worked at institutions with a tenure system.¹ In 1985, about 70-75 percent of full-time faculty reported ties to a tenure system.² In 1993, tenure reportedly operated on over 90 percent of college campuses.³

Despite its prevalence, tenure continues to be subject to considerable scrutiny and criticism.⁴ Many faculty in tenure-granting institutions register dissatisfaction with their tenure and promotion systems⁵ (although it is reasonable to presume that most faculty would argue against the elimination of tenure). More to the point, tenure continues to elicit serious criticism from outside of academia.⁶ A recent example comes from the *New York Times*, which stated that "tenure promotes inefficiency, inhibits competition and probably raises costs to con-

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1. Commission on Academic Tenure in Higher Educ., *Academic Tenure Today*, in *FACULTY TENURE* 1 (1973).

2. HOWARD R. BOWEN & JACK H. SCHUSTER, *AMERICAN PROFESSORS: A NATIONAL RESOURCE IMPERILED* 44-45 (1986).

3. David E. Rosenbaum, *Amid Joblessness, the Joys of Tenure*, N.Y. TIMES, Dec. 12, 1993, at E4.

4. William H. Honan, *Wary of Entrenchment in the Ranks, Colleges Offer Alternatives to Tenure*, N.Y. TIMES, Apr. 20, 1994, at B13; Rosenbaum, *supra* note 3, at E4.

5. RICHARD I. MILLER, *EVALUATING FACULTY FOR PROMOTION AND TENURE* 1, 9 (1988).

6. Rosenbaum, *supra* note 3, at E4.

sumers”⁷ and that tenure “is no longer necessary to protect professors’ freedom to speak out politically.”⁸

Much of the contemporary criticism of tenure centers on the following arguments: 1) tenure is no longer necessary to protect academic freedom, and 2) tenure protects or even rewards mediocrity and incompetence to the extent that it releases faculty from conventional methods of accountability.⁹ The first of these two criticisms questions the longstanding link between tenure and academic freedom.

The significance of this link extends back to the establishment of tenure at American universities. In 1894, the Board of Regents of the University of Wisconsin approved a statement of principles that has sometimes been labeled the Magna Carta of academic freedom.¹⁰ The statement was prompted by pressures to fire a faculty member because of his controversial writings on the trade union movement. The statement said, in part, that “[i]n all lines of academic investigation it is of the utmost importance that the investigator should be absolutely free to follow the indications of truth wherever they may lead.”¹¹

This statement was followed a few years later by the classic report on academic freedom and tenure, formulated by a committee of the American Association of University Professors (AAUP) in 1915.¹² The report held as essential that faculty “be exempt from any pecuniary motive or inducement to hold, or to express, any conclusion which is not the genuine and uncolored product of his own study or that of fellow-specialists.”¹³ To this end, the report argued for “the reasonable security of tenure,”

7. *Id.*

8. *Id.*

9. See, e.g., Stanley Feingold, *Leonard Jeffries and Academic Freedom*, CONG. MONTHLY, July-Aug. 1993, at 10, 11.

10. WALTER P. METZGER ET AL., DIMENSIONS OF ACADEMIC FREEDOM 69 (1969).

11. *Id.* at 70.

12. See RICHARD HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 468-74 (1965). The AAUP was formed in 1915 in large measure to protect the principle of academic freedom and standardize the tenure process on university campuses. Yet it was also spurred by the desire to professionalize the professoriate and provide a counterbalance to the power of campus administrators. The AAUP's formation was aided by the reformist zeal that was sweeping the country during the Progressive era. *Id.* at 468-80.

13. *General Report of the Committee on Academic Freedom and Academic Tenure (1915)*, reprinted in 53 LAW & CONTEMP. PROBS. 393, 396 (Summer 1990).

with an added provision for dismissal based on just cause, and the opportunity for a hearing prior to any contemplated dismissal.¹⁴

These sentiments were amplified in a 1940 AAUP statement, arguing for tenure as a means to insure intellectual freedom for teaching, research, and service activities, as well as to provide some measure of economic security in order to attract and retain qualified individuals in the profession.¹⁵ In short, tenure and academic freedom are "inextricably intertwined"¹⁶ because the former awards economic security in order to "forestall restrictions on freedom that might stem from the power to dismiss."¹⁷ The use of such power could stem from pressures inside or outside of the university.

The second criticism of tenure, that it rewards and protects mediocrity, has surfaced increasingly in recent decades, since most have argued that faculty no longer face serious threats to academic freedom. In the aftermath of campus tensions and unrest in the 1960s, two national commissions reexamined the issue.¹⁸ One commission, headed by negotiator Sol Linowitz,¹⁹ said that tenure "sometimes has been a shield for indifference and neglect of scholarly duties."²⁰ Another commission, headed by former Pennsylvania Governor William Scranton, said that tenure may "grant faculty members a freedom from accountability that would be unacceptable for any other profession."²¹

These longstanding concerns have found sharp focus in recent years as a result of the highly publicized incidents of City

14. *Id.* at 405-06.

15. *1940 Statement of Principles on Academic Freedom and Tenure*, reprinted in 53 LAW & CONTEMP. PROBS. 407, 407-09 (Summer 1990).

16. PAUL H. MORRILL & EMIL R. SPEES, *THE ACADEMIC PROFESSION* 225 (1982).

17. Ralph F. Fuchs, *Academic Freedom—Its Basic Philosophy, Function, and History*, in *ACADEMIC FREEDOM: THE SCHOLAR'S PLACE IN MODERN SOCIETY* 1 (Hans W. Baade ed., 1964). This article can also be found in *THE AMERICAN CONCEPT OF ACADEMIC FREEDOM IN FORMATION* (Walter P. Metzger ed., 1977).

18. SPECIAL COMM. ON CAMPUS TENSIONS, *CAMPUS TENSIONS: ANALYSIS & RECOMMENDATIONS* 5-7 (1970); REPORT OF THE PRESIDENT'S COMM'N ON CAMPUS UNREST 1-6 (1970).

19. Sol Linowitz is a lawyer and diplomat who served as a special negotiator for President Jimmy Carter. In particular, he helped negotiate the Panama Canal Treaties in 1977-1978, and served as a special Middle East negotiator from 1979-1981. *WHO'S WHO IN AMERICA* 2038 (41st ed. 1981).

20. SPECIAL COMM. ON CAMPUS TENSIONS, *supra* note 18, at 42-43.

21. REPORT OF THE PRESIDENT'S COMM'N ON CAMPUS UNREST 201 (1970).

College, City University of New York (CUNY) professors Michael Levin and Leonard Jeffries, Jr.²² In both cases, tenured faculty members have come under fierce criticism for their espousal of not only controversial, but inflammatory views.²³ Moreover, these views are at best thinly supported by established scholarship, and have been aired outside of the university setting.²⁴ Predictably, many have called for the discipline, resignation, or termination of each.²⁵ Just as predictably, some have countered that Levin and Jeffries are variously protected by tenure, academic freedom, and the First Amendment.²⁶

This article does not propose to rehash the arguments in favor of and against tenure.²⁷ That debate, along with careful histories of the development of tenure and academic freedom, are available elsewhere.²⁸ The author does note, however, these features of tenure: it is by no means a practice unique to the teaching profession, even though the label "tenure" is rarely applied to other systems of employment;²⁹ whatever its virtues, tenure provides no absolute guarantee of academic freedom or intellectual autonomy, either from inside or outside of the uni-

22. *Levin v. Harleston*, 770 F. Supp. 895 (1991), *aff'd in part*, 966 F.2d 85 (2d Cir. 1992); *Jeffries v. Harleston*, 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).

23. *See, e.g., Jerry Gray, Educators Chided for Race Remarks*, N.Y. TIMES, Mar. 24, 1991, at 34.

24. *See, e.g., Samuel Weiss, Are There Any Enforceable Limits on Academic Freedom of Speech?*, N.Y. TIMES, Nov. 10, 1991, § 4 at 8.

25. *See infra* text accompanying notes 42-46.

26. *A Professor Flaunts His Bias*, N.Y. TIMES, Aug. 9, 1991, at A26; *Alessandra Stanley, City College Professor Assailed for Remarks on Jews*, N.Y. TIMES, Aug. 7, 1991, at B4; *Sam H. Verhovek, Cuomo Urges CUNY to Act on Professor*, N.Y. TIMES, Aug. 8, 1991, at B1, B4; Weiss, *supra* note 24, at 8.

27. *See* Commission on Academic Tenure in Higher Educ., *supra* note 1, at 13-20 (summarizing the arguments for and against tenure); BARDWELL L. SMITH ET AL., *THE TENURE DEBATE* (1973); MORRILL & SPEES, *supra* note 16, at 230-31.

28. *See, e.g., CLARK BYSE & LOUIS JOUGHIN, TENURE IN AMERICAN HIGHER EDUCATION: PLANS, PRACTICES, AND THE LAW* (1959); RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1955); WALTER P. METZGER ET AL., *TENURE* (1979).

29. *See* BYSE & JOUGHIN, *supra* note 28, at vii-viii; Matthew W. Finkin, "A Higher Order of Liberty in the Workplace": *Academic Freedom and Tenure in the Vortex of Employment Practices and Law*, 53 LAW & CONTEMP. PROBS. 357 (Summer 1990).

versity setting;³⁰ it incorporates responsibilities and obligations as well as freedom;³¹ and in all probability tenure is here to stay because of its prevalence, its resilience to attack, its sanctioning in law, and support from unions.³²

This article will first examine the Jeffries episode to determine whether it indeed supports the above-mentioned criticisms of tenure—specifically, that it protects mediocrity and incompetence. The article focuses on the Jeffries case for four reasons. First, it was precipitated by a public speech given outside of the university setting, thus raising all three issues of tenure, academic freedom, and free speech. Second, it has prompted significant public debate and outcry. Third, far from being an aberration, his speech reflected views that have permeated his professional career. Finally, there is abundant and relatively detailed information available in the public press concerning the facts and events of the case.³³ This article contends that the Jeffries incident not only undercuts the critics of tenure, but vindicates the system if and when properly adminis-

30. See DEREK BOK, *BEYOND THE IVORY TOWER: SOCIAL RESPONSIBILITIES OF THE MODERN UNIVERSITY* 20-26 (1982); ASHLEY ELLEFSON, *THE HIGHER SCHOOLING IN THE UNITED STATES* 118-21 (1978); PAUL F. LAZARSFELD & WAGNER THEILENS, JR., *THE ACADEMIC MIND: SOCIAL SCIENTISTS IN A TIME OF CRISIS* 35-72 (1958); CHARLES H. MCCORMICK, *THIS NEST OF VIPERS: MCCARTHYISM AND HIGHER EDUCATION IN THE MUNDEL AFFAIR, 1951-52*, at 87-102 (1989); Robert M. O'Neal, *Tenure Under Attack*, in BARDWELL L. SMITH ET AL., *THE TENURE DEBATE* 178-99 (1973).

31. See BYSE & JOUGHIN, *supra* note 28, at 138-39. See also Thomas I. Emerson & David Haber, *Academic Freedom of the Faculty Member as Citizen*, in *ACADEMIC FREEDOM: THE SCHOLAR'S PLACE IN MODERN SOCIETY* 95, 97-100 (Hans W. Baade ed., 1964); Fritz Machlup, *On Some Misconceptions Concerning Academic Freedom*, in *ACADEMIC FREEDOM AND TENURE* 186-89 (Louis Joughin ed., 1967); *General Report of the Committee on Academic Freedom and Academic Tenure (1915)*, reprinted in 53 *LAW AND CONTEMP. PROBS.* 393, 403-405 (Summer 1990).

32. See Richard P. Chait & Andrew T. Ford, *Tenure in Context*, in *ASHE READER ON FACULTY AND FACULTY ISSUES IN COLLEGES AND UNIVERSITIES* 171-79 (Martin J. Finkelstein ed., 2d ed. 1987). About 20 states introduced legislation to limit, change, or end tenure during the 1960s and 1970s. In only one state did any such legislation survive. *Id.* at 177-78.

33. According to the author's count from the New York Times Index, the *Times* printed 38 stories on the Jeffries case in 1991, *THE NEW YORK TIMES INDEX*, 246, 594 (Harvey L. Holmes, Jr. ed., 1991), and eight stories in 1992. *THE NEW YORK TIMES INDEX*, 251, 635 (Alan R. Greengrass ed., 1992). See, e.g., James Barron, *Professor Steps Off A Plane Into a Furor Over His Words*, *N.Y. TIMES*, Aug. 15, 1991, at B4; Gray, *supra* note 23, at B4; Verhovek, *supra* note 26, at B1; Samuel Weiss, *Outraged CUNY Officials Weigh Action on Professor*, *N.Y. TIMES*, Aug. 9, 1991, at B3.

tered. The second part of this Article proposes a typology for thinking about varieties of speech on the college campus, based in part, on elements of the Jeffries case.³⁴

II. The Jeffries Incident

A. Background

On July 20, 1991, City College professor and Afro-American Studies Department Chair, Leonard Jeffries, delivered a speech at the state-sponsored Empire State Black Arts and Cultural Festival in Albany, New York.³⁵ The speech outlined "a conspiracy, planned and plotted and programmed out of Hollywood," by "people called Greenberg and Weissberg and Trigliani."³⁶ Jeffries stated that Russian Jews "and their financial partners, the Mafia, put together a financial system of destruction of black people."³⁷ He called Assistant Secretary of Education Diane Ravitch "the ultimate, supreme, sophisticated, debonair racist" and a "Texas Jew."³⁸ Jeffries's comments were not anomalous, but rather, were part of his broader view of race relations which include his theory that the abundance of skin pigment melanin in blacks confers greater intellectual and physical advantages to them, than to those who have less pigment—i.e., whites. Jeffries has also argued that whites, whom he labels "ice people," are greedy, domineering, and materialistic, whereas people of African descent, whom he labels "sun people," are more communal and humanistic.³⁹

34. See *infra* part III.

35. The author will not deal with the questions of whether Jeffries was acting in a professional capacity, as a private citizen, or whether his comments can be considered inside or outside of his field of expertise. Compare David M. Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405, 1409 (1988) ("Denying protection to acts by professors that fall outside the proper bounds of their professional functions vindicates, rather than violates, academic freedom.") with Ernest van den Haag, *Academic Freedom in the United States*, in ACADEMIC FREEDOM: THE SCHOLAR'S PLACE IN MODERN SOCIETY 85, 87 (Hans W. Baade ed., 1964) (suggesting that "academic freedom should protect a professor even when he comments on matters outside his special field, and regardless of context"). See also Weiss, *supra* note 24, at 8.

36. *A Professor Flaunts his Bias*, *supra* note 26, at A26.

37. Jacques Steinberg, *CUNY Professor Criticizes Jews*, N.Y. TIMES, Aug. 6, 1991, at B3.

38. *Id.*

39. See Gray, *supra* note 23, at 34.

Jeffries's videotaped speech attracted wide attention and condemnation. Jeffries had expressed similar views in his classes and in public in the past, however, they had never before received such wide exposure.⁴⁰ Educators, journalists, and a variety of public figures called for CUNY to sanction Jeffries.⁴¹ State Assemblyman G. Oliver Koppell circulated a letter within the state legislature urging Jeffries's dismissal.⁴² Governor Mario Cuomo stated, "it seems to me that the comments are so egregious that the City University ought to take action or explain why it doesn't."⁴³ New York Senators Alfonse D'Amato⁴⁴ and Daniel Patrick Moynihan⁴⁵ called for Jeffries's resignation as chair. The *New York Times* editorialized that officials at CUNY "[were] right to consider removing him as head of the department."⁴⁶

On September 19, 1991, the City College Faculty Senate passed a resolution condemning Jeffries's remarks and views.⁴⁷ The resolution, however, also opposed any punishment, based on the protections provided by the principles of academic freedom and free speech.⁴⁸ On October 28, in what was considered a rebuke to Jeffries, the Trustees of the City University voted to extend his term as chair for eight months, instead of the standard three years.⁴⁹ On October 29, the CUNY University Faculty Senate passed a resolution condemning all race-based attacks and hate speech, but did not mention Jeffries by name.⁵⁰ The following March, City College President Bernard Harleston recommended that the trustees appoint Edmund Gordon, a re-

40. Four months before the Albany speech, the *Times* reported on some of Jeffries's views. *Id.*

41. See *infra* text accompanying notes 42-46.

42. Stanley, *supra* note 26, at B4.

43. See Verhovek, *supra* note 26, at B1.

44. James Traub, *The Hearts and Minds of City College*, *NEW YORKER*, June 7, 1993, at 42, 50.

45. Eric Pooley, *Doctor J.*, *N.Y. MAG.*, Sept. 2, 1991, at 33, 37.

46. *A Professor Flaunts His Bias*, *supra* note 26, at A26. See also A.M. Rosenthal, *This Ugly Echo*, *N.Y. TIMES*, Aug. 13, 1991, at A17.

47. Alan Finder, *Faculty Senate Assails Jeffries but Resists Censure*, *N.Y. TIMES*, Sept. 20, 1991, at B3.

48. *Id.*

49. Joseph Berger, *College Chief Calls Jeffries 'Racist,' but Defends Keeping Him*, *N.Y. TIMES*, Nov. 5, 1991, at B1.

50. Mervyn Rothstein, *CUNY Vote on Jeffries Pleases Few*, *N.Y. TIMES*, Oct. 30, 1991, at B1, B4.

tired Yale faculty member, as Afro-American Studies Department chair.⁵¹ The board approved the nomination, effective July 1, 1992.⁵² A month before Gordon was to assume the position, Jeffries sued to retain the position of chair, alleging that he would be deprived of his property for merely exercising his First Amendment rights.⁵³ Agreeing that the college punished Jeffries because of his Albany speech, a jury in federal district court awarded him \$400,000 in punitive damages in 1993.⁵⁴ Following the verdict, Jeffries moved for a permanent injunction restoring his position as chair. The judge granted Jeffries's motion and upheld the jury's verdict, but reduced the punitive damage award by \$40,000.⁵⁵ On April 18, 1994, the United States Court of Appeals for the Second Circuit upheld the district court ruling, but dismissed the jury's award for punitive damages.⁵⁶

B. *The Tenure Issue*

Initially, critics noted that Jeffries's tenure protected him from immediate dismissal. The *New York Times* reported that "tenure . . . should protect him against dismissal from his professorship."⁵⁷ Both CUNY officials and non-university critics noted that the principle of academic freedom, along with First Amendment rights, should not be trampled because of the offensive and factually suspect nature of Jeffries's comments.⁵⁸ These officials and critics believe that a faculty member whose competence and judgment were suspect, is nevertheless protected by thick academic walls. On the other hand, Assemblyman Koppell opined, "I don't think that tenure entitles someone to be a preacher of hate."⁵⁹ Critics question whether a system

51. Susan Chira, *CUNY Ousts Chief of Black Studies*, N.Y. TIMES, Mar. 23, 1992, at A1.

52. *Id.*

53. *Jeffries v. Harleston*, 828 F. Supp. 1066, 1077-78 (S.D.N.Y. 1993).

54. *Id.*

55. *Id.* at 1098 (President Harleston's payment to Jeffries was reduced from \$30,000 to \$15,000, and that of CUNY Chancellor W. Ann Reynolds was reduced from \$50,000 to \$25,000).

56. *Jeffries v. Harleston*, 21 F.3d 1238, 1250 (2d Cir. 1994).

57. *A Professor Flaunts His Bias*, *supra* note 26, at A26. See also Mickey Kaus, *Speech Defect*, NEW REPUBLIC, June 14, 1993, at 6, 49.

58. Stanley, *supra* note 26, at B4.

59. *Id.*

that protects incompetence is worth retaining given the high-sounding values espoused by institutions of higher learning.⁶⁰

As mentioned earlier, tenure is not an absolute protection. From its beginnings, the system was designed to incorporate provisions for dismissal based on grounds including incompetence, personal misconduct, and neglect of duty.⁶¹ Admittedly, such dismissals are rare. According to the AAUP, approximately thirty-five to fifty tenured faculty are discharged each year.⁶² Yet these numbers probably underestimate the number of faculty forced out through informal agreement because of their failure to live up to their responsibilities.⁶³ Anecdotal information suggests that the numbers are actually much higher.⁶⁴ However, they are not reflected in AAUP statistics because administrators may strike bargains with faculty to avoid formal proceedings. One such example is an early retirement package in exchange for a faculty member's agreement to leave voluntarily.⁶⁵

In any case, tenure does provide substantial security for the simple reason that a faculty member's status changes significantly at the time of the tenure decision. During a new faculty member's period of probation (usually five to seven years⁶⁶), the

60. See Rosenbaum, *supra* note 3, at E4; Maria Newman, *Free-Speech Lesson*, N.Y. TIMES, May 16, 1993, at 33 (stating that universities have a concern for civility, tolerance, diversity, and teaching higher values).

61. BYSE & JOUGHIN, *supra* note 28, at vii-viii.

62. Rosenbaum, *supra* note 3, at E4.

63. Examples of faculty failing to fulfill their responsibilities would include failure to meet with scheduled classes, refusing to meet with students for advisement or assistance outside of class, unwillingness to maintain appropriate substantive content of classes the professor is required to teach, and physical or mental incapacity. See PSCCUNY AGREEMENT BETWEEN THE PROFESSIONAL STAFF CONGRESS/CUNY AND THE CITY UNIVERSITY OF NEW YORK, Sept. 1, 1987-Aug. 31, 1990, at 47. According to a representative of the AAUP, faculty members can be dismissed, regardless of tenure, for "gross neglect of duty, immorality or professional incompetence." Weiss, *supra* note 24, at 8.

64. At SUNY Cortland, for example, the author is familiar with four such cases in the last decade, and no instances where the administration actually followed through with the termination of a tenured faculty member based on questions of competence. In a highly publicized case in 1993, a senior faculty member in the Cortland history department was convicted of making hundreds of harassing phone calls to college administrators. In the end, he was allowed to retire (in part so he could retain his retirement package) rather than be terminated.

65. See *supra* note 64.

66. See, e.g., STATE UNIV. OF N.Y., POLICIES OF THE BOARD OF TRUSTEES 1993 12 (1993) (providing that under section 3(b) of Title B of Article XI, an assistant

faculty member bears the primary responsibility of demonstrating to the institution why she or he should continue to be employed. To this end, the untenured faculty member typically amasses a substantial personnel file which details achievements, objectives, skills, and generally demonstrates that the faculty member is meeting the institution's expectations.⁶⁷ Once tenure is granted, however, the burden of proof shifts from the faculty member to the institution. Promotion aside, the faculty member must no longer make the case for continued employment, since it is now assured. Instead, the burden shifts to the institution to demonstrate why the individual is no longer meeting the institution's requirements.⁶⁸

Another benefit of the probationary period is its use as a developmental or therapeutic process. However, this use is often ignored or undervalued both in literature and in practice. For example, a comprehensive analysis of the tenure and promotion process in higher education ignored this process. This analysis summarized ten characteristics of an effective system of tenure⁶⁹ and promotion as follows: 1) a promotion and tenure process that reflect the institution's nature; 2) a promotion and tenure system consistent with the institution's objectives and goals; 3) a system that balances professional priorities with the institution's academic priorities; 4) a system incorporating the expectations of both departments and the institution; 5) institutional policies that are clearly written and understood; 6) consistent and fair application of policies; 7) a system that is manageable; 8) existence of a viable grievance process; 9) a system that is within the law; and 10) a system that is considered generally credible.⁷⁰ Absent from this list, however, is any mention or consideration of the probationary period within the ten-

professor is eligible for continuing appointment after completion of a total of seven years in a position of academic rank).

67. See ALLAN TUCKER, CHAIRING THE ACADEMIC DEPARTMENT 143-69 (1981).

68. The primary alternative to tenure is the contract system. See, e.g., Commission on Academic Tenure in Higher Educ., *supra* note 1, at 10; Penina M. Glazer, *The Concept of Tenure and an Alternative*, in WALTER P. METZGER ET AL., TENURE 15 (1979).

69. An effective system of tenure is understood here to mean one which incorporates a meaningful assessment of the accomplishments of the faculty member, consistent with the goals and objectives of the institution, and that offers possible remedies for those faculty members seeking to improve their performance.

70. MILLER, *supra* note 5, at 4-13.

ure process as a developmental or therapeutic process for the faculty member.⁷¹ An effective system of tenure should incorporate more than a summary approval or disapproval of the faculty member's level of work. It should also analyze the ways in which the faculty member can meet the institution's expectations to improve performance regarding teaching, research, and service. Additionally, an effective system should include appropriate prescriptions. Such a system leaves the faculty member with little doubt about what the institution expects.

A sample framework for a system of therapeutic advice and counseling could include the following elements: an evaluation of teaching methods with suggestions for improvement; specific suggestions regarding the subject matter of scholarly activities; and particular suggestions for appropriate college service activities. While such specific prescriptions might be considered overly paternalistic at some institutions or in some academic departments, it is an approach that is most likely to cultivate faculty who will best fit the needs of the institution, while retaining strong affirmative loyalties. This approach will better serve the institution's interests, keeping in mind two factors: 1) that most faculty who seek tenure receive it, and 2) institutions are more likely to retain faculty who will continue to be positive and constructive contributors.

Jeffries was hired to chair the Afro-American Studies Department in 1972. However, the hire included tenure based on the recommendation of the search committee.⁷² Those who participated in the hiring later disputed their justification for including tenure in the offer.⁷³ The reasons cited for hiring Jeffries with tenure included: Jeffries's high standing among "cultural nationalists," a part of the Black Power movement that extolled all things African; Jeffries's pre-existing considerable contacts in his field of study; and the threat by black

71. Other works contain similar gaps. See, e.g., MORRILL & SPEES, *supra* note 16, at 269-85; NATIONAL EDUC. ASS'N, *ENTERING THE PROFESSION: ADVICE FOR THE UNTENURED* (1988).

72. John Tierney, *For Jeffries, A Penchant For Disputes*, N.Y. TIMES, Sept. 7, 1991, at B10.

73. Traub, *supra* note 44, at 47.

faculty and students to precipitate conflict if Jeffries was not extended such an offer.⁷⁴

Jeffries did not undergo the customary probationary period. Although rare, faculty members hired with tenure typically have substantial academic experience at another institution.⁷⁵ Since Jeffries was hired with tenure, he was unable to benefit from the developmental and evaluative components of the tenure process.

C. *Alternate Opportunities for Evaluation*

While the Jeffries case emphasized the tenure issue, evaluation may also take place through the promotion processes and, on many campuses, through a system of merit pay adjustments.⁷⁶ While tenured faculty members are not required to seek promotion or merit pay increases, most do so. Thus, the evaluative process previously described for tenure may also apply to promotion and salary adjustments, which provide added evaluative opportunities for faculty with tenure. Jeffries was hired in 1972 as a full professor, which is extremely unusual since he had just recently completed his dissertation and had very little experience.⁷⁷ According to Robert E. Marshak, City College president at the time of Jeffries's hire, the offer of tenure and full professorship was unusual but justified because of the recent development of the field and the dearth of candidates.⁷⁸ Marshak further stated that, "[w]hen you're trying to build up new disciplines . . . you generally make more concessions in terms of tenure and rank than you would in older disci-

74. *Id.* Jeffries taught as an instructor in City College's Political Science Department in 1969, and then helped found the Black Studies Department at San Jose State University. Pooley, *supra* note 45, at 36. Jeffries completed his doctoral dissertation from Columbia University on subnational politics in the Ivory Coast in 1971. *Id.*

75. The policy for the State University of New York (SUNY) is that tenure for associate professors and professors shall normally be granted only after three consecutive years of service at the institution granting tenure, and seven years of service for assistant professors, although campus presidents and the SUNY chancellor retain discretion to grant tenure under other circumstances. See STATE UNIV. OF N.Y., POLICIES OF THE BOARD OF TRUSTEES 1993, at 12 (1993).

76. For example, the nation's largest university system, the State University of New York, has a system of merit pay. Merit pay decisions are considered a typical responsibility of a department chair. See TUCKER, *supra* note 67, at 129-30.

77. See *supra* notes 74-75 and accompanying text.

78. Tierney, *supra* note 72, at B28.

plines. It was difficult to attract talented candidates in new areas, and he was considered a very talented person."⁷⁹ These justifications notwithstanding, Jeffries bypassed both the tenure review process and the promotions review process.

D. *Evaluation Criteria*

With some variations, the faculty assessments that accompany personnel evaluations are built on the academic triad of teaching, scholarship, and service.⁸⁰ Larger research-oriented universities with substantial graduate schools are more likely to emphasize scholarly and research activities, while smaller institutions are more likely to emphasize teaching as the most important criterion since they focus on undergraduate education.⁸¹ Generally speaking, service is less important than research and teaching.⁸² All three, however, are normally considered in personnel evaluations, despite their relative importance.⁸³

City College is predominantly an undergraduate institution with approximately 14,000 students, 11,500 of whom are undergraduates.⁸⁴ The agreement between CUNY and its faculty union, the Professional Staff Congress, provides that faculty are evaluated on their teaching-related activities, scholarly and research-related activities, and various service commitments, but "with especial attention to teaching effectiveness."⁸⁵

79. *Id.*

80. KENNETH E. EBLE & THE CONFERENCE ON CAREER DEVELOPMENT, CAREER DEVELOPMENT OF THE EFFECTIVE COLLEGE TEACHER 85 (1971); MILLER, *supra* note 5, at 56.

81. See BURTON R. CLARK, THE ACADEMIC LIFE: SMALL WORLDS, DIFFERENT WORLDS 85-86 (1987).

82. See, e.g., ALIX ROBINSON, ACADEMIC ADVANCEMENT AT SUNY 3-5 (1992).

83. *Id.*

84. Joseph Berger, *Turmoil and Tradition At City College*, N.Y. TIMES, Dec. 1, 1991, at E6; Traub, *supra* note 44, at 43.

85. PSCCUNY AGREEMENT BETWEEN THE PROFESSIONAL STAFF CONGRESS/CUNY AND THE CITY UNIVERSITY OF NEW YORK, Sept. 1, 1987-Aug. 31, 1990, at 36-37. The three basic categories of teaching, scholarship, and service are broken down into nine specific categories in the contract, including: "1. Classroom instruction and related activities; 2. Administrative assignments; 3. Research; 4. Scholarly writing; 5. Departmental, college and university assignments; 6. Student guidance; 7. Course and curricula development; 8. Creative works in individual's discipline; 9. Public and professional activities in field of specialty." *Id.*

1. *Scholarship*

The extensive coverage of the Jeffries case in the press highlighted key elements of Jeffries's record. Since joining the City College faculty in 1972, Jeffries's record of scholarship has been labeled "astonishingly meager."⁸⁶ By his own account, Jeffries's scholarly works consist of a fifty-page unpublished booklet prepared for junior-high-school-level students,⁸⁷ a chapter in the state Education Department's 1989 report "A Curriculum of Inclusion,"⁸⁸ a 1976 article in the magazine supplement of the newspaper the *Amsterdam News*,⁸⁹ and a book on South Africa published in 1983 for the World Council of Churches, for which he claims editorship.⁹⁰

In a personnel review process following conventional academic standards, none of these writings would be considered acceptable scholarly publications, with the possible exception of the book on South Africa.⁹¹ While scholarly activity is sometimes criticized for its obscurity and narrow standards, the publication process is important because it submits one's written work to peers and editors for review and peer reaction. This process is vital because it advances academic discourse in a field of study, subjects the work to others in the field of study for critical evaluation, and as a result of revisions based on reader critiques improves the level of the published work. Publications in the "popular" press or other non-academic venues are not necessarily precluded from legitimate consideration; however, works in these venues must be subject to evaluation for their intellectual rigor and contribution to academic and public discourse. In other words, the mere existence of writing is not sufficient as a basis for accepting the legitimacy of research and

86. Traub, *supra* note 44, at 48.

87. *Id.*

88. *Id.* at 47.

89. Tierney, *supra* note 72, at B28.

90. Traub, *supra* note 44, at 48.

91. According to one analysis in the field of political science of the relative weight accorded edited books in the tenure and review process, Clive S. Thomas and Ronald J. Hrebenar note, "In most political science departments edited books rank just above newspaper articles and non-refereed journal publications and certainly well below textbooks. Some departments don't count edited books as publications." Clive S. Thomas & Ronald J. Hrebenar, *Editing Multiauthor Books in Political Science: Plotting Your Way Through an Academic Minefield*, 26 PS: POL. SCI. AND POL. 778 (Dec. 1993).

inquiry. Writing must be subject to broader scrutiny and verification to insure that work is accurate, substantiated, or otherwise meets meaningful standards associated with the advancement of knowledge. Even unpublished papers presented at professional conferences advance this objective, since the work is exposed to a wider audience of interested professionals. Therefore, Jeffries's written work is not consistent with the underlying standards of the academic profession.

2. Teaching

At least one report has stated that Professor Jeffries is popular among students in his classes, and is considered "a charismatic figure, with an almost cult-like following at City College."⁹² However, serious questions have been raised regarding his commitment to teaching and the level of substance of his classes.

A reporter who observed four of his classes noted that, of the four, Jeffries came late twice (15 minutes and 25 minutes),⁹³ and failed to show at all in two other instances.⁹⁴ Students report that this pattern is typical for his classes.⁹⁵ If this is so, it represents a serious lapse in teaching responsibilities. Students also report that plagiarizing each others' papers without penalty is commonplace in Jeffries's class.⁹⁶ In addition, dissenters or others who disagree with Jeffries's views in class prompt *ad hominem* responses designed to suppress their views.⁹⁷ Other faculty members reported that students taking the Jeffries-guided curriculum are ill-prepared academically and intellectually.⁹⁸ Reportedly, Jeffries's classes are highly polemical, and substantively weak.⁹⁹ Jeffries's theories, propounded both in public and in the classroom, find little or no support in disciplines such as history, biology, or Afro-American

92. Traub, *supra* note 44, at 43.

93. *Id.* at 44.

94. *Id.* (stating that on these days, in these classes, an assistant taught the class).

95. *Id.* at 49.

96. *Id.*

97. *Id.*

98. *Id.* at 49, 52.

99. *Id.* at 44, 49, 52; Massimo Calabresi, *Dispatches*, TIME, Feb. 14, 1993, at 16; Brian Hecht, *Dr. Uncool J*, NEW REPUBLIC, Mar. 2, 1992, at 11-12.

Studies.¹⁰⁰ His theories include his view that Jews bear the primary responsibility for past African American enslavement,¹⁰¹ and that skin pigmentation is related to intelligence and behavior.¹⁰²

The second-hand accounts in this article are no substitute for direct observation and assessment of documents including, but not limited to, course syllabi, testing instruments, and course-teacher evaluations.¹⁰³ However, even these second-hand accounts raise substantial questions about Jeffries's teaching effectiveness.

3. *Service*

A key reason for Professor Jeffries's hire in 1972 was CUNY's establishment and cultivation of a new academic department. Therefore, service activity should carry greater weight in any overall assessment.¹⁰⁴

Even in the area of service, substantial competency questions have been raised. Specifically, allegations have been leveled against Jeffries's conduct as department chair. It has been alleged that Jeffries's anti-Semitic remarks have poisoned his relations with other faculty and administrators at City College;¹⁰⁵ that his substance and style could have caused his department to become stigmatized and isolated in the college¹⁰⁶ as reflected in "three 'disruptive' incidents" in which Jeffries was

100. Harold Brackman, *Jews Had Negligible Role in the Slave Trade*, N.Y. TIMES, Feb. 14, 1994, at 16; Weiss, *supra* note 24, at 8. Princeton's then-director of Afro-American Studies, Cornel West, said "We certainly can't understand the modern world in terms of climate and pigmentation." Tierney, *supra* note 72, at B28.

101. Pooley, *supra* note 45, at 33.

102. *Id.* at 34.

103. These are standard methods for evaluating teaching; no comment is being offered here regarding the methods of evaluation actually employed at City College with regard to Jeffries's teaching.

104. In an informal interview conducted by this author in November of 1993 with a former faculty member from City College, I was told that Jeffries's argument was indeed that he was hired to build a department, that he was essentially a public educator whose audience properly extended beyond the boundaries of the college, and that the traditional personnel evaluation process is racist. Except for the last accusation, the other factors would not mitigate the standard approach to faculty evaluation.

105. *Jeffries*, 828 F. Supp. at 1075.

106. *Id.*

involved;¹⁰⁷ that his statements have harmed City College's reputation;¹⁰⁸ and that the college's ability to raise money from alumni has been damaged.¹⁰⁹ In addition, Jeffries has been accused of other indiscretions, such as, threatening the life of a student reporter for the *Harvard Crimson* during a 1991 interview,¹¹⁰ the harassing questioning of a leading candidate for director of the college's International Studies program during a 1985 interview,¹¹¹ and other similar incidents.¹¹² If true, any of these incidents would provide prima facie evidence of an inability to carry out the responsibilities of a department chair.¹¹³

These public accounts suggest the existence of evidence to question Professor Jeffries's competence in all three areas of the academic triad.¹¹⁴ Jeffries's tenure poses no obstacle to the initiation of proceedings against his continued status as a faculty member at City College, or to his continued service as department chair. However, the question remains, why have two courts ruled against the college's attempt to remove him as chair?

E. *The Failure of Will*

The federal district court noted in its decision that City College officials have been aware of the problems surrounding Jeffries for many years, yet have failed to take any action against

107. *Id.* at 1081. See also *id.* at 1097 n.50 (describing another incident).

108. Joseph Berger, *CUNY Board Votes to Keep Jeffries in Post*, N.Y. TIMES, Oct. 29, 1991, at B1-B4 [hereinafter Berger, *CUNY Board*]; Rosenthal, *supra* note 46, at A17.

109. Maria Newman, *CUNY Says Speech by Jeffries Hurt Fund Raising*, N.Y. TIMES, Jan. 22, 1994, at B3.

110. Rothstein, *supra* note 50, at B4.

111. Berger, *supra* note 49, at B6.

112. *Jeffries*, 828 F. Supp. at 1075-76.

113. The responsibilities of a department chair vary from institution to institution, but department chairs are, by definition, administrators who represent the institution of which they are a part. Actions they take which harm the reputation of the department or institution, or which erode relationships with other colleagues or departments, are inimical to the administrative function. See generally TUCKER, *supra* note 67.

114. The academic triad is teaching, scholarship and service. See *supra* text accompanying note 80. See *Jeffries*, 828 F. Supp. at 1097 (noting in its decision that "there appears to have been some indication . . . of rather serious improprieties on the part of Professor Jeffries upon which the CUNY administrators could have constitutionally acted").

him, either as a faculty member or as chair.¹¹⁵ President Harleston "has known for years about Dr. Jeffries' statements, has conducted three reviews and has never moved beyond a statement of criticism."¹¹⁶ Only after Jeffries's 1991 Albany speech did City College officials attempt to remove Jeffries from the position of chair.¹¹⁷ Therefore, when a jury was presented with the question of whether the college was punishing Jeffries for exercising his free speech rights, rather than for his conduct as chair, it sided with Jeffries. In its verdict, the federal district court was unequivocal:

the action taken by the University was constitutionally impermissible. This is and must be the case, in spite of the hateful, poisonous and reprehensible statements made by the professor in the speech in question. This need not have been the case if the University had offered convincing, firsthand proof at trial 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.¹¹⁸

The court went on to discuss the congratulatory tone of the many documents in which the university approved Jeffries's reappointments as chair.¹¹⁹ Moreover, CUNY officials "presented not one scintilla of credible evidence that the dramatic shift in President Harleston's attitude toward the plaintiff and the accompanying sense of urgency within the administration . . . was caused by anything other than plaintiff's July 20, 1991 speech."¹²⁰ The court also clearly asserted that it did not seek to unduly limit the discretion of the administration in making such personnel decisions.¹²¹ "Defendants and City University bear the responsibility for and the freedom of making employment decisions with respect to Department

115. *Jeffries*, 828 F. Supp. at 1075, 1097.

116. *Berger*, *CUNY Board*, *supra* note 108, at B4. Harleston had worked quietly to try and ease Jeffries out. *Id.*

117. *Jeffries*, 828 F. Supp. at 1079-80.

118. *Id.* at 1071.

119. *Id.* at 1079-80.

120. *Id.* at 1080.

121. *Id.* at 1094-95.

Chairpersons. However, they may not base their decisions on unconstitutional grounds."¹²²

F. *Assessment*

City College completely mishandled the Jeffries incident.¹²³ This mishandling did not begin with the Albany speech, but rather, dated back to his initial appointment in 1972.¹²⁴ Despite considerable evidence that Professor Jeffries had improperly performed his duties as a college professor,¹²⁵ CUNY failed to make a proper, evidence-based case to justify Jeffries's removal from his chairmanship.¹²⁶ In addition, City College robbed Jeffries of the opportunity to submit his performance to personnel reviews in both the tenure and promotion processes. This was a particularly grievous lapse given Jeffries's very limited academic experience at the time of his appointment. Although the tenure system was blamed in part for the situation that arose in 1991, it should not have been, because tenure was not properly implemented in Jeffries's case. The college's instant conferral of full professorship upon Jeffries obviated similar opportunities for evaluation.¹²⁷

The frustrations expressed by CUNY officials, political leaders, and others concerned with the consequences of Jeffries's inflammatory and non-substantive rhetoric are entirely understandable. Although an academic in name and title, the available evidence supports the conclusion that Jeffries's behavior in the classroom, on campus, and off campus is entirely inconsistent with the norms and values that underlie institutions of higher learning.¹²⁸ His case is not problematic because he is controversial, because he speaks on race issues, or because he is

122. *Id.* at 1095. This logic applies even if one considers Jeffries's speech as a part of his professional obligations carried out in his capacity as an appointed consultant for the New York State Education Department. *Id.* at 1073.

123. *Jeffries*, 828 F. Supp. at 1072.

124. *Id.* at 1075.

125. *See supra* parts II.D.1-3.

126. The *New York Times* noted that "the Jeffries case will serve as a lesson to other universities on how not to discipline an employee." Newman, *supra* note 60, at 33.

127. This point went largely ignored in the public debate over the Jeffries case. *But see* Leonard Kriegel, *A Tale of Two Leonards*, 1 RECONSTRUCTION 143, No. 4 (1992) (noting an exception to this gap).

128. *See supra* part II.D.

flamboyant (although these factors explain the wide public attention the case has garnered). Rather, his case is problematic because he makes unsupported claims involving race relations, a subject to which society is singularly sensitive. After all, if Jeffries or anyone else had, for example, produced real, scientifically verifiable evidence that the presence of melanin has the effects he claims, this case would not have unfolded as it did.

Although Jeffries's speech was the event that riveted public attention, it is not the important substantive issue addressed in this article. Yet his speech does raise important questions of the limits of academic freedom, the relationship between that freedom and academic responsibilities and standards, and the relationship between academic freedom and First Amendment free speech protections. Each of these topics alone warrants detailed treatment.¹²⁹

The balance of this article will address the question of how to think about the kind of speech symbolized by the Jeffries speech, in a campus setting.

III. A Typology of Campus Speech

Considerable attention has been focused in recent years on campus speech.¹³⁰ In particular, controversies surrounding issues like hate speech and the so-called "political correctness" debate present campus administrators, faculty, and students with the difficult problem of trying to decide how, or whether, any form of speech regulation on campus is appropriate.¹³¹ The

129. See, e.g., Symposium, *Academic Freedom: The Scholar's Place in Modern Society*, 28 LAW & CONTEMP. PROBS. 429 (Summer 1963); Symposium on *Academic Freedom*, 66 TEX. L. REV. 1247 (June 1988); *Freedom and Tenure in the Academy: The Fiftieth Anniversary of the 1940 Statement of Principles*, 53 LAW & CONTEMP. PROBS. 3 (Summer 1990).

130. See *Widmar v. Vincent*, 454 U.S. 263 (1981) (addressing the constitutionality of regulating speech on public university campuses).

131. See *Campus Culture Wars: Five Stories About PC* (PBS television broadcast, Sept. 25, 1993) (quoting Alan Dershowitz contending that, "[i]t's not like in the 1950s, nobody's going to jail, nobody's losing tenured positions, but there is a very significant threat to freedom of speech, particularly among young, untenured assistant professors. And even among tenured professors."). On the same program, a senior history department faculty member from the University of Wisconsin said that he used his name to shield younger faculty from reprisal in offering public comment on such campus controversies. *Id.* Whether imagined or real, it is clear that faculty on both ends of the ideological spectrum continue to see serious

United States Supreme Court has given clear indication that it views "hate speech" codes with suspicion.¹³²

The language that composed Jeffries's Albany talk, as well as his classroom and other campus speech, provides one example of the type of speech that has concerned many on American college campuses. A recent, comparable example arose on the campus of Kean College, where a senior official of the Nation of Islam gave a speech criticized as "cruelly abusive" to Catholics, Jews, whites, gays, and even some black leaders.¹³³

This article does not offer a solution to the speech regulation problem, but rather, proposes a framework for analyzing campus speech.¹³⁴ The proposal is predicated on the principle that campus speech, like free speech itself, holds a "preferred position" among individual rights.¹³⁵ It should be subject to the least intrusive form of regulation, because of the preeminence of speech as a core democratic value,¹³⁶ as well as its vital importance to the academic mission of the university. This typology is also predicated on the assumption that the university faces a third option, aside from imposing sanctions ("thou shalt nots")

threats to academic freedom. This current controversy alone provides evidence that tenure continues to be as important to academic freedom as it ever was.

132. See *R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992). The Court ruled unanimously against a city ordinance that criminalized speech likely to provoke "anger or alarm" based on "race, color, creed, religion, or gender." *Id.* at 2540. Five members of the Court argued that the law should be struck down because it was "content-based"—i.e., it sought to regulate language dealing with certain specific subjects. *Id.* at 2541-50. The other four members argued that the law in question was overly broad, thus posing a threat to other forms of legitimate speech. *Id.* at 2558-60. See also J.M. Balkin, *Some Realism About Pluralism: Realist Approaches to the First Amendment*, 3 DUKE L.J. 375 (1990); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 3 DUKE L.J. 431 (1990); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 3 DUKE L.J. 484 (1990); Kathryn M. Dessayer & Arthur J. Burke, *Leaving them Speechless: A Critique of Speech Restrictions on Campus*, 14 HARV. J.L. & PUB. POL'Y 565 (1991).

133. Jon Nordheimer, *Angry Echoes of Campus Speech*, N.Y. TIMES, Jan. 26, 1994, at B4. The speech was given by Khalid Abdul Muhammad on November 29, 1993. *Id.*

134. This framework arises from the author's participation in a series of four two-day seminars held on the campus of SUNY Oneonta in the Spring and Fall of 1992 on hate-speech and the college campus, funded by a grant from the Gannett Foundation.

135. *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949).

136. 3 *Preferred Freedoms*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 1439 (Leonard W. Levy et al. eds., 1986).

on hateful utterances or doing nothing. The third option, consistent with the educational mission of universities, is the establishment of codes or guidelines that emphasize the positive, constructive behaviors institutions wish to cultivate ("thou shalt"). As Rodney Smolla¹³⁷ argues, "the battle against hate speech will be fought most effectively through persuasive and creative educational leadership rather than through punishment and coercion."¹³⁸ Such statements of principle include expectations that the campus should foster high standards of civility, respect for diversity, and the like.¹³⁹ One might argue that such affirmative statements carry little weight in campus behavior. Yet a positive, educational approach is highly appropriate in the university setting.

A. *Campus Speech Matrix*

What follows is a scheme designed to divide realms of campus speech into categories in order to better define and understand the complexities of campus speech.¹⁴⁰ The scheme is depicted in Table 1, and encompasses the varieties of speech found on the college campus. It is based on what might be termed a "locational analysis"—that is, the scheme is organized around the location and context, rather than the content, of the speech.

137. Rodney Smolla, professor of constitutional law at the College of William and Mary School of Law, has authored many books about the freedom of speech. See, e.g., RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* (1992); RODNEY A. SMOLLA, *JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL* (1988); RODNEY A. SMOLLA, *LAW OF DEFAMATION* (1986); RODNEY A. SMOLLA, *SUING THE PRESS* (1986).

138. Rodney Smolla, *Academic Freedom, Hate Speech, and the Idea of a University*, 53 LAW & CONTEMP. PROBS. 195, 224 (Summer 1990).

139. Models for such wording can be found in publications of the American Association of State Colleges and Universities—in particular, their publications COMMITTEE ON EDUC. EQUALITY, *AMERICAN ASS'N OF STATE COLLEGES AND UNIV., RACISM AND CAMPUS DIVERSITY* (1989); COMMITTEE ON PURPOSES, POLICIES AND PRIORITIES OF THE AM. ASS'N OF COLLEGES AND UNIVS., *ACADEMIC FREEDOM AND "POLITICAL CORRECTNESS,"* (1991); DAVID S. TATEL ET AL., *HOW THE FIRST AMENDMENT APPLIES TO OFFENSIVE EXPRESSION ON THE CAMPUSES OF PUBLIC COLLEGES AND UNIVERSITIES* (1990).

140. Smolla, *supra* note 138, at 218 (suggesting that the "soundest view is to treat the campus not as one unified forum, but as subdivided into multiple forums to which differing free speech standards apply"). Smolla applies this analysis to public campuses, but the principle is certainly applicable to private campuses as well. *Id.*

Table 1
Campus Speech Matrix

<u>Nature of Speech</u>	<u>Context of Speech:</u>		
	<u>Classroom</u>	<u>Residential Areas</u>	<u>Common Areas</u>
Planned	(1)	(2)	(3)
Impromptu	(4)	(5)	(6)
Symbolic Behavior as Expression	(7)	(8)	(9)

1. *Nature of Speech*

These nine cells depict the spectrum of where and what type of speech arises on a college campus. A complete analysis requires studying both the nature and the context of the speech in these nine scenarios. "Nature of speech" itself incorporates three varieties of utterances: planned speech, impromptu speech, and symbolic behavior as expression. Each variety has unique characteristics that raise different issues making it subject to separate analysis and varying degrees of regulation.

Planned speech poses a relatively small problem because planned activities of a controversial or potentially offensive nature can be organized in such a way as to allow for the structuring of dissent in appropriate and functional ways. To take the previously mentioned incident at Kean College, the outside speaker was invited to speak on the campus by a student group, was paid an honorarium, and gave his address at a pre-set location and time. While the content of his speech was inflammatory, it was certainly within the ambit of campus guidelines. Had other students wished to protest the speech, they could have done so as long as they did not disrupt the speech itself.

Impromptu speech, which is unpredictable and spontaneous, poses a more difficult problem. Aside from the realm of the classroom, which is regulated by the faculty member (and with the understanding that students may follow established grievance avenues in instances of faculty misbehavior), other areas on campus may be realms where campus rules of behavior are the only means of regulating and controlling impromptu speech. However, it is difficult to imagine an example of impromptu speech where existing campus harassment codes would not provide a means for an aggrieved student to seek redress. In addi-

tion to campus sanctions, offensive impromptu speech may be deterred by emphasizing sensitivity to such issues as an important part of the training of resident assistants, dorm directors, student leaders, and others involved in student life. Freshman orientation, dormitory meetings, and counseling sessions provide opportunities to transmit such values.

Symbolic behavior poses perhaps the most difficult problem of the three categories of campus speech. At least since the 1960s, the campus setting has been one where a wide range of symbolic behavior has been given free rein. In addition, the general thrust of cultural norms in recent years, as well as the verdicts from several Supreme Court cases,¹⁴¹ all suggest the avoidance of restrictions in this area. Even when some especially odious and offensive symbols, such as the swastika and the confederate flag, appear on a person or inside a dorm room, the campus should avoid regulatory attempts. However, general campus rules that restrict or bar the hanging of items outside of windows, for example, would certainly incorporate such symbols. (The presence of such symbols within the classroom should certainly be allowed as long as they serve some educational purpose.)

2. *Context of Speech*

There are three categories of places where speech might occur: the classroom, the residential area and the common area. The degree of regulation varies according to the location of the speech. Since the teaching profession is largely self-regulating, the classroom is clearly the area most directly under the control of the faculty member. The discretion of the faculty member over the conduct of the class is, and should be, great.¹⁴² Even

141. See *Texas v. Johnson*, 491 U.S. 397 (1989) (finding the burning of an American flag to be expressive conduct and thus, protected by the First Amendment); *Smith v. Goguen*, 415 U.S. 566 (1974) (overturning a criminal conviction for flag misuse because the statute was unconstitutionally vague as to what constituted a violation); *Street v. New York*, 394 U.S. 576 (1969) (overturning a conviction for flag burning because the defendant had been wrongfully punished for his words which accompanied the action); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969) (upholding the right of public school children to wear armbands in protest of the Vietnam War); *Stromberg v. California*, 283 U.S. 359 (1931) (reversing a conviction for displaying a red flag based on the statute's vagueness and indefiniteness).

142. Smolla, *supra* note 138, at 221.

so, faculty may abuse their authority in the classroom. Standard university guidelines govern how, and under what circumstances students may challenge a faculty member's classroom conduct of speech-related activities.¹⁴³

Residential areas are the living spaces of students and some staff, and thus warrant treatment commensurate with that fact. The close quarters of the dorm setting in which students normally live, require regulations that may infringe on aspects of speech in order to maintain some degree of order.

Common areas represent the most open and public forums on a campus. Codes pertaining to these areas might reasonably parallel those of public parks and village greens.

Cass Sunstein's analysis of campus hate speech provides support for this locational analysis.¹⁴⁴ Sunstein supports restrictions by campuses on speech "to the extent that the restrictions are closely related to its education mission."¹⁴⁵ Interestingly, all of the examples Sunstein cites to support such regulations involve instances occurring in classrooms (aside from his discussion of faculty personnel evaluations) even though Sunstein's argument revolves around content-based regulation.¹⁴⁶ Yet it is equally clear that many of his examples of permitted regulation are limited only to the classroom. Examples include, rules supporting the maintenance of civility in the class, and restrictions on classroom speech based on the germaneness of the speech to the subject of the class. Neither of these examples would be appropriate or allowable as regulations on campus outside of the classroom. Sunstein's argument

143. *Id.* at 222.

144. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 197-208 (1993). Cass Sunstein is a member of the faculty of the University of Chicago School of Law, and the author of numerous articles and books on constitutional issues. See, e.g., CASS R. SUNSTEIN, *THE PARTIAL CONSTRUCTION* (1993); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1992). See also Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992).

145. Smolla, *supra* note 138, at 201.

146. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 204-07 (1993) (discussing the Jeffries case). Sunstein argued that his removal is justified either in response to a poor professional record or if the university could show that "the relevant speech makes it very difficult or impossible for the employee adequately to perform his job"—a position to which Sunstein seems sympathetic. *Id.* at 205. The mere utterance of controversial statements alone would be insufficient. *Id.*

that speech regulations are allowable in the classroom specifies a particular location on campus where the rule would apply.¹⁴⁷ It is just as clear that classroom civility standards would be inappropriately strict for a college dorm room or a campus quad. Thus, location becomes a crucial variable in determining the extent and nature of regulation.

B. *Description of Matrix Cells*

The nine cells in Table 1 represent nine distinct speech-related issues. Each is specified below:

(1) lectures, planned discussions, class-related exercises and activities related to curriculum;

(2) meetings, rap sessions in dorm lounges, meeting rooms, etc. Dorm presentations planned and hosted by student groups, student life personnel, faculty, and other invited guests;

(3) lectures, panel discussions, organized meetings, entertainment and artistic events;

(4) unplanned outbursts by students or faculty in ways not structured into the curriculum, broadly defined, or intrusion by others not normally included in the particular classroom who intrude in an unplanned and appropriate or inappropriate way;

(5) the normal discussion and social intercourse to be found in any living area;

(6) the normal discussion and social intercourse found in any common area;

(7)-(9) clothing, armbands, posters, flags, decals, pins, other non-verbal forms of expression (the modes of expression are the same here regardless of the location or context; however, this does not mean that the regulatory remedy would be the same in each).

C. *Discussion of Matrix Cells*

Each of the nine cells poses a distinctive situation for speech on campus. Too often, discussions and analyses of speech-related problems on campus fail to make key distinctions between campus locations, and types of speech. Yet mean-

147. *Id.* at 197-208.

ingful analysis must incorporate such consideration because the regulatory consequences are somewhat different for each.

(1) Planned-classroom areas should be most free from regulation. Offensive comments from students in planned discussions should be dealt with by instructors as part of the learning experience; offensive comments by faculty as part of the curriculum may raise question of faculty competence to be addressed through the personnel process by department chair, dean, etc. (e.g., a lecture which accepts as fact the proposition that the Holocaust is a myth).

(2), (3) Planned-residential/planned-common areas reserved for common or public use should be accessible to all members of the campus community (and those invited from the outside by members of the campus community) when facility use follows usual campus channels. Such areas may be subject to time-place-manner restrictions, if necessary to sustain public order.

(4) Impromptu-classroom involves situations where disruptive or abusive outbursts are generally considered to be inconsistent with the core academic values of the university setting, and may be subject to harassment proceedings or other disciplinary actions.

(5), (6) Impromptu-residential/impromptu-common areas involve circumstances where threats, harassment, verbal abuse, intimidation and the like suggest forms of harassment to be dealt with through the campus judicial system.

(7) Symbolic behavior as expression in the classroom incorporating, for example, wearing of arm bands, clothing or items on clothing designed to make a political or other statement would normally be allowed unless the presence of such items resulted in short-circuiting the learning environment, in the judgment of the instructor. The same principle would apply to signs, posters, etc.

(8) Symbolic behavior as expression in residential areas is an environment where students should be generally free to engage in such expression when in the confines of their rooms. Disputes between roommates may require campus adjudication. Such expression outside of the room (on the outside of a door, outside of a window, in common areas) may be limited by campus codes concerning when, where, and how materials may

be displayed (e.g. limiting materials to designated bulletin boards). Students who post offensive materials on the outside of their dorm room doors (under circumstances where college codes allow such a practice) may be the object of informal counseling or floor discussion if the posted material prompts complaints from other students.

(9) Symbolic behavior as expression in common areas is normally allowed, and not subject to regulation (aside from public nudity or overtly harassing behavior).

D. *Assessment*

This scheme is offered as a work in progress, and as a means for shedding more light on speech in the campus environment. It emphasizes: 1) the importance of thinking about the campus as a multifarious environment where its citizens live, work, and play and 2) the desirability of relying on positive, constructive values to resolve speech-based conflict. Universities must lean toward free expression; yet they must not neglect the values of civil discourse and respect for others.

IV. Conclusion

An institution of higher learning should (to borrow recklessly from Abraham Lincoln) be of the faculty, by the administration, and for the students. It may indeed be true that "academic freedom has caused power and influence to migrate from the central administration to the faculty."¹⁴⁸ The same effect might be attributed to tenure. But the weight of academic freedom and tenure are counterbalanced in the university setting by peer review and the ultimate authority of administrators to exercise personnel decisions over faculty, whether tenured or not.

In the Jeffries case, City College administrators denied both Professor Jeffries and themselves a key avenue for cultivating a young and inexperienced faculty member by awarding tenure and a full professorship at the point of Jeffries's initial hire. Subsequent to that decision, the administration failed to pursue considerable evidence that Jeffries was not performing his job satisfactorily. Even if such charges proved to be un-

148. Bok, *supra* note 30, at 37.

founded, the failure of the college to seriously question or investigate the allegations until after the July 1991 speech represents a second serious failure to use existing powers and mechanisms to assure the academic integrity and reputation of its institution. Tenure undeniably provides a measure of security for faculty; yet nothing in the Jeffries case suggests fault in the tenure structure. Indeed, there is every reason to believe that the tenure and promotion structure, properly applied, would have either led to general improvement in Jeffries's performance, or impelled him to seek employment elsewhere.

The anger and frustration expressed by many inside and outside of the academic community is understandable, especially in the light of Jeffries's court victory. But it is important to remember that the tenure system is hardly infallible, and that "attempts to make it easier to get rid of incompetents make it easier also to dismiss competent professors."¹⁴⁹ Furthermore, while bad cases may make bad law, the same does not apply to bad or unsavory people.¹⁵⁰ The particulars of controversial cases cannot and should not be divorced from the broader principles that frame them. As the former chair of the City College Faculty Senate, Bernard Sohmer (himself a target of Jeffries's invective) noted, "I think Leonard Jeffries is a terrible person . . . a seriously flawed, anti-Semitic person. On the other hand, the structure of the university is more important than Leonard Jeffries."¹⁵¹

149. Van den Haag, *supra* note 35, at 87.

150. The Supreme Court has made good law from bad situations in several cases. For example, in *Hustler v. Falwell*, 485 U.S. 46 (1988), sleaze merchant Larry Flynt won reversal of a judgment against him for his cruel parody of Jerry Falwell. In the process, Flynt helped carve out new First Amendment protections for satire. In *Brandenburg v. Ohio*, 395 U.S. 444 (1969) the court held that even the controversial ideas of the Ku Klux Klan may receive constitutional protection. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court held that even a career criminal and rapist had a constitutional right to counsel during police questioning. Finally, in *Near v. Minnesota*, 283 U.S. 697 (1931) the Supreme Court expanded the protection of the First Amendment in a case involving a xenophobic, racist, bigoted scoundrel.

151. Rothstein, *supra* note 50, at B1, B4.