

# Academic Freedom: Illusions, Allusions, and Conclusions

*Kathy Menzie*

Academic freedom — fine sounding words that call to one's mind the freedoms Americans enjoy — freedom of speech, freedom of the press, freedom to practice religion, and freedom to gather with others. But what is academic freedom? Is it the freedom to say what one wants in the classroom? Is it the freedom to refuse to sign a loyalty oath? Is it the freedom to assign grades to students? Is it the freedom to choose the play or the books students will read in one's class?

The definition of academic freedom is open to question, both inside and outside the educational institution. The American Association of University Professors defines academic freedom for teachers in three areas: freedom in research and publication; freedom in classroom discussion; and the freedom to speak or write as citizens. However, not everyone agrees with this definition. Some question who actually has the academic freedom — an individual teacher or an institution? The debate swirls around these questions: is academic freedom automatically granted to all professors as a First Amendment right? Or is it a right granted not to individuals, but to a university?

## History of Academic Freedom

Academic freedom was not a concept of the first American colleges. The goals were to teach discipline, tradition, and authority<sup>1</sup> to prepare students for careers in the church, law, or medicine.<sup>2</sup> Students wanting advanced degrees had to attend school in European countries. The students who were educated in Germany were particularly impressed with the ideas of the German university and they are credited with bringing back to the United States some of the German ideas, specifically academic freedom and the organizational structure of the German universities.<sup>3</sup> The German model became uniquely American when it was expanded, adapted, and modified by the culture of free speech. The ability of professors to express their views on any subject became part of the American model of higher education.<sup>4</sup>

In spite of this enlightened concept, professors in America

continued to be dependent on the wills of the university presidents and boards. Salaries were low; opportunities for study and research were few. Professors began calling for academic freedom to provide for themselves higher salaries, more secure positions, and the ability to search for truth through research and scholarly reporting.<sup>5</sup> These professors were fortunate in their timing, as the late 1800s and early 1900s were the Progressive age — reform was the movement of the day. Activists were challenging the government to clean up the cities and to clean up politics, from the school boards to Congress.<sup>6</sup> The conflict between the desires of the professors and dictates of their employers led to the formation of the American Association of University Professors. This body, in turn, produced the 1915 General Declaration of Principles. This declaration gave general statements on the foundations of academic freedom and practical ways in which these principles could be implemented.<sup>7</sup> Revised in 1940 and 1970, the statement has been endorsed by nearly every American higher educational institution<sup>8</sup> and by more than 140 professional organizations.<sup>9</sup> Three areas of academic freedom were established in the statement:

1. 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.
2. 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.
3. College and university teachers are citizens, and should be accorded the freedom of citizens.<sup>10</sup>

World War I brought major challenges to the concept of academic freedom. There was a new aversion to change and reform. Those who had less passion for America's entrance into the war or those who promoted pacifist causes were looked upon with suspicion and derision.<sup>11</sup>

In 1917, Columbia University began investigating faculty to see if anyone was guilty of teaching and spreading subversive ideologies. The president of Columbia said that in the past the university had tolerated "folly" and "wrongheadedness" but now, "What had been wrongheadedness was now sedition.

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What had been folly was now treason.”<sup>12</sup> All over the country, professors were being forced to defend what they said and with whom they associated.

The search for disloyalty and radicalism continued for many years and focused on eliminating the influence of those who believed in or spread radical ideas, especially the ideas of communism. Professors were forced to balance their beliefs in academic freedom with their employers' desires for loyalty oaths and information on possible subversive activities. The rise of Congressional hearings and Senator Joseph McCarthy's campaign against communists in the 1950s brought additional threats to academic freedom. Some universities caved in to the pressure to reject or remove any people who might not be loyal to the American government. The concept of “innocent until proven guilty” was absent, as people assumed any accused professors were guilty. If a faculty member was called before an investigation committee, the university also began investigating the professor. During this time, nearly 100 professors lost their jobs and several hundred more “eased out.”<sup>13</sup> State legislatures and school administrators added loyalty oaths and laws and rules that restricted who could work in their schools. The AAUP, which would normally have led the fight against McCarthyism, had an executive director that was in ill health and the organization did nothing to protest the assault on academic freedom.<sup>14</sup>

After McCarthy was discredited and America entered the 1960s, threats to academic freedom did not stop. A Stanford University professor's tenure was revoked because he opposed Stanford's involvement with activities that supported the Vietnam war.<sup>15</sup> When legislator Julian Bond criticized the Vietnam War, the Georgia legislature refused to seat him.<sup>16</sup>

### **Current examples**

The American climate of post-September 11, 2001 trauma and the war on terrorism contain many examples of this predilection to prevent uncomfortable speech. Sami Al-Arian, a University of South Florida professor, appeared on the television show “The O'Reilly Factor” in which he was questioned about his outspoken pro-Palestinian views.<sup>17</sup> Immediately after the show, the university received complaints and death-threats against Al-Arian. The president

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of the university considered termination from the beginning, not because of his words, but because of the disruption he had caused on the campus. The university had to deal with hundreds of calls and questions, and donor misgivings. Al-Arian was eventually arrested and indicted on charges of raising money for the Palestinian Islamic Jihad and officially fired in 2003.<sup>18</sup>

Jonnie Hargis, a librarian from the University of California at Los Angeles, criticized the United States' support for Israel in an email response to a patriotic email. He was suspended for five days without pay.<sup>19</sup> Ken Hearlson, a professor from Orange Coast College in Costa Mesa, California, was put on paid leave after he was accused of verbally attacking four Muslim students in his classroom by calling them terrorists, murderers, and Nazis. Even though an audiotape of his class showed he did not accuse any student of being a terrorist, the university sent him a letter of reprimand.<sup>20</sup> He won reinstatement, but the university placed the reprimand in his file.<sup>21</sup>

Richard Berthold, a University of New Mexico professor said to a class on Sept. 11, "Anyone who can blow up the Pentagon has my vote." He received death threats and was forced to leave campus for a week. He apologized, but the university conducted an investigation.<sup>22</sup> He received a reprimand, removal from teaching freshman classes, and a post-tenure review. He chose to retire early in 2002.<sup>23</sup>

Mary A. Burgan, the general secretary of the AAUP, placed a statement on the AAUP website, following the Sept. 11 attacks which "called for a renewal of our trust in reason in the presence of irrational acts."<sup>24</sup> Many responses she received accused her of being disloyal and/or radical. Burgan goes on to say "I have learned that academic freedom requires practice, and even so, neither speech nor silence will ever feel very good in opposition."<sup>25</sup>

While other studies have sought to define what academic freedom should be, the purpose of this study is to look at what academic freedom is, by examining how the courts have treated persons claiming an academic freedom infringement and by what the courts have stated about academic freedom in their decisions. State, district, appellate, and the United States Supreme Court decisions will be examined. Because it is extremely difficult to discuss the issues in the cases

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without having discussed the cases, this study will first examine the cases, then examine what professors, lawyers, and scholars say about academic freedom. This study will then answer the question of whether or not academic freedom is a constitutional right; and whether academic freedom adheres to the individual or to the institution. By constitutional, the courts question whether public universities must give professors a constitutional right of academic freedom. By "institutional," the courts generally mean that academic freedom is not an individual right, but is granted to an academic institution.

### **Methodology**

On the Lexis-Nexis Legal Research database from 1993-2001, there are 207 cases containing the words "academic freedom." The years 1993-2001 were chosen to reflect recent court decisions. These 207 cases were examined and 11 cases were chosen, based on a court decision that included an issue of academic freedom. Cases were eliminated if they dealt with issues other than academic freedom. Because case law is based on precedents set from earlier cases, nine cases from dates earlier than 1993 were included, in order to explain the academic freedom precedents. The courts have not made a marked distinction between university professors and high school teachers in the issues of academic freedom, so this study includes cases involving both. Indeed, the courts have often not even made a distinction between university professors and nurses, as will be seen in the cases presented. This study includes only public institutions. Private institutions do not have the same academic freedom rights. This is pointed out by Byrne in his study of academic freedom: "Faculty and students at state universities enjoy extensive substantive and procedural constitutional rights against their institutions, while faculty and students at private institutions enjoy none."<sup>26</sup>

In a study of campus speech codes, Sunstein said, To the extent we are dealing with private universities, the Constitution is not implicated at all, and hence all such restrictions are permissible... Private universities can do whatever they like. They can ban all speech by Republicans, by Democrats, or anyone they want to silence.<sup>27</sup>

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An additional study may want to look at the institutional policies and practices of private universities. Many universities may include the AAUP academic freedom rights in faculty handbooks and this may affect how the courts view this issue. This is, however, beyond the scope of this particular study, which is limited to decisions affecting public universities.

### **Cases involving loyalty oaths, subversive associations or subversive activities**

The earliest cases, those that established a constitutional basis for academic freedom, were decided from 1952-1967, during the McCarthy era and stretching into the Cold War era. They involved loyalty oaths and refusals to answer questions about "subversive" activities or associations.

*Adler v. Board of Education* was decided in March 1952, and involved the public schools in New York City. A civil service law in New York declared that the public schools could not employ anyone who was a member of an organization advocating overthrowing the government by force, violence, or any unlawful means. The Supreme Court of New York declared the law unconstitutional. The Court of Appeals reversed and the U.S. Supreme Court agreed. The Supreme Court said members of subversive organizations could keep their ability to speak freely and associate freely, but they just could not work in the New York public schools.

Justice Black dissented from this opinion and said, "The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher."<sup>28</sup> He said the threat of the law would play havoc with academic freedom. "A pall is cast over the classrooms and there can be no real academic freedom in that environment."<sup>29</sup> While this was not really a victory for academic freedom, the dissenting words that defended teachers and academic freedom are often quoted in subsequent cases.

Later the same year in another case, Supreme Court Justice Black expressed his thoughts on teachers, and this time, this view was in the majority. This case, *Wieman v. Updegraff*,<sup>30</sup> was decided in December 1952. Oklahoma's Act 205 required that every employee take a loyalty oath. The Act made no provision for a person who may have been

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a member of an organization, but who did not know the activities and purposes of that organization. The Supreme Court in Oklahoma sustained the constitutionality of the Act. The United States Supreme Court reversed and said the Act inhibited individual freedom of movement and stifled the flow of democratic expression and therefore violated the due process clause of the Fourteenth Amendment. Justice Frankfurter said:

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.... A university, then, is a kind of continuing Socratic conversation on the highest level for the very best people you can think of, 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 express themselves.<sup>31</sup>

Five years later, in 1957, the courts were still dealing with loyalty and governmental desires to prevent subversive persons from teaching in schools. The case of *Sweezy v. New Hampshire* is one of the most important academic freedom cases. Nearly every article on academic freedom includes mention of some aspect of the *Sweezy* decision. In this case, *Sweezy*, who gave a lecture at a state university, refused to answer questions from the New Hampshire attorney general about the content of the lecture. The Superior Court of Merrimack County found him in contempt of court; the Supreme Court of New Hampshire affirmed the judgment. The U.S. Supreme Court, however, reversed saying *Sweezy* was deprived of due process. The court said the “questions asked the witness infringed upon his constitutionally protected academic and political freedoms.”<sup>32</sup> The court goes on to describe academic freedom in glowing terms:

The essentiality of freedom in the community of American universities is almost self-evident. . .

To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.<sup>33</sup>

Using the Universities of South Africa, Justice Frankfurter described the academic freedom of a university. He said:

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It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.<sup>34</sup>

This case added a tremendous amount to the debate on academic freedom. The strong words are often quoted in cases involving academic freedom. But there is a conundrum here in Justice Frankfurter's descriptions of the four freedoms of a university. While the first examples in this paragraph show academic freedom is a strong personal right enjoyed by professors, the second example, of the four freedoms of a university, has been used to show that academic freedom belongs to the university.

While the decision was in favor of Sweezy, it was a short-lived victory for those wanting to avoid questions about possible "subversive activity" as the following two decisions were not decided in favor of the teachers who refused to answer questions from governmental bodies. In the first, *Belian v. Board of Public Education, School District of Philadelphia*, Belian, a public school teacher, refused to answer his superintendent's questions about his membership in a Communist political association, and he was fired for incompetency.<sup>35</sup> The County Court of Common Pleas reinstated him, but the Supreme Court of Pennsylvania reversed the lower court and upheld the teacher's discharge. The U.S. Supreme Court affirmed that Belian's due process was not violated. This case was really decided on the basis of due process and not academic freedom. This is a much easier concept for the courts to address as the case can be decided on a yes or no basis — was Belian's due process violated or not? The courts decided it had not been and they did not deal with the more difficult gray area of academic freedom. In the second case, *Barenblatt v. United States, 1959*,<sup>36</sup> Barenblatt was called as a witness before a subcommittee of the House Committee on Un-American Activities. When he refused to answer questions about his affiliation with the Communist party, he was convicted of contempt of Congress. The Court of Appeals for the District of Columbia Circuit upheld the

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conviction and the U.S. Supreme Court agreed by another 5 to 4 vote. The Court said Congress had the power to question witnesses and could compel those witnesses to testify about their knowledge of the Communist party. The court said the question Barenblatt refused to answer was not protected by the First Amendment, but it did introduce an oft-quoted passage on academic freedom.

. . . when academic-freedom and learning-freedom are claimed, the United States Supreme Court will always be on the alert against intrusion by Congress into this constitutionally protected domain....<sup>37</sup>

This statement has formed some of the historical basis for academic freedom as a constitutional right, though whether this is a constitutional right for individuals or for institutions is not addressed. However, the case was thrown out by a 1967 case (see *Keyishian v. Bd. of Regents*, 1967).<sup>38</sup>

Teachers had better fortune in 1960 in *Shelton et al v. Tucker et al.*<sup>39</sup> Arkansas had a state law that required that every year all teachers in state-supported schools must disclose a list of every organization they had belonged to or contributed money to in the last five years. The District Court, the State Court and the Arkansas Supreme Court agreed the law was valid, but the Supreme Court, by a vote of 5 to 4, said the law was too unlimited and indiscriminate. The court said, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."<sup>40</sup>

A very important case for academic freedom was decided in 1967. This case, *Keyishian v. Board of Regents of the University of the State of New York*,<sup>41</sup> is often quoted in articles on academic freedom. In this case, New York had both state laws and administrative regulations that prevented the state from employing anyone who was a subversive. The District Court said these were constitutional, but the U.S. Supreme Court disagreed and in the process threw out any use of *Adler v. Board of Education* (1952) as a precedent. The Court ruled 5 to 4 that the laws were vague because it was not clear whether a teacher had to advocate a subversive doctrine or simply talk about it in the abstract. The Court said:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent

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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."<sup>42</sup>

The Court heavily quoted Sweezy's<sup>43</sup> wording for academic freedom in several parts of its decision on this case. The Keyishian case is often cited as the basis for academic freedom, as the court claims that academic freedom is a special concern of the First Amendment. However the definition of "special concern" is not clear, which leaves the issue open to interpretations.

### **Cases involving free speech**

In 1968 and in 1983, the United States Supreme Court decided two cases whose reasoning will be used in subsequent cases. The first is *Pickering v. Board of Education of Township High School District 205*.<sup>44</sup> Pickering, a public high school teacher, wrote a letter critical of the superintendent and the school board to the editor of the local newspaper after a funding proposal had been defeated by voters. The board decided the letter was detrimental to the operation of the schools and fired Pickering. The Circuit Court of Will County, Illinois and the Supreme Court of Illinois agreed with the Board of Education. The U.S. Supreme Court reversed the lower court's decision, 6 to 3. The court said that without the teacher knowingly and recklessly making false statements, he had a First Amendment right of free speech on issues of public importance. The court said:

Public school teachers may not constitutionally be compelled, as a condition of retaining their employment, to relinquish the First Amendment rights that they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work.<sup>45</sup>

This case became a very important precedent and provided the "Pickering test," which determines whether or not the speech in question is protected — speech on a matter of public interest is protected. The right of comment is assured for teachers, but this right is clearly stated as the

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same rights all citizens enjoy and is not a special right of academic freedom.

Even though the next case does not involve a teacher, the above decision was cited in this case, with no distinction made between the teacher in the Pickering case and an attorney in the next case. In this case, *Connick v. Myers*,<sup>46</sup> Sheila Myers had served as an assistant district attorney for more than five years when she was notified she was being transferred to another section of the criminal court. She then put together a survey which she sent to 15 assistant district attorneys asking for their opinions on office morale, grievances, etc. The District Attorney fired her for refusing the transfer and for insubordination because she distributed the questionnaire. The District Court decided she was wrongfully terminated because the questionnaire involved matters of public concern. The Fifth Circuit Court of Appeals agreed, but the Supreme Court reversed and upheld her firing in a 5 to 4 vote.

The limited First Amendment interest involved does not require that the supervisor tolerate action that he reasonably believed would disrupt the office, undermine his authority, and destroy the close working relationships within the office.<sup>47</sup>

Pickering was quoted as the case used to help decide the free speech issue.

The problem is to arrive "at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>48</sup>

The Pickering test was expanded in *Connick*. Public speech on a matter of public concern was protected in Pickering, but private speech on a private matter was not protected in *Connick*. In addition, the court added the concept of disruption into the speech issue. In *Connick v. Myers* (1983),<sup>49</sup> the courts allowed employers to restrict, demote, or terminate employees who disrupted the workplace. The court ruled against Myers and the questionnaire she circulated, saying she could be fired because her employer did not have to tolerate disruptive behavior that would undermine the employer's authority.

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The court ruled that private speech on private matters could be restricted. This case was a setback for academic freedom, as it allowed an employer to fire or demote an employee based on the disruption caused by the speech, not by the speech itself. It has also become a precedent for other cases in which the courts have made no distinction between any government employee and professors employed by public universities, indicating there is no special academic freedom of speech privilege.

The case of *Silva v. The University of New Hampshire* (1994) was not a Supreme Court case. It was decided at the level of the District Court for the District of New Hampshire, but directly involves academic freedom in a classroom. A University of New Hampshire professor, J. Donald Silva, used several references or metaphors in teaching his technical writing class. In one he compared, “belly dancing to jelly shimmying on a plate with a vibrator under it.”<sup>50</sup> When several women in his class complained, he was found to have violated the university’s sexual harassment policy and was suspended without pay for a year. The District Court found that Silva’s First Amendment rights had been violated when the university tried to apply the sexual harassment policy to his classroom speech. Using the Connick test, the court found that his speech in class was not on matters of personal interest, but was related to the subject matter.<sup>51</sup> The University of New Hampshire published the AAUP Statement of Principles on Academic Freedom and Tenure in its faculty handbook. Silva contended that the university breached this contract. The court agreed and said, “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.”<sup>52</sup> The university was ordered to reinstate Silva and to return him to the classroom as soon as possible. While this case is a triumph for academic freedom, it is important to remember it was at the District Court level. Had the case been appealed, it is not certain Silva would have been reinstated.

*Waters v. Churchill* (1994)<sup>53</sup> also does not involve a teacher, however, the decision in the case was used to decide the *Jeffries v. Harleston* (1995) case,<sup>54</sup> which did involve a professor, so it is included in this collection. Cheryl Churchill, a nurse

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at a public hospital, was fired because she was critical of the hospital in a private conversation. Churchill said her speech was protected under *Connick v. Myers* (1983). The District Court disagreed and said she could be fired. The Court of Appeals reversed and said her speech was a matter of public concern and not disruptive. The Supreme Court said that the government could not restrict speech as a sovereign, but could as an 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."<sup>55</sup> Seven members of the Supreme Court voted to set the Appeals Court verdict aside and send the case back to the lower court to reconsider.

This case further extends the tendency of the court to see professors as no different from any other state employee, again failing to acknowledge any special academic freedom or any special relationship between professors and their academic institutional employers. The Pickering/Connick balancing test now adds the *Waters* case, which expanded the definition of disruption — now the employers could claim a possible disruption as the reason for a professor's termination. It is not the speech itself that is the issue, but the disruption the speech may cause.

The decision in *Jeffries v. Harleston* (1995)<sup>56</sup> was based in part on *Waters v. Churchill*. Leonard Jeffries gave an off-campus speech in which he criticized and made derogatory remarks about Jews. The Board of Trustees of the City University of New York (CUNY) voted to remove Jeffries from his position as chair of his department. The District Court for the Southern District of New York found the university had violated Jeffries' rights and had acted unconstitutionally and ordered Jeffries reinstated in his position. The Court of Appeals for the Second Circuit affirmed the district court's judgment, saying that government could not punish a person for speaking on a public issue, without showing the speech caused a disruption of government operations. However, one month after the Appeals Court decision, the Supreme Court handed down its decision in *Waters v. Churchill* (1994). When *Jeffries v. Harleston* was appealed to the Supreme Court, the Supreme Court set the Appeals Court verdict aside and ordered the lower court to reconsider

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Jeffries v. Harleston by looking at the decision in Waters. The Appeals Court reversed the District Court decision and affirmed Jeffries demotion, saying that the trustees showed they had a reasonable expectation that Jeffries' speech would harm or disrupt CUNY operations.<sup>57</sup> The Court noted that a "friend of the court" brief suggested that Jeffries deserved greater protection with his speech than the nurse, but because Jeffries was not fired, only demoted, the court said his academic freedom was not infringed. Professor Jeffries was compared to Churchill, the nurse in a public institution. The court ruled that an employee, in this case, a professor, could be demoted by his employers when the employers had a "reasonable expectation" that his speech could cause a disruption.

In the following case, Keith Dambrot, head basketball coach at Central Michigan University, sued the university because his contract was not renewed (*Dambrot v. Central Michigan University*, 1995).<sup>58</sup> Dambrot is white, though most of the basketball team's members were black. Several times, Dambrot used the word "nigger" when he was talking to his players. He said he had heard black players use the term and felt it was a term with positive meaning, as in a person who is "fearless, mentally strong, and tough."<sup>59</sup> The District Court decided, and the Appeals Court for the Sixth District, affirmed that Dambrot's termination did not violate his First Amendment rights. The Courts said Dambrot's speech was private and not speech on matters of public concern.<sup>60</sup>

While not specifically an academic freedom issue, in *Westbrook v. Teton County* (1996), Dr. Pamela Westbrook was successful in her suit against the Teton County School District No. 1, when the District Court for the District of Wyoming, struck down the school district's "Staff Conduct" policy that prevented criticism of other employees.<sup>61</sup> Westbrook had argued that speech in an educational setting or that addressed academic issues should receive more protection. She cited the 1969 *Tinker v. Des Moines*<sup>62</sup> that said students "do not shed their constitutional rights of freedom of speech or expression at the schoolhouse gate."<sup>63</sup> The court agreed with her, but said, "Although it generally is true that teachers do not shed these rights at the schoolhouse gate, this does not mean that by passing this gate teachers are clothed with First Amendment rights in addition to those

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they enjoy purely as public citizens.”<sup>64</sup> This case is both good and bad for academic freedom. The court ruled that the criticism policy prohibited too much and cited the cases that have lauded academic freedom, but the court also said that there is no special academic freedom for teachers — at least no more than that enjoyed by all citizens.

Academic freedom and the right to decide curriculum are issues in *Edwards v. California University of Pennsylvania* (1998).<sup>65</sup> Dilawar Edwards taught a class in Educational Media that included how to use films, photographs, etc. in classroom teaching. Edwards began including in his syllabi additional material that covered bias, censorship, and religion. When a student complained that Edwards was teaching religious ideas, he was told to stop using religious materials in class. When he failed to show up for some classes, he was suspended with pay for part of the school term. Edwards filed a lawsuit against the university. The District Court and the Appeals Court for the Third Circuit both affirmed Edwards’ suspension. The Appeals Court said:

We conclude that a public university professor does not have a First Amendment right to decide what will be taught in the classroom.... although a teacher’s out-of-class conduct, including her advocacy of particular teaching methods, is protected, her in-class conduct is not.... Although the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula.<sup>66</sup>

Using *Sweezy v. New Hampshire* (1957), the court noted the four freedoms of a university: “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>67</sup> The Appeals Court concluded that Edwards did not have a right to choose his own classroom materials in the face of the objections by the university. This argument shifted some of the court’s sweeping defense of academic freedom in *Sweezy*. This decision places academic freedom with the university, indicating the right of academic freedom adheres to the university and not to particular professors.

In *Bonnell v. Lorenzo* (2001),<sup>68</sup> the District Court for the Eastern District of Michigan, Southern Division, found in

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favor of Bonnell. John Bonnell had been suspended from his teaching position at Macomb Community College for profanity in the classroom. The District Court ordered Bonnell reinstated and said he had a First Amendment right to free speech in his classroom. The Court of Appeals for the Sixth Circuit reversed this decision. The Appeals Court said:

This case presents us with the difficult task of balancing the precious First Amendment rights of a professor in the academic setting, against the legal obligations of a college to guarantee the rights of students to learn in an environment free of sexual harassment and hostility. Mindful of the significant import of the respective interests involved, we conclude that the balance tips in favor of the College."<sup>69</sup>

Later in their decision, the court said, "Plaintiff may have a constitutional right to use words such as 'pussy,' 'cunt,' and 'fuck,' but he does not have a constitutional right to use them in a classroom setting."<sup>70</sup> While the court acknowledged its interest in classroom debate, it said that vulgar or profane speech is not protected, especially when it was not germane to the subject and in a setting, such as a classroom, when students are a captive audience and cannot "avert their ears." In a battle between academic freedom and expression that may be sexually harassing, academic freedom will probably lose. This presents a difficult issue and may place in conflict those who favor totally free speech and those who would protect the right of people not to hear uncomfortable speech.

### **Miscellaneous cases**

Grades were the focus of *Parate v. Isibor* (1989)<sup>71</sup>. Natthu Parate was a professor at Tennessee State University whose contract was not renewed. Parate had changed a grade for Student X, but not for Student Y. Student Y took his complaint to the Dean of the School of Engineering and Technology, Edward Isibor. Isibor ordered Parate to change Student Y's grade, Parate refused. The court held that:

The individual professor may not be compelled, by university officials, to change a grade that the professor previously assigned to her student.

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Because the individual professor's assignment of a letter grade is protected speech, the university officials' actions to compel the professor to alter that grade would severely burden a protected activity.<sup>72</sup>

The court went on the find, however, that Parate "has no constitutional interest in the grades which his students ultimately receive."<sup>73</sup> The court found that the university may not order Parate to change a grade, but the university itself may administratively change a grade.

There were a number of incidents between the two men, including one time when Isibor visited and disrupted Parate's classroom. Parate alleged this incident had violated his right to academic freedom, but the court said the one incident did not constitute casting "a pall of orthodoxy over the classroom."<sup>74</sup> In this case, even though the courts allowed for academic freedom, they took a backhanded swing at it anyway. The court said the university had violated Parate's academic freedom when it tried to force him to change a grade, but then said, however, that the university can change the grade. The ultimate freedom to decide the grade a student receives seems to rest with the university. In this case, the court also found that the incident where the dean interrupted Parate's classroom lecture was not enough to be seen as disruptive. In this ruling, the court decided the authority — and the academic freedom — resided with the university and not with an individual professor.

In *Burnham, Marchese v. Ianni* (1997),<sup>75</sup> Albert Burnham and Ronald Marchese were professors in the history department and Lawrence Ianni was chancellor of the University of Minnesota. In a display case outside of the history department were photographs of all the history professors, dressed in costume to indicate their research specialty. Both Burnham and Marchese were photographed in military costume with weapons. Meantime, a newly appointed vice-chancellor began receiving death threats. The affirmative action officer on campus saw the history display and objected to the weapons, in light of the threats to the vice chancellor. Ianni sent the campus police to open the case and remove the photographs. The two professors brought suit against Ianni for violation of academic freedom rights.<sup>76</sup> The District Court and the Appeals Court agreed that the rights of the professors had been violated. This is one of the few cases where the professors actually won

their case against the university. Though the professors said their academic freedom was violated, the case is really more one of free speech, the free speech in this case being the pictures in the display case. This case, while seeming to support academic freedom, really supports free speech/free expression, a right guaranteed to all citizens.

In *Boring v. The Buncombe County Board of Education* (1998),<sup>77</sup> Margaret Boring was a high school drama teacher. For a state contest, she chose a play that depicted a single-parent family that included a lesbian and a woman pregnant with an illegitimate child. The play won several awards at regional competition, but before the state contest, the play was performed at the high school and a parent of one of the students complained to the principal. The principal then read the play and told Boring she could not perform it. After several decisions and appeals, the case was sent back to the Appeals Court for the Fourth Circuit who said:

The only issue in this case is whether a public high school teacher has a First Amendment right to participate in the makeup of the school curriculum through the selection and production of a play. We hold that she does not, and affirm the judgment of the District Court dismissing the complaint.<sup>78</sup>

The Court of Appeals for the Seventh Circuit denied a motion to stop a play at Purdue University in the next case, *Linnemeir v. Board of Trustees of Purdue University* (2001).<sup>79</sup> Three Indiana residents asked the court to stop Purdue (a state university) from performing the play, *Corpus Christi*. The three residents claimed performance of the play endorsed anti-Christian beliefs, a violation of the First Amendment. The court said, if a “violation arose each time a student believed that a school practice either advanced or disapproved of a religion, school curricula would be reduced to the lowest common denominator, permitting each student to become a ‘curriculum review committee’ unto himself.”<sup>80</sup> The court seems to be on the side of the university when an outside censor wants to control the university.

The last case in this section, *Urofsky v. Gilmore* (2000)<sup>81</sup> involves Internet access. In this case, six Virginia professors challenged the constitutionality of a “law restricting state employees from accessing sexually explicit material on computers that are owned or leased by the state.”<sup>82</sup> Professors

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said they would be prohibited from assigning students online research assignments on decency. Others said they would be prohibited from research on sexual themes in Victorian poetry or Freud's theories or pornography and gender roles.<sup>83</sup> The District Court found in favor of Urofsky and said the professors' First Amendment rights had been violated. The Appeals Court for the Fourth Circuit heard the case en banc and reversed the District Court. They cited *Boring v. Buncombe County Board of Education* (1998), because the Virginia Act affected the professors as state employees, not citizens.

The Court commented on the academic freedom issue in this way:

Alternatively, Appellees maintain that even if the Act is valid as to the majority of state employees, it violates the First Amendment academic freedom rights of professors at state colleges and universities and thus is invalid as to them. In essence, Appellees contend that a university professor possesses a constitutional right to determine for himself, without the input of the university (and perhaps even contrary to the university's desires), the subjects of his research, writing, and teaching... Our review of the law, however, leads us to conclude that to the extent the Constitution recognizes any right to "academic freedom" above and beyond the First Amendment rights to which every citizen is entitled, the right adheres in the University, not in individual professors, and is not violated by the terms of the Act.<sup>84</sup>

After a lengthy discussion of the history of academic freedom and court decisions, the Circuit Court said that in spite of other Supreme Court decisions referring to academic freedom, they felt there was no special right adhering only to teachers.<sup>85</sup>

The Court discussed *Sweezy v. New Hampshire* (1957) and pointed out that in spite of the nod to academic freedom, *Sweezy's* conviction was not reversed based on the First Amendment, but on due process: the Attorney General should not have investigated *Sweezy*. The Court said Justice Frankfurter's words on academic freedom were in favor of the university, not individuals. In his discussion of the four

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freedoms of a university, there is no mention of Sweezy's individual rights as a professor being violated. And so, based on these words, the Fourth Circuit felt the Virginia Act did not violate the University's academic freedom. The court noted that in later decisions, such as *Keyishian v. Board of Regents* (1967) the rights that the earlier cases may have called academic freedom, were extended to all public employees. The Court said academic freedom is simply an old concept that meant professors were the "first public employees to be afforded the now-universal protection against dismissal for the exercise of First Amendment rights. Nothing in Supreme Court jurisprudence suggest that the 'right' claimed by Appellees extends any further."<sup>86</sup> Judge Luttig said:

The court holds today, as has been uniformly recognized by the Supreme Court through the years, only that there is no constitutional right of free inquiry unique to professors or to any other public employee, that the First Amendment protects the rights of all public employees equally... the academic can be no less accountable to the people than any other public servant. His speech is subject to limitations of the First Amendment certainly no more, but just as certainly no less, than is the custodian's.<sup>87</sup>

The Supreme Court refused to review the case. This case is not a positive decision for academic freedom — in fact, the Fourth Circuit Court of Appeals heavily restricted the definition of academic freedom. They even said the four professors who claimed an academic freedom issue in their desire to have unrestricted access to sexually explicit material on the Internet showed audacity in their claim that there is special academic freedom protection for professors.<sup>88</sup> The court said that any academic freedom rights are simply free speech rights that any person receives as a citizen. Melvin Urofsky, the plaintiff in this case, said the authors of this Act did not have university professors in mind — they were worried about people in the prison system and the highway system and were surprised to find professors concerned about the law. He noted that the ruling applies only to the Fourth Circuit<sup>89</sup> and that possibly Judge Wilkinson's dissenting view on the issue of academic freedom may become the stronger rule.<sup>90</sup> While the pronouncements in this particular case

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may not have much application beyond the Fourth Circuit, they present a discouraging view of academic freedom.

### Literature Review

Is academic freedom a contractual right? Does it adhere to the university or to individual professors? A number of studies have explored this question. Now that the court cases have been explained, this section will discuss what other scholars have found in their studies of these cases. Murphy<sup>91</sup> sees constitutional protection for academic freedom as “emerging,” rather than developed. He feels that the ways in which the Supreme Court has acknowledged academic freedom is a promise of future protection. It is inevitable, he claims, that the Supreme Court soon will accept and rule on a case that involves a clear violation of academic freedom, perhaps one that involves a wrongful termination. Connolly also feels academic freedom is developing.<sup>92</sup> He considers academic freedom a “kind of cousin of freedom of speech.”<sup>93</sup> It is a special privilege — to seek truth — and as a burden — to be worthy of the term by respecting others who also seek truth. An additional study believes the Supreme Court has recognized academic freedom as a constitutional right and points out that the court said it will watch carefully cases that claim academic freedom.<sup>94</sup> The author of the study believes the Court will continue to protect academic freedom based on the teachers’ roles in society, since the Court has already given strong support to recognition of the term academic freedom in cases that have come before it.<sup>95</sup> However, the problem with the idea that academic freedom is “emerging” is that most of the cases upon which these articles have based their conclusions are the earlier cases, decided in the 1950s and 1960s. Later cases do not seem to support the conclusions of Murphy and Connolly, as the courts have not strongly protected academic freedom<sup>96</sup> and have in fact upheld the right of the university to choose curriculum, assign grades, demote faculty for disruptive speech, and restrict Internet access.

Byrne<sup>97</sup> points out the confusion with the term academic freedom. It has not been conclusively defined by the court and while the expansive language of *Sweezy* and *Keyishian*<sup>98</sup> would indicate the Court was ready to place academic freedom in a special category, such has not been the case.

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Byrne suggests that the Keyishian definition does not mean what most have assumed it does. He argues that the case really says that academic freedom prevents a professor from being interfered with by government officials who may have a particular point of view they want expressed, but does not prevent the same kind of interference from a university administration. Standler<sup>99</sup> also notes this and says that academic freedom, as the courts have interpreted it, is a professional right and not a legal concept. It does not protect professors from being dismissed by their universities, but does protect them from being dismissed by the mayor or governor. In a study of numerous cases, Standler<sup>100</sup> says that academic freedom, as the courts have interpreted it, is a professional right. He sees academic freedom as a protection from being fired by a mayor or a governor, but not as protection from being dismissed by a university. Standler indicates that he read 160 cases and in cases "involving professor v. university or student v. university disputes, the university nearly always wins."<sup>101</sup>

In looking at some of the same cases, Byrne<sup>102</sup> draws a slightly different conclusion on how the courts see academic freedom (again, using information from *Sweezy v. New Hampshire*, 1957), he notes:

The court's rhetoric praises academic freedom as an institutional right to be free from orthodoxy prescribed by the government at large:....The "orthodoxies" feared are not those of academics themselves, but those imposed by non-academic officials seeking to advance their views on various policies....The focus on the protection of the system from government interference can easily be missed because the term academic freedom had always signified an individual right against any interference by laypersons.<sup>103</sup>

Chang<sup>104</sup> feels it is vital to American life that university professors remain free to question, research, and teach. When a professor is penalized for controversial speech, it calls into question the very foundations of the university. "Therefore, by resuscitating the vague yet emphatic principles set out in *Sweezy v New Hampshire*, we help give meaning not only to a brief moment of Supreme Court rhetoric, but also to the very basis of academic scholarship and university life."<sup>105</sup>

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While Chang is correct in her praise of Sweezy's statement on academic freedom, *Sweezy v. New Hampshire* was decided a long time ago: in 1957.

On the other side of the debate, some see academic freedom as a contractual and institutional right. Ryan<sup>106</sup> sees academic freedom as a professional privilege, not a right a person receives as a constitutional right. "The point of establishing that academic freedom is a professional freedom is that it allows us to see that you can ask people to curb their conduct in ways that you would not do in the outside world."<sup>107</sup>

Others agree that academic freedom is a professional right. Academic freedom is not a human or constitutional right, according to Shils.<sup>108</sup> It is a "qualified right," one that is realized because one is a university professor in a public university, but is incumbent on one's following certain standards and rules and is predicated on the primary goal of seeking and teaching truth. The professor must conform to accepted standards in both research and teaching (including such things as class attendance and assigning grades). For Shils, truth is something that can be achieved and arguments that are true and valid should have more status than an idea that is unproven or untrue — without this standard, one cannot assess scholarly work. However, if all ideas have the same weight and all ideas are valid, then academic freedom has no meaning. So Shils would place under academic freedom only those ideas that are true and valid, rather than allowing a professor total academic freedom to do and say whatever he or she so chooses.<sup>109</sup> While this definition may sound enlightening, the courts have not supported this idea.

Pavela<sup>110</sup> advises caution for professors in what they think may be protected by academic freedom. "Constitutionally protected academic freedom is a fragile concept. It's not clear that courts will continue to see it as a 'special concern' of the First Amendment."<sup>111</sup> When there are conflicts between the university and the professor, the court will balance the interests of the two, but he says the concept of academic freedom cannot be based on sweeping freedoms or rights. Pavela is correct in his idea that academic freedom for individual professors is a fragile concept. The words from historical cases are strong, but the decisions in later cases have not supported the words.

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The courts have indeed not seen academic freedom as a special concern, but have seen it as a right granted to all by the First Amendment<sup>112</sup> or as a right that adheres to the university and not to individual professors.<sup>113</sup>

Chang<sup>114</sup> questions whether or not academic freedom protects professors who criticize their superiors. Critical speech may not be constitutionally protected. The way the decision is usually applied in *Connick*<sup>115</sup> encourages professors to assume critical speech is not constitutionally protected. Using the *Connick* test (also referred to as the *Pickering/Connick* test or the *Pickering/Connick/Waters* test<sup>116</sup>) which measures whether or not the speech in question is a matter of public concern, the courts are drawing parallels to the participants in these cases and participants in university cases. *Myers* was an assistant district attorney, a public employee who worked for a public employer, just as professors are public employees who work for a public employer, the court says. Chang points out that university professors are not employees in the way one might usually think of employees, but the courts have not always recognized this as a difference. Using the four freedoms of a university, from *Sweezy v. New Hampshire*,<sup>117</sup> *Rabban*<sup>118</sup> agrees with Chang and also notes that the courts seem to be attributing academic freedom to universities rather than individuals. This is also shown in *Urofsky v. Gilmore*,<sup>119</sup> when the Fourth Circuit gave academic freedom rights only to the university. *Caster*<sup>120</sup> also expresses concern that courts may apply public employee tests to university professors. This could have a marked chilling effect on professors and could pose a threat to the reasons a university exists, she says. Because a university is different from any other public institution, academic speech should receive greater protection.

This may be the reason for the decision in *Boring v. Buncombe County Board of Education*<sup>121</sup> when the Fourth Circuit Court said a public school teacher had no right to choose course curricula. Going one step further in acknowledging the employer's rights, the decision in *Waters v. Churchill* (1994), a case in which a public employee could be disciplined when her employer felt her speech may cause a disruption, *Fugate*<sup>122</sup> says the court completely reversed its earlier direction. Formerly an employer had to prove an actual disruption, but with the *Waters* decision, employers

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may be able to completely avoid any mention of academic freedom and simply claim a potential disruption to dismiss or discipline an employee. This case was indeed used in a case of a professor and a university.<sup>123</sup> Fugate's contention is that academic freedom is in danger because, "If the price for voicing controversial ideas is sanction or discharge, a university may be peaceful, but it will also be sterile."<sup>124</sup>

There has not yet been a clear definition from the Supreme Court on what academic freedom really means. Justices Frankfurter and Black devoted many eloquent words to academic freedom, but neither one of them left behind a definition. Many of the cases of the 1950s and 1960s in which academic freedom is mentioned were not decided on the basis of academic freedom and while the words have been quoted often, the court has not shown any great willingness to define or defend these words further. The cases included in this study from 1993-2001, would seem to indicate that the courts are not as sympathetic to academic freedom as they have been in the past.

### **Conclusion: how have the courts dealt with academic freedom?**

The answer is: not clearly. The stirring words on academic freedom from *Wieman v. Updegraff* (1952), *Sweezy v. New Hampshire* (1959), and *Keyishian v. Board of Regents* (1967) are like fog — they look substantial, but when a person tries to grab a handful, there is nothing there. The courts have spoken eloquently on academic freedom. Justice Douglas in *Adler v. Board of Education* (1952) said, "The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher."<sup>125</sup> He continues by saying if this freedom is not allowed, "A pall is cast over the classrooms and there can be no real academic freedom in that environment."<sup>126</sup> In *Wieman v. Updegraff* Justice Frankfurter said, "To regard teachers . . . 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...."<sup>127</sup> In *Sweezy v. New Hampshire* the court said, "The essentiality of freedom in the community of American universities is

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almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."<sup>128</sup> In *Barenblatt v. United States* the court said "when academic-freedom and learning-freedom are claimed, the United States Supreme Court will always be on the alert against intrusion by Congress into this constitutionally protected domain."<sup>129</sup> In *Keyishian v. Board of Regents* the court said "...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...."<sup>130</sup>

Yet, nowhere does the court explain exactly what it means by academic freedom or exactly what expression is protected. It is unclear whether or not a professor has the right to criticize his or her superiors and/or the university. Pickering, the teacher in *Pickering v. Board of Education*, was permitted to criticize the Board of Education as his speech was ruled a matter of public concern. Myers, the assistant attorney general in *Connick v. Myers*, was not allowed to circulate a questionnaire which appeared to criticize (and disrupt) the office where she worked. The nurse, Cheryl Churchill in *Waters v. Churchill*, was fired for criticizing her boss. Though these people were not professors, the rulings were used in the case of *Jeffries v. Harleston*, when Jeffries was demoted for an off-campus speech he delivered. The court subjects each case involving free speech to the Pickering/Connick/Waters balancing test, to see whether or not the speech is on a matter of public concern, making no distinction between any state employee (such as an assistant district attorney or nurse at a public hospital) and professors. All cases are subjected to the balancing test, with no special privilege for professors.

On a mixed note, the court did strike down a criticism policy that prevented more speech than it should in *Westbrook v. Teton County School District*. But the court also said, "Although it generally is true that teachers do not shed these rights at the schoolhouse gate, this does not mean that by passing this gate teachers are clothed with First

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Amendment rights in addition to those they enjoy purely as public citizens.”<sup>131</sup>

It is also unclear what privileges professors have within their classrooms. The District Court for the District of New Hampshire found that J. Donald Silva<sup>132</sup> could use sexual references or metaphors in teaching his technical writing class. However, Dilawar Edwards in *Edwards v. California University of Pennsylvania*, was not allowed to add material to his class curricula that the university felt had no place. The Third Circuit Appeals Court said “we conclude that a public university professor does not have a First Amendment right to decide what will be taught in the classroom.... Although the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula.”<sup>133</sup> Margaret Boring discovered this in *Boring v. Buncombe County Board of Education* when the Fourth Circuit Court said a public school teacher had no right to choose course curricula.

The concept of academic freedom did not help Keith Dambrot, head basketball coach at Central Michigan University, who was fired when he used a term he interpreted to have a positive meaning.<sup>134</sup> It did not help John Bonnell, either, who in *Bonnell v. Lorenzo* found that his academic freedom to speak in his classroom did not extend to vulgar and profane speech, because students were a “captive audience and could not avert their ears.”<sup>135</sup>

The right to free expression was upheld in *Burnham v. Ianni* when the court said the university did not have the right to remove photographs in a department display, but the case was decided more on the basis of the right to free speech and free expression, rather than academic freedom. This point of view actually supports the idea that academic freedom is not a separate right, as the right of free speech is one enjoyed by all Americans, not just professors.

Natthu Parate found the university had the right to change a grade he assigned and that the disruption of his classroom by administrators did not cast “a pall of orthodoxy over the classroom.”<sup>136</sup> The court did not define unreasonable interference or indicate how many times or in what instances a classroom could be interrupted in such a way to cast this “pall of orthodoxy.” This could also mean the court is seeing the issue as Byrne does, that the pall of orthodoxy is cast by

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government interference, not university interference.<sup>137</sup>

The record so far shows that the Supreme Court has not spoken clearly on what it will accept as a definition of academic freedom. Even the scholars who have studied this issue do not agree.

The courts, however, are clearer on academic freedom as a contractual right and if academic freedom adhere to the individual or to the institution. Some faculty handbooks contain academic freedom rights and these are often considered to be a contract that can be considered legally binding. This was certainly true for Donald Silva. The University of New Hampshire published the AAUP Statement of Principles on Academic Freedom and Tenure in its faculty handbook. Silva contended that the university breached this contract and the district court agreed.<sup>138</sup>

But in many cases, the courts seem to be seeing academic freedom as something that adheres to the institution — and not necessarily to individuals. Many rulings return to Justice Frankfurter's description of the academic freedom of a university.<sup>139</sup> The courts seem to be using these four freedoms as an indication that academic freedom adheres to the university, not to individual professors.

The courts also see professors as state employees who have a contractual relationship with their university employer. An employee can be fired or demoted for potentially causing a disruption, even though he or she may have a free speech right to speak on a particular subject. The right of deciding whether or not a person's speech will cause a disruption rests with the employer. The academic freedom to express one's opinion can be superceded by the employer's fear of a disruption. And any state employee is seen in the same light as any other state employee — there is no special category for professors.

As noted earlier, the courts do not allow professors to decide what they will teach. A public school teacher had no right to choose course curricula<sup>140</sup> and a university professor has no right to decide the final grade a student receives.<sup>141</sup> The school has the right to decide curricula and to decide the final grade a student actually receives.

The Virginia court in *Urofsky v. Gilmore* (2000) said there is no special grant of academic freedom. The court said,

Our review of the law, however, leads us to conclude that to the extent the Constitution

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recognizes any right to “academic freedom” above and beyond the First Amendment rights to which every citizen is entitled, the right adheres in the University, not in individual professors....<sup>142</sup>

The examination of the cases included in this study indicates that the courts see academic freedom as a right that adheres to the academic institution — it is the institution that decides what is appropriate to discuss in a classroom and the institution that decides what is appropriate curriculum.

What I have argued here is that if a university wishes to terminate a professor, there are ways to do so, often without dealing with academic freedom issues at all. For professors, arguing academic freedom is not necessarily a benefit — many cases do not prevail on these grounds. And herein lies the difficult part — indeed academic freedom may have been violated, but it is so much easier for the courts to decide a contractual issue, than a constitutional issue, so if it is possible for either side to argue a contractual case, that side has a greater chance of prevailing. The United States Supreme Court has not yet given a clear definition of what it considers to be or to not be academic freedom. However on the question of who owns the academic freedom, the individual or the institution, the court appears to slide the balance toward the academic institution. Cases covered in this paper seem to point to these conclusions. However, the issue is still open to question and debate. It remains an ambiguous and elusive term, meaning different things to different people and to different organizations. It is “often defined by its absence”<sup>143</sup> as opposed to a clear discussion of what the term covers. There seems to be no real consensus on what academic freedom actually means, whom it covers, and what the consequences should be for breaching it.

- 1 Richard Hofstadter and Walter P. Metzger, *The Development of Academic Freedom in the United States* (New York: Columbia University Press, 1955), 279.
- 2 J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 *Yale Law Journal*, 251 (1989).
- 3 Robert K. Poch, “Academic freedom in American higher education: Rights, responsibilities and limitation.” ERIC Digest, ED366262 (1994).
- 4 William Gleberzon, W. “Academic freedom and holocaust denial literature: Dealing with infamy.” *Interchange*, 14-15, (1983-1984): 62-69.

- 5 Byrne at 272.
  - 6 Hofstadter & Metzger at 472.
  - 7 *Id.* at 472.
  - 8 Byrne at 272.
  - 9 Poch at 12.
  - 10 Policy documents & reports ninth edition AAUP (Washington, D.C.: American Association of University Professors, 2001): ¶ 11.
  - 11 Hofstadter & Metzger, 499.
  - 12 *Id.*
  - 13 Ellen Schrecker, *The Age of McCarthyism* (Boston: Bedford Books of St. Martin's Press, 1994), 84.
  - 14 *Id.*
  - 15 William G. Tierney, "Academic freedom and parameters of knowledge," 63 *Harvard Educational Review*, (1993) 143-160.
  - 16 *Id.*
  - 17 Sharon Walsh. "Blaming the Victim?" *The Chronicle of Higher Education*, 58, (2002) A12.
  - 18 Robert M. O'Neil, et al., "Academic freedom and national security in times of crisis" Report of an AAUP Special Committee, 2002, <http://www.aaup.org/REPORTS/911report.htm> (accessed October 22, 2004).
  - 19 Arlene Levinson, "College faculty, staff find chilling new climate for free speech on campus" Foundation for Individual Rights in Education, 2001, <http://www.thefire.org> (accessed March 15, 2002).
  - 20 *Id.* and Cathy Young, "Even after September 11, left-wing McCarthyism persists on American campuses," *reasononline*, 2002, March, <http://reason.com/0203/co.cy.windbags.shtml> (March 15, 2002).
  - 21 See O'Neil.
  - 22 See Levinson.
  - 23 See O'Neil.
  - 24 Mary A. Burgan, "Academic freedom is no picnic," *Academe*, 88 (2002): 80.
  - 25 *Id.*
  - 26 Byrne at 299.
  - 27 Cass Sunstein, "Academic freedom and law: Liberalism, speech codes, and related problems," in *The future of academic freedom*, ed. L. Menand, 101 (Chicago: The University of Chicago Press, 1996).
  - 28 *Adler v. Board of Education*, 342 U.S. 485, 508 (1952).
  - 29 *Id.* at 510.
  - 30 *Wieman v. Updegraff*, 344 U.S. 183, (1952).
  - 31 *Id.* at 197.
  - 32 *Sweezy v. New Hampshire*, 354 U.S. 234, 234 (1957).
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- 33 Id. at 250.
  - 34 Id. at 263.
  - 35 *Belian v. Board of Public Education*, 357 U.S. 399 (1958).
  - 36 *Barenblatt v. United States*, 360 U.S. 109 (1958).
  - 37 Id. at 112.
  - 38 *Keyishian v. Board of Regents*, 85 U.S. 589 (1967).
  - 39 *Shelton v. Tucker*, 364 U.S. 479 (1960).
  - 40 Id. at 487.
  - 41 *Keyishian v. Board of Regents*, 85 U.S. 589.
  - 42 Id. at 603.
  - 43 *Sweezy v. New Hampshire*, 354 U.S. 234.
  - 44 *Pickering v. Board of Education*, 391 U.S. 563 (1968).
  - 45 Id. at 568.
  - 46 *Connick v. Myers*, 461 U.S. 138 (1983).
  - 47 Id. at 138.
  - 48 *Pickering v. Board of Education*, 391 U.S. 563 at 142.
  - 49 *Connick v. Myers*, 461 U.S. 138.
  - 50 Id. at 299.
  - 51 *Connick v. Myers*, 461 U.S. 138.
  - 52 *Silva v. University of New Hampshire*, 888 F. Supp. 293, 299 (1994).
  - 53 *Waters v. Churchill*, 511 U.S. 661 (1994).
  - 54 *Jeffries v. Harleston*, 52 F.3d 9 (1995).
  - 55 *Waters v. Churchill*, 511 U.S. 661, at 672, 675.
  - 56 *Jeffries v. Harleston*, 52 F.3d 9.
  - 57 *Waters* allows the government agency to claim that a particular speech may be disruptive and to take action against the speaker, *Waters v. Churchill*, 511 U.S. 661.
  - 58 *Dambrot v. Central Michigan State*, 55 F3d 1177 (1995).
  - 59 Id. at 1180.
  - 60 See *Pickering v. Board of Education*, 391 U.S. 563; *Connick v. Myers*, 461 U.S. 138.
  - 61 *Westbrook v. Teton County School District*, 918 F. Supp. 1475 (1996).
  - 62 *Tinker v. Des Moines*, 393 U.S. 503, 506, 21L. Ed. 2d. 731, 89 S. Ct 733 (1969). The court gave the students the right to wear black arm bands to protest the Vietnam War. The Supreme Court upheld the right of students to communicate an idea under the First Amendment right of free speech.
  - 63 *Tinker v. Des Moines*, 393 U.S. 503 at 360.
  - 64 *Westbrook v. Teton County*, 918 F. Supp. 1475 at 1491.
  - 65 *Edwards v. California Univ of Pennsylvania*, 156 F3d 488 (1998).
  - 66 Id. at 491.
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- 67 Sweezy v. New Hampshire, 354 U.S. 234 at 250.
  - 68 Bonnell v. Lorenzo, 241 Fed 800 (2001).
  - 69 Id. at 802.
  - 70 Id. at 820.
  - 71 Parate v. Isibor, 868 F2d 821 (1989).
  - 72 Id. at 828.
  - 73 Id. at 829.
  - 74 Keyishian v. Board of Regents, 85 U.S. 589 at 603.
  - 75 Burnham, Marchese v. Ianni, 119 F3d 668 (1997).
  - 76 Id at 676.
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