Freedom of Speech in the Academic Workplace Academic Freedom to Microaggressions, Tenure, Contracts and the Courts

Bruce L. Haller
Molloy College

The legal right to freedom of speech is a cherished tenet of our cultural identity, a fundamental right afforded every citizen and a ubiquitously misunderstood protection in the workplace. The academic workplace whether public sector or private sector is not an exception. Faculty, often with the additional protections of tenure and academic freedom through their university policies and handbooks, act as if their employment status could not be negatively impacted by their speech. This paper examines that belief using recent examples of faculty testing the limits of their academic free speech, tenure protections and Constitutional rights.

INTRODUCTION

The pendulum of political correctness unavoidably influences society's definition of civility and appropriate discourse. Eventually these standards are adopted by the courts through the changing definitions applied to determine the contractual right, statutory limits or Constitutional protection of speech. This paper will examine some of the recent applications in the law of freedom of speech in the workplace as applied to the postsecondary academic workplace.

When complimenting an interviewee as "articulate" rises to the level of a racial slur, discussions of salary history are legislated away as gender discrimination and professors are terminated for advocating open discussion of controversial ideas, the historical purpose of freedom of speech has been lost. That this evolution has occurred in a time where "Put America first" foreign policy is hailed as patriotic and new Supreme Court Justice Gorsuch is complimented as a "Scalia Originalist" creates a fascinating juxtaposition of free speech philosophies.

The paper will begin by examining the original intent of academic freedom and the subsequent historical development. The profession's academic freedom right will be contrasted with the individual professor's free speech right. The focus of this research is the legal rights of the parties as it relates to employment.

The subsequent section will discuss the role of tenure as it changes the right to discipline and terminate for various types of speech. Speech within the scope of employment and as a private citizen will be differentiated. Academicians employed in the public sector and those in the private sector will have different rights due to different legal protections.

Following will be an analysis of recent cases in the postsecondary academic workplace. Beginning with the termination and later reinstatement of Marquette Professor John McAdams and contrasting that with the court's unwillingness to reverse the termination of tenured education Professor Teresa Buchanan.

Recent calls for the termination of Professor Tat-Siong Liew of Holy Cross, Randa Jarrar of Fresno State and Bret Weinstein of Evergreen State College will be examined along with the current outcomes and arguments in each case.

The paper will conclude with a discussion of the most current legal scholars' interpretations of what these changes in the laws will mean for the academic workplace. Unencumbered scholarly research, the classroom and campus search and debate of controversial subject matter and the job security and recruitment of talented diverse faculty. What will lead to the best education and educational environment?

Initially as an attorney, later as a tenure-track professor and finally as a Dean, I have observed with professional purpose, then personal interest and ultimately administrative responsibility the interaction of workplace free speech, job security and institutional productivity. This variety of perspectives has lead me to this research. An analysis of the balance among societal benefit, individual rights and the furthering of an institution's mission leads to at least one threshold question this paper aspires to explore. Does society through its courts, universities and behavior still believe in the benefit of free speech? Justice Brandeis opined, "if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression" (*Whitney v. California*, 1927).

The focus of this paper is the employment law parameters related to the impact of speech in the academic workplace. Whether the content of the speech is offensive to some, many, or even contrary to the mission or branding of the institution, may it be the basis for discipline up to and including discharge? How does the answer to this query vary based on the nature of the institution and the employment status of the professor?

ACADEMIC FREEDOM

Academic freedom is not freedom of speech. Freedom of speech is an individual right or more often a limitation placed on the government under the law. In the college or university setting, free speech may be defined, encouraged, and protected by adopted policies ("Free Speech Guidelines," 1990). Academic freedom is the freedom of university professors and the university administrators to function autonomously, without interference from the government. It also refers to the freedom of individual teachers to not suffer interference by the administrators of the university. These two freedoms can come into conflict. The academic institution enjoys a position of supremacy in addressing curriculum content. Academic freedom does not license uncontrolled expression which is detrimental to the institution's proper functioning. It helps the teachers and students to express their ideas in school without religious or political or institutional restrictions. This is an indispensable characteristic of an institution of higher education. Academic freedom developed in American Universities in the early part of the 20th century following Stanford University's decision to fire economics professor Edward Ross.

Ross was dismissed from Stanford University at the urging of Jane Stanford, the surviving cofounder of the University. The reasons for the actions of Stanford President David Starr Jordan, Trustee Jane Stanford and even Professor Ross are complex and in dispute. Ross's support of Presidential candidate William Jennings Bryan, advocacy for the monetization of silver and stance against immigration of Asian laborers were undoubtedly significant factors as all of these positions stood in opposition to Jane Stanford's.

Ross was a popular and respected academic. He had held faculty positions at the University of Indiana and Cornell before being recruited to Stanford by President Jordan. His dismissal raised serious concern among academics. Ross's effective use of the press and the reactions to his dismissal within the faculty had national repercussions within the profession.

Stanford Professor George Elliott Howard was terminated for speaking out in opposition to Ross's forced resignation. Eventually seven other Stanford faculty members resigned in protest (Neumann, 2017). A national debate ensued concerning the freedom of expression and control of universities by private interests.

At the time, professors were at-will employees of the Universities who could be dismissed at the discretion of the Board of Trustees or President depending upon the charter. In his remarks on the subject at Columbia Law School, Yale Law School Dean Robert Post described the attitude of academia at the time, "American professors began to ask, 'How can we do our job if we're subject to control by those who own the universities? They're lay people – they know nothing about economics, they know nothing about immigration…If they control us, we can't develop these forms of knowledge as a matter of expertise" ("Free Speech and Academic Freedom," 2016).

In 1914, in response to concerns about the academic environment, the Joint Committee on Academic Freedom and Tenure was formed with representatives from the American Economic Association, the American Sociological Society, and the American Political Science Association. Economics Professor Edwin R. A. Seligman, Columbia University was responsible for examining academic freedom issues. The difficulties of undertaking this work through separate disciplinary societies soon became apparent. A more broadly conceived faculty association was needed obviating the creation of the AAUP in 1915 ("History of the AAUP," n.d.).

In December, the AAUP published the inaugural volume of the Bulletin of the American Association of University Professors. Included in the Bulletin was the 1915 Declaration of Principles on Academic Freedom and Academic Tenure, which states, "Once appointed, the scholar has professional functions to perform in which the appointing authorities have neither competency nor moral right to intervene. The responsibility of the university teacher is primarily to the public itself, and to the judgment of his own profession (2017)."

A series of joint conferences begun in the mid-1930s between the Association of American Colleges (now the Association of American Colleges and Universities) and the AAUP culminating in agreement on a reformulation of the principles laid out in the 1925 Conference Statement on Academic Freedom and Tenure. The resulting 1940 Statement of Principles on Academic Freedom and Tenure defines faculty rights and responsibilities with regard to speech in the classroom, extramural speech, and research and establishes a maximum seven-year probationary period for tenure.

Over the next several decades colleges and universities throughout the United States adopted the principles and policies advocated in the 1940 Statement. Some by unilateral administrative action, some through the collective bargaining process, and some through collegial joint governance. Once the principles become articulated policies, these conditions of employment allow faculty to gain the protections as a matter of contract law.

The US Supreme Court upheld the right of Paul Sweezy, a university lecturer, to decline to answer questions posed by a state body investigating subversive activities. Justice Felix Frankfurter, in his concurrence in Sweezy v. New Hampshire, describes the doctrine of academic freedom when he cites "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" (*Sweezy v. New Hampshire*, 1957).

As Brown University President Christina Paxson wrote after Brown students marched silently on campus to protest the university's handing of 2014 date-rape drug and sexual assault cases on March 11, 2015, in Providence, R.I., "With the right of academic freedom comes the moral responsibility to think carefully about how that right is exercised in the service of society to confront these divides. At Brown, as at many institutions of higher education, we are not coddling our students — or limiting freedom of expression. Instead, we are teaching them, encouraging them and giving them the space to have the discussions that will make them better scholars and prepare them to best serve society" (Paxton, 2016). Some administrations send mixed signals about their support or definition of academic freedom. Only recently, after overturning a faculty grievance committee decision, Chancellor Carol Folt of the University of North Carolina, Chapel Hill qualified her faculty requested affirmation of the institution's commitment to academic freedom. If professors are asking for complete autonomy, "accreditors and governing boards might have something to say about that" (Stancill, 2018).

TENURE

Tenure is an enhanced status of employment security and presumption of professional fitness. Tenure is not a guarantee of permanent employment. It is a due process guarantee. The university may set the conditions for the peer review and administrative decision leading to the awarding of tenure. The circumstances which rise to the level of adequate cause to dismiss a tenured professor are numerous.

The grounds for terminating a tenured professor at the college or university level are created contractually. Typical grounds include "gross professional misconduct," "bona fide financial exigency," or "academic program/unit closing" (Lindsay, 2018). Misconduct in scholarship or research and harassment and discrimination are also common contractual grounds for discipline up to and including termination ("Suspension for Termination," 2015).

While hearing panels, appeals procedures, and generous rules of evidence are common contractual rights in termination for cause proceedings, the Board of Trustees is often the final decision maker and is not bound by the recommendation of the hearing committee ("Suspension for Termination," 2015). What speech by a professor has been determined to constitute "gross professional misconduct?" If the Board of Trustees retains the power to define the contracted for interpretation of "just cause" or "gross professional misconduct" the protections may be illusory.

PRIVATE SECTOR AND PUBLIC SECTOR

Private sector employees do not have any Free Speech Rights under the Constitution. Certain categories of speech may be protected by statute. Speech protected by federal and state labor law, discrimination laws or whistle blower laws are just a few examples. Speech that is sufficiently severe and pervasive enough to violate sexual racial or ethnic harassment policies and law, is not protected speech.

Basing faculty discipline, up to and including discharge, on a violation of prohibited speech, usually based on a campus speech code or policy necessitates a carefully crafted narrowly defined restriction. Broad prohibitions against offensive speech, harassing speech, and offensive speech have been struck down by courts as overly broad, vague or unenforceable.

The University of Chicago has led the movement to correct these poorly drafted campus policies. Although the vast majority of colleges, in both the private and public sector, are probably not in compliance (Lindsay, 2018). Even school statements intended to support academic freedom principles sound good in theory, but the statement's legal protection is doubtful.

As an institution of higher education, one specifically committed to the Catholic and Jesuit tradition, Georgetown University is committed to free and open inquiry, deliberation and debate in all matters, and the untrammeled verbal and nonverbal expression of ideas. It is Georgetown University's policy to provide all members of the University community, including faculty, students, and staff the broadest possible latitude to speak, write, listen, challenge, and learn ("Speech and Expression," 2018). If the college is a public institution, additional constitutional protections inure. Public universities are government actors. The faculty of public universities have the additional legal protection of the First Amendment. How that protection has played out in the courts appears unexpected and inconsistent.

PROFESSOR BUCHANAN, LOUISIANA STATE UNIVERSITY

Louisiana State University, a public sector employer, terminated Teresa Buchanan, a tenured Education Professor, in 2015. LSU accused her of, among other things, using vulgar language in the classroom. Professor Buchanan alleged LSU violated her First Amendment free speech rights. LSU stated and later argued successfully in federal court that Buchanan violated the University's Sexual Harassment Policy by using vulgar language. She further alleged the University's Sexual Harassment policy, the violation of which was cited by her employer as a partial basis for the disciplinary action, was unconstitutionally vague.

Professor Buchanan's termination was upheld by the U.S. District Court for the Middle District of Louisiana in September 2017 (*Buchanan v. Alexander*, 2018).

Fieldon King Alexander, President of LSU, called academic freedom the cornerstone of university teaching and research but said Buchanan's case was not about such freedom or the rights of tenured professors. LSU presented documented evidence of a history of inappropriate behavior that included verbal abuse, intimidation and harassment of students, he said.

A five-member faculty panel had recommended that Buchanan not be fired, but a unanimous LSU Board of Supervisors voted to terminate her employment (Gyan, 2018). Demonstrating as previously stated, the requirement of "just cause" and due process creates some protection, but if the College Board is the final arbiter, then describing academic freedom as a protected right, and tenure as permanent employment, is an overstatement, unless courts in the jurisdiction decide to interject their interpretation into the process.

PROFESSOR MCADAMS, MARQUETTE UNIVERSITY

The Wisconsin Supreme Court ordered a tenured Political Science Professor at Marquette University, John McAdams, reinstated with unimpaired rank tenure, compensation and benefits after winning his breach of contract claim against private Jesuit Marquette University. The 4-2 opinion was filed July 6, 2018.

In November 2014, McAdams had criticized the actions of Marquette graduate student and Instructor Cheryl Abbate in his blog, the Marquette Warrior. McAdams provided Abbate's contact information, which eventually led to threats against her. (While Abbate's statements to the Marquette class are disputed, the subject matter was Gay Marriage.) McAdams was suspended. A faculty grievance committee recommended McAdams be suspended without pay for two semesters for violating the faculty code of professional conduct, a contractual condition of his employment. Marquette President Michael Lovell added as an additional punishment and condition of reinstatement that McAdams apologize for his unprofessional conduct. McAdams considered this discipline tantamount to termination and he sued for breach of contract. Marquette's promise of academic freedom being the contract provision allegedly breached by his suspension.

The dissent argued the court was an inappropriate forum to resolve interpretations of academic speech and conduct at a private institution. The majority held this was a breach of contract between an employee and employer (*McAdams v. Marquette U.*, 2018).

PROFESSOR JARRAR, FRESNO STATE

Earlier this year, another public sector faculty member brought into the mainstream limelight academic freedom. Fresno State Professor, Randa Jarrar, exemplified free speech does not mean popular or even civil speech. Professor Jarrar tweeted about former first Lady Barbara Bush, calling her a "racist" who raised a "war criminal." In a series of tweets over five hours, Professor Jarrar referred to Bush as a "witch" and wished "the rest of her family to fall to their demise the way 1.5 million Iraqis have."

On April 17, 2018, Fresno State University President Joseph I. Castro, apologized on social media for tenured English Professor Randa Jarrar's comments made on social media immediately after the passing of Barbara Bush. When comments on social media called for Fresno State President Castro to fire Professor Jarrar, she responded by tweeting President Castro's twitter information, and taunting her critics with tenure and free speech statements. Twitter users immediately called on Fresno State President Joseph I. Castro to address the professor's tweets. Jarrar fired back, offering up Castro's Twitter handle. She wrote, "What I love about being an American professor is my right to free speech, and what I love about Fresno State is that I always feel protected and at home here," adding, "GO BULLDOGS!" Jarrar also stated she is a tenured professor and could not be fired. "Sweetie i work as a tenured professor. i make $100K a year doing that. i will never be fired," she posted to Twitter (Cederlof, 2018). Being tenured

may not save the teacher from being reprimanded. A Fresno State history professor was disciplined last year after he stated on Twitter that President Donald Trump "must hang."

President Castro tweeted, "Professor Jarrar's comments were made as a private citizen and not as a representative of Fresno State. He went on to state Professor Jarrar's expressed personal views and commentary are obviously contrary to the core values of our university, which include respect and empathy for individuals with divergent points of view" (Renee, 2018).

A YouTube video of previous comments made by Professor Jarrar, soon surfaced amidst the Bush controversy. Professor Jarrar, who has championed literacy and teaches creative writing, is seen criticizing farmers who support President Trump and gun control advocates.

"A lot of the farmers now are Trump supporters and just f---ing stupid," she says, adding that she "can't f---ing stand the white, hetero-patriarchy" (Brown, 2018). Is Castro's distinction regarding private citizen and not a representative of the university relevant? When do a professor's comments rise to the level of being grounds for termination? If the answer turns on an interpretation of, "professional misconduct" "gross negligence" of "just cause," what tests will be applied?

PROFESSOR LIEW, THE COLLEGE OF THE HOLY CROSS

College of the Holy Cross tenured Professor Tat-Siong "Benny" Liew, class of 1956 Chair of New Testament Studies scheduled to become the Chair of the college's Religious Studies Department in September, has written extensively on gender, sexuality and race in the Bible, concluding that Jesus was "God, man and gender fluid." In a 2009, he co-edited a piece titled, "They Were All Together in One Place? Toward Minority Biblical Criticism," Liew argues Christ "ends up as a drag-kingly bride in his passion" and engages in "(homo)sexual bonding" on the cross (Richardson, 2018).

Is this interpretation by Professor Liew academic freedom encouraging debate and stimulating thought and rigorous debate exploring all ideas? At a certain point can an interpretation and expression of ideas be contrary to the mission of a university and thus not a fulfillment of the purpose of academic freedom? When Professors as scholars and experts speak on a subject within their advertised domain of expertise, do they not by definition represent the university rather than speak as a private citizen? If damages to the university's reputation, dare I say brand? can be established, would such speech be actionable as "gross professional misconduct?" In recent months, the College of the Holy Cross has been engaged in a fitful and highly public debate over whether its sports teams should retain that politically incorrect name "Crusaders." The final decision — which one suspects was influenced by alumni pressure — was to retain the moniker but rebrand it. Holy Cross's "Crusaders" are now, according to the school, knights errant promoting social justice, gender equality, environmental sustainability, and all that good stuff. The debate in Worcester over the meaning of "Crusaders" was mildly amusing for those of us who like to watch college administrators turn themselves into Möbius strips as they strain to satisfy the demands of both alumni fundraising and political correctness (Weigel, 2018). Following the Holy Cross student newspaper's criticism of Professor Liew's writings, which were known and previous to his hiring at the college, reactions by the public, administration and church not surprisingly differed. 20,000 people signed an online petition demanding Professor Liew be terminated for his writings (Brinkmann, 2018). The Reverend Philip L. Boroughs, the President at Holy Cross, carefully supported Liew's academic freedom later adding his personal disagreement in the interpretation of Liew's writings:

> I know Professor Liew to be a dedicated teacher and an engaged scholar … He is a man of faith, and he and his family are active members of a church community. Academic freedom is one of the hallmarks of a liberal arts education. Scholars in all disciplines are free to inquire, critique, comment, and push boundaries on widely accepted thought. However, I strongly disagree with the interpretation of John's Gospel, as described in the Fenwick Review, and I find it especially offensive in this most sacred of all weeks in the liturgical calendar (Jaschik, 2018)

The conflict became more public when the Reverend Robert J. McManus (2018), bishop of Worcester, Mass., published a statement on Liew in the local Catholic newspaper. Bishop McManus took issue with Liew's writings and President Boroughs comments. McManus specifically disagreed with any defense of Liew by Boroughs based on academic freedom. "I am deeply troubled and concerned to hear that someone who holds an endowed chair in New Testament studies at the College of the Holy Cross has authored such highly offensive and blasphemous notions. Such positions have no place in the biblical scholarship of a professor who teaches at a Catholic college and who, as such, should be supportive of the college's Catholic identity and mission.

Specifically addressing Borough's defense of Liew, the Bishop wrote,

> Academic freedom certainly plays a critica role in the intellectual life of a Catholic institution of higher learning like Holy Cross. However, how that academic freedom is exercised, particularly in the fields of theology or religious studies, cannot provide cover for blatantly unorthodox teaching. Clearly the biblical conclusions that Professor Liew has reached in his writings are both false and perverse… Holy Cross has a duty to, at least, ask Professor Liew if he rejects the biblical positions he penned some 10 years ago or if he supports and defends those positions today. If he disavows them, then he must state so publicly, so as not to create confusion about the nature of Christ. If he does not, then it is my duty as the bishop of Worcester to clearly state that such teaching is a danger to the integrity of the Catholic faith and, in prudence, warn the Catholic faithful committed to my pastoral care that such unorthodox teaching has no place in a Catholic college whose mission is to promote and cultivate the Catholic intellectual tradition (McManus, 2018)

While The College of the Holy Cross is a Jesuit institution it is not under the control of the diocese of Worcester where it is geographically situated. The question of balancing the mission of a college with the definition of "Professional misconduct" is an appropriate legal discussion. It is relevant to remember, private institutions may contractually limit speech since no Constitutional Rights apply to their employee/faculty. Some private universities, like Brigham Young, specifically limit faculty and student speech as is their right as a private sector actor. Holy Cross certainly has the legal right to do so as well, especially considering the firestorm Professor Liew and to a lesser extent President Boroughs speech caused and may mean for enrollment, recruiting faculty and endowment donations.

A final examination of applicable contract questions would include, at what point would Liew's writings become research and scholarship negligence? Is following an acceptable research procedure sufficient? Is interpretation of conduct ever sufficient to be negligent research and scholarship? Finally, would interpretations always be protected as professional differences of opinion? Some added, "Even when pushing those boundaries amounts to blasphemy?" (Brinkmann, 2018).

MICROAGGRESSIONS

Professor Liew's, to some, blasphemous interpretations, Professor Buchanan's, according to the court, harassing conduct and Professor Jarrar's, racist accusations may or may not fall within the faculty member's legal free speech protection. When schools attempt to prohibit speech based on Harassment, Professional Conduct or Civility standards, the courts have set a legal bar to proscribe said conduct.

The US Supreme Court defined prohibited harassment in an educational setting to be conduct that is so severe and pervasive according to an objective standard that the victim is denied educational benefits (*Davis v. Monroe County BoE*, 1999). Vague codes of conduct or contractual policies which do not clarify with specificity these definitions are likely unenforceable.

Some colleges have attempted to discipline speech that by definition does not meet the severe and pervasive Court definition of actionable harassment. Yet the behavior has been the subject of discipline or

calls for discipline. Unless it can be argued that microaggressions are severe and pervasive according to an objective standard, it is difficult to argue disciplining offending faculty is legally permissible.

Microaggressionas are subtle insults (verbal, nonverbal and/or visual) directed toward people of color, often automatically or unconsciously (Solorzano, Ceja & Yosso, 2000). The term was originally conceived as "subtle, stunning, often automatic, and non-verbal exchanges which are 'put downs'" (Pierce, Carew, Pierce-Gonzalez & Wills, 1976) initially describing covert racial discrimination only toward African Americans. Pioneering researcher Derald Sue ("Microaggressions in everyday life," 2010) defines microaggressions as "brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial, gender, sexual orientation, and religious slights and insults to the target person or group." Even further, Sue and other researchers suggest there are different forms of microaggressions, including microassaults (explicit, verbal and nonverbal derogatory remarks), microinsults, (subtle remarks about a person's minoritized identities that are insensitive, demeaning and rude), and microinvalidations (an experience that excludes, negates, and nullifies a person's minoritized reality) (Crandall & Garcia, 2016).

Over the past several years, microaggression research has been extended to include other target groups, including other people of color, women, persons with disabilities, ethnic and religious minority groups, and lesbian, gay, bisexual, and transgender (LGBT) individuals (Nadal, Wong, Griffin, Davidoff & Sriken, 2014). Even the marginalization of political views has been the subject of discontent (Reynolds, 2016). Overt racist acts are usually not socially condoned and that examples of overt racism in the public discourse are rare. It is typically in subtle and covert ways (i.e., private conversations) that racism manifests itself. These innocuous forms of racist behavior constitute racial microaggressions (Kennedy, 1989). While many forms of overt discrimination are prohibited under federal, state and local statutes, the more subtle and covert manifestations, microaggressions, do not fall within the protection of these statutes. Consequently, if the jurisdiction or the employer wishes to proscribe such behavior whether through statute or contract, a constitutional definition of the prohibited actions would be required.

Tiffany C. Martínez (2016), a sociology major at Suffolk University, made waves last week when she blogged about an experience in which she said her professor had called her out in front of her classmates and accused her of copying parts of an assignment. Ms. Martínez said she was particularly upset that her professor had circled the word "hence" and written in the margin, "This is not your language" (Zamudio-Suarez, 2016b). Though she said she understood that her professor was questioning whether the paper was plagiarized and probably did not intend for the comment to carry a racial tone, the words still hurt.

The incident is a clear example of a perceived microaggression, and prompts a question: How can institutions ensure instructors enjoy academic freedom while also pushing them to be mindful of students' racial backgrounds and experiences? (Zamudio-Suarez, 2016a). Did a Columbia Professor cross the line when she assigned her class "punitive" additional readings on racial identity and microaggressions after she found some students in her online graduate social work students used racially microaggressive language? When she separated her students into groups of white and nonwhite to debrief them about their perceptions of microaggressions, was she exercising her academic freedom? (Airaksinen, 2018).

To reiterate, the object of this paper is not to discuss or recommend what should be done. I leave that to society and the democratic process. If however, Microaggressions acted out in the form of speech become the basis for disciplining or terminating a faculty member, it would be required to base the discipline on the violation of a law or contractually created condition of employment that passes constitutional muster.

Void for vagueness and overbroad campus codes of conduct have been regularly struck down by courts, and numerous institutions have voluntarily modified their speech codes as part of settlement agreements from issues over gun rights to posting flyers around campus (Barrows, 2016; Perrino, 2015). What constitutes a threat or intimidation has been established by the U.S. Supreme Court. Threats, "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence on an individual or group of individuals" and intimidation, a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of

bodily harm or death" are terms used but misinterpreted in many college campus code "violation cases" (*Virginia v. Black*, 2003).

PROFESSOR BRET WEINSTEIN AND PROFESSOR HEATHER HEYING, EVERGREEN STATE COLLEGE

Professor Bret Weinstein, joined in the legal action by his wife Professor Heather Heying received $500,000 from Evergreen State College to settle their civil suit. Weinstein objected publically to white people being called to (voluntarily) stay off campus in a twist of a previously held "Day of Absence," to raise awareness of minority student issues and contributions. Based on the ideas of the 1965 Douglas Turner Ward play in previous years, Evergreen State minority students, and faculty were encouraged to stay off campus and meet to discuss relevant issues.

Weinsteins objections were met with student protests and demand for his termination. Evergreen administrators informed Weinstein his safety could not be guaranteed. (A YouTube video of fifty students protesting outside Weinstein's office went viral). Weinstein held his Biology class off campus in a public park. Weinstein brought suit against Evergreen alleging "hostility based on race" (Weiss, 2017).

As part of the $500,000 settlement, Professors Weinstein and Heying resigned their faculty positions. Other media outlets have interpreted the events at Evergreen with Weinstein as the aggressor and free speech opponent. Evergreen has cancelled their support of any further Days of Absence (Berlatsky, 2018).

HECKLERS' VETO AND SPEECH CODES

Speech is entitled to no lower standard of protection because the reaction of the listeners will be negative or even disruptive. The so called "hecklers veto" does not alter the analysis of the protected nature of the speech. It is the obligation of the local authority to protect the public and the speaker. The right to interfere with, prohibit the speech or punish the speaker is not Constitutional (Horley, 2018). Penalizing or dissuading the speaker financially by imposing a higher fee or security charge is also not a legal option.

Statutes, ordinances, or campus rules that call for higher security fees because of the nature of the speech, have been invalidated by the court as violative of the content neutrality test. The content or viewpoint neutrality test has been established by three United State Supreme Court decisions.

In 1995 the Court held the University of Virginia could not withhold financial support from a Christian student publication while disbursing funds from collected student fees to a wide variety of other campus organizations. The University argued the publication "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality," as prohibited by University guidelines. The majority held withholding funding based on the content/viewpoint of the speech was unconstitutional (*Rosenberger v. Rector and Visitors of Univ. of Va.*, 1995).

The Court reiterated its viewpoint neutral analysis in 2000 and 2010. Any restrictions on access to university resources placed on student organizations, must be viewpoint neutral. In Southworth, the Court ruled unanimously that a student's First Amendment Rights were not infringed upon by a mandatory fee that supported all student organizations, some of whom stood for and engaged in speech offensive to Southworth (*Board of Regents of the Univ. of Wisc. Systerm v. Southworth* et. al., 2000).

A divided court upheld the University of California, Hastings College of Law right to fail to recognize the Christian Legal Society Chapter of the Hastings College of Law, as an official student organization because state law requires all registered student organizations to allow "any student to participate, become a member, or seek leadership positions, regardless of their status or beliefs" (*Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law v. Martinez*, 2010). The CLS chapter requires students to, attest in writing, that "I believe in: The Bible as the inspired word of God; The Deity of our Lord, Jesus Christ, God's son; The vicarious death of Jesus Christ for our sins; His

bodily resurrection and His personal return; The presence and power of the Holy Spirit in the work of regeneration; [and] Jesus Christ, God's son, is Lord of my life" ("Statement of faith," n.d.)

In a 5-4 decision, the majority upheld the university's action as viewpoint neutral as required by precedent. The dissenting opinion interpreted disallowing the CLS as restricting a student viewpoint and not at all viewpoint neutral in its application (*Christian Legal Society Chapter v. Martinez*, 2010).

It should be noted viewpoint neutrality is not the same as content neutral nor content based. The Court's categorization of the state regulation dictates the constitutional test to be applied. Although at times the Court's application and use of this seemingly clear cut analysis has been called into question as overly malleable (Kozlowski, 2012).

State actions which violate viewpoint neutrality are not constitutional. Scholars and commentators have explained the Viewpoint-based restrictions are most damaging because the government skews "public debate in an explicitly message-sensitive way" by suppressing particular views (Jacobs, 2003). A viewpoint-based regulation thus violates any number of values that animate the First Amendment: It arguably impedes a free search for truth (*Abrams v. United States*, 1919) and stunts individual self-fulfillment. Moreover, because viewpoint restrictions are often the product of antagonism toward a minority view (Jacobs, 2003), they fail to protect dissent and encourage tolerance.

Content-based laws "restrict the subject matter of expression, while content-neutral laws restrict the opportunity for expression" (Huhn, 2004). A restriction on the time and route of a parade is an example of a content neutral regulation. The regulation may encroach slightly on freedom of expression, but it is not aimed at regulating the content of the parade, only its time, place, and manner. The Court, therefore, considers content-based restrictions to be more worrisome. As such, those restrictions will receive strict scrutiny under review, the most rigorous scrutiny the Court employs. A content-neutral restriction, on the other hand, receives a more lenient intermediate scrutiny.

Universities speech codes usually portend to have the best interests of the students education, faculty academic freedom, and institution's mission in mind. Nevertheless, most speech codes designed to prevent harassment, lack of civility, and encourage a professional disposition are unconstitutional and overbroad. When violation of these codes as incorporated into campus policy, and employee handbooks is the contractual basis for discipline, or termination of a faculty member, the action is a violation of the faculty member's rights.

While unpopular and certainly not politically correct in many circles, free speech analysis prohibits viewpoint based restrictions and only in the most limited conditions allows content based restrictions. The AAUP website acknowledges the justification.

An institution of higher learning fails to fulfill its mission if it asserts the power to proscribe ideas—and racial or ethnic slurs, sexist epithets, or homophobic insults almost always express ideas, however repugnant. Indeed, by proscribing any ideas, a university sets an example that profoundly disserves its academic mission ("On freedom of expression," n.d.).

To some persons who support speech codes, measures like these—relying as they do on dissuasion rather than sanctions, may seem inadequate. Freedom of expression requires toleration of "ideas we hate," as Justice Holmes put it. The underlying principle does not change because the demand is to silence a hateful speaker, or because it comes from within the academy. Free speech is not simply an aspect of the educational enterprise to be weighed against other desirable ends. It is the very precondition of the academic enterprise itself ("On freedom of expression," n.d.).

CONCLUSION

Universities seem to talk a better game of academic freedom and free speech than they actually support and protect. Private colleges, particularly those with narrow missions would demonstrate more honesty, integrity and commitment to their mission if they did not purport to promise academic freedom and free speech and then rationalize their lack of support as an imposed accreditation or governance right or parameter.

Faculty share responsibility with their shared governance partners. Negotiate policies and procedures that actually protect the rights professed rather than paying mere lip service to broad, vague and legally unenforceable principles. Due process and shared governance is meaningless and illusory if the ultimate adjudicator is a Board of Trustees. Advisory grievance committees and shared governance are simply insincere trappings without real power to enforce a final solution. Negotiating away the power to determine the ultimate outcome only leads to unprotected rights, misunderstood security and dissatisfied stakeholders.

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