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Academic Freedom and the Obligation to Earn It

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I. INTRODUCTION

The typical faculty justification for academic freedom is utilitarian, and suggests a variant of the "trickle-down" economics not otherwise in fashion on most campuses. If faculty are left to their own curricular, pedagogic and scholarly devices, it is suggested, everyone—students, faculty, staff and indeed all of society—will be better off because of the ideas, energies and freedoms that result. Like many businesses, many faculty want more subsidy and less regulation. A related notion is that faculty votes should determine major policy decisions within the university, including decisions about faculty appointments, retention, discipline and tenure.

Academic freedom is not defined nearly as much as it is discussed. Although many assume that academic freedom is based in law, no one is quite sure what that law is. Finally, the suggestion is rarely made in polite academic conversation that academic freedom resides, not in individual faculty members, but in the central administration.

Interest in academic freedom, and in tenure, which to me is a separate question, tends to be episodic. The McCarthy era, for example, saw an outpouring of writing on academic freedom, much of it with an emphasis on the need to protect free expression on campus.[1] Decades later, books such as *Profscam*[2] both reflected and encouraged a movement to

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1. *See generally* RICHARD HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES (1955).

2. CHARLES J. SYKES, PROFSCAM: PROFESSORS AND THE DEMISE OF HIGHER EDUCATION (1988).

hold the professoriate more accountable. That movement is very much alive, although with varying emphasis and intensity around the country.

Increased demands for institutional accountability, and increased competitiveness among academic institutions combine to put today's deans under pressure to increase and enforce expectations for faculty. We are managers of institutions populated by, and most of us have come up through the ranks of, faculty who believe they should be treated as something more than "mere" employees. As we attempt to hold faculty accountable to the interests of the university and of the public, claims will be made that we are violating academic freedom. If we fail to be accountable, we will lose the academic freedom we have enjoyed.

A. European Roots and the American Association of University Professors

All agree that notions of academic freedom in the United States find roots in European universities. Indeed, the only major disagreement on this point seems to concern whether European universities protected academic freedom despite their religious roots or because of them.

At the beginning of the twentieth century, many American professors were attracted by their understanding of academic freedom in German universities.[3] The pathbreaking American expression of academic freedom was the 1915 *Declaration of Principles on Academic Freedom and Tenure*[4] (*Declaration*) for the newly-founded American Association of University Professors (AAUP). The 1915 *Declaration* did not directly define academic freedom,[5] but Arthur O. Lovejoy, a celebrated philosopher and founder of the AAUP, offered what became a well-known definition:

3. *See* RUSSELL KIRK, ACADEMIC FREEDOM: AN ESSAY IN DEFINITION 22-23 (1955):
> Just what "academic freedom" meant at the German universities, not many Americans clearly understood: it was, in fact, almost wholly an internal freedom, the right to organize the curriculum without the interference of the minister of education; and it had been developed as a last safeguard against political meddling, in the secularized universities of the new bureaucratic German Empire. It was a tolerance by the state, rather than the assertion of a prescriptive right or a moral tradition; but American professors took up this German concept with more good-will than clarity of apprehension.

4. *Declaration of Principles on Academic Freedom and Tenure*, 1 BULL. AM. ASS'N U. PROFESSORS 1 (1915), *reprinted in* 40 BULL. AM. ASS'N U. PROFESSORS 90 (1954).

5. The *Declaration* did say that the academic freedom of a teacher has three elements: "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extra-mural utterance and action." *Id.* at 93.

> Academic freedom is the freedom of a teacher or researcher in higher institutions of learning to investigate and discuss the problems of his science and to express his conclusions, whether through publication or the instruction of students, without interference from political or ecclesiastical authority, or from the administrative officials of the institution in which he is employed, unless his methods are found by qualified bodies of his own profession to be clearly incompetent or contrary to professional ethics.[6]

This definition was said to reflect "the classical *Lehrfreiheit* of the continental academicians."[7]

B. The Principle of Neutrality

The faculty who drafted the *Declaration* thought the university as an entity should be a nonpartisan community detached from the political struggles of the outside world. "In their view, while individual professors could express their opinions freely on controversial subjects, academic institutions should observe a strict neutrality toward all political, economic and social issues."[8] The founders of the AAUP considered conservative trustees and compliant university presidents as the greatest threat to academic freedom. The principle of institutional neutrality was an attempt to prevent administrators from establishing official orthodoxies that would inhibit professors or penalize them for expressing unpopular opinions. Professors also were to be protected with peer review and with tenure.[9]

C. The Professor as Appointee

The *Declaration* was adamant that professors should not be considered employees of the university. It distinguished "proprietary institu-

6. 1 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 384 (1930).

7. Will Herberg, *On The Meaning of Academic Freedom, in* ON ACADEMIC FREEDOM 1 (Valerie Earle ed., 1971). The idea of academic freedom expanded in scope after 1915. In addition to protecting the role of individual faculty, academic freedom came to include institutional autonomy in educational policy. "Specifically, universities insisted with greater success that curricula, admissions policies, and academic standards should be established by the faculty, rather than by outside groups, and should be fashioned for the sole purpose of carrying out the educational aims of the institution." BOK, *infra* note 8, at 5.

8. DEREK BOK, BEYOND THE IVORY TOWER: SOCIAL RESPONSIBILITIES OF THE MODERN UNIVERSITY 5 (1982).

9. Decades later, post-tenure review came to be denounced as exceedingly dangerous.

tions," those that exist to propagate a specific religious or secular viewpoint, from "ordinary institutions," those that appeal to the general public for moral or financial support. The *Declaration* stated that trustees of a proprietary institution are overseeing a private trust for the benefit of those who control the institution's purse strings. It stated that proprietary institutions could not be expected to advance truth through vigorous and unrestricted research, and should not be allowed to hold themselves out as institutions of academic freedom. By contrast, ordinary institutions should be viewed as public trusts that cannot be permitted to restrict teaching or research in the same way as proprietary institutions.

The *Declaration* stated that the prohibition of "proprietary attitude and privilege" should elevate the employment relationship between trustee and professor above that of mere employer and employee. Professors are "appointees, but not in any proper sense the employees"[10]of the trustees. Indeed, "so far as the university teacher's independence of thought and utterance is concerned–though not in other regards–the relationship of professor to trustees may be compared to that between judges of the Federal courts and the Executive who appoints them."[11]

D. Two Recent Cases With A Decidedly Different View

Two relatively recent cases are of special interest in identifying the role of faculty within the university. Neither case gives even the most remote suggestion that a faculty appointment is like an appointment to the federal bench. The first is *Urofsky v. Gilmore*,[12] which essentially says that state university professors have no greater academic freedom rights under the First Amendment than any other state employees. If there are constitutionally protected academic freedom rights, says *Urofsky*, they belong to the university, not to individual faculty. The second is *Bonnell v. Lorenzo*,[13] which identifies some of those university rights (and duties) and balances them against the constitutional claims of an abusive faculty member. Both cases are victories not only for deans and other university managers, but also for all dedicated and productive faculty and the students they serve. In the case of state universities, they also represent victories for the taxpayers who pay the bills.

10. Bok, *supra* note 8, at 98.
11. *Id.* at 99.
12. 216 F.3d 401 (4th Cir. 2000), *cert. denied*, 121 U.S. 759 (2001).
13. 241 F.3d 800 (6th Cir. 2001), *rev'g and remanding* 81 F. Supp. 2d 777 (E.D. Mich. 1999).

II. *UROFSKY*: THE PROFESSOR AS EMPLOYEE

A. Introduction to *Urofsky*

Urofsky says that faculty are employees of the university who are hired and assigned to do its work. The plaintiffs in *Urofsky* were six professors employed by various public colleges and universities in Virginia. They challenged a statute that restricts state employees from accessing sexually explicit material, on computers owned or leased by the state, without agency approval.[14] The Fourth Circuit Court of Appeals heard the case en banc,[15] and held there was no violation of faculty First Amendment rights.

The professors made two basic arguments. First, they argued that the statute violated the First Amendment rights of all state employees. Second, in the alternative, they argued that the statute violated the academic freedom of college and university professors.

B. The First Amendment Rights of State Employees

Urofsky concluded that the professors' speech was in their role as employees and hence within the control of their employer. In short, because the statute did not affect the speech of professors in their capac-

14. The central provision of the statute provides:

> Except to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content. Such agency approvals shall be given in writing by agency heads, and any such approvals shall be available to the public under the provisions of the Virginia Freedom of Information Act.

VA. CODE ANN. § 2.2-2827(B) (Michie 2003).

15. The district court granted summary judgment in favor of the professors, *Urofsky v. Gilmore*, 995 F. Supp. 634 (E.D. Va. 1998), concluding that the statute unconstitutionally infringed on state employees' First Amendment rights. A panel of the Court of Appeals for the Fourth Circuit reversed, *Urofsky v. Gilmore*, 167 F.3d 191 (4th Cir. 1999), and a majority of the active circuit judges voted to hear the appeal en banc. Unless otherwise indicated, the quotes that follow are from Judge Wilkins' opinion in the en banc review, *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000).

ity as private citizens speaking on matters of public concern, it did not infringe on their First Amendment rights as state employees.[16]

The most interesting aspect of this portion of the court's opinion is its statement that restrictions on public employees' speech

> in their capacity as employees are analogous to restrictions on government funded speech . . . . In both situations–public employee speech and government-funded speech–the government is entitled to control the content of the speech because it has, in a meaningful sense, "purchased" the speech at issue through a grant of funding or payment of a salary.[17]

The court at this point relied on *Rust v. Sullivan*,[18] in which the Supreme Court held that regulations prohibiting abortion counseling in a federally funded project did not violate the First Amendment rights of clinic staff. The "funding authority" could permissibly restrict the scope of the project to exclude abortion counseling. This analogy raises a host of questions about constitutionally permissible restrictions attached to university funding. For example, may a state legislature permissibly exclude the topic of abortion counseling from a state law school's course in reproductive technology?

C. The Academic Freedom Issue

The Virginia faculty alternatively argued that, even if the statute was valid as to state employees in general, it violated the First Amendment academic freedom rights of professors. As the court saw it, the basic academic freedom argument of the faculty was "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."[19]

16. It is debatable whether the First Amendment scrutiny should have been cut off by the determination that the restriction affected the employees in their capacity as employees. *See generally* Recent Cases, 114 HARV. L. REV. 1414 (2001). In concurring in the judgment, Chief Judge Wilkinson said that the state's interest in the restriction should be balanced against the burden of the restriction. He concluded that the statute passed muster under a balancing analysis. *Urofsky*, 216 F.3d at 434-35 (Wilkinson, concurring).

17. *Urofsky*, 216 F.3d at 408 n.6. In other areas of the law, it is recognized that short-term contracts are different from long-term contractual relationships.

18. 500 U.S. 173 (1991).

19. *Urofsky*, 216 F.3d at 409-10. The professors argued in their brief that "[a]cademic freedom embraces not only professors but [also] the librarians, research assistants, and other staff

The Fourth Circuit emphasized that academic freedom, as conceived of by the AAUP, was a professional norm, not a legal one. The AAUP principles[20] have been widely adopted into bylaws, faculty contracts and collective bargaining agreements.

> In view of this history, we do not doubt that, as a matter of professional practice, university professors in fact possess the type of academic freedom asserted by Appellees. Indeed, the claim of an academic institution to status as a "university" may fairly be said to depend upon the extent to which its faculty members are allowed to pursue knowledge free of external constraints . . . . Were it not so, advances in learning surely would be hindered in a manner harmful to the university as an institution and to society at large.[21]

Despite this apparent sympathy for academic freedom, the court referred to the "audacity" of the claim of special constitutional protection for faculty. Giving special protection to faculty would be "manifestly at odds with a constitutional system premised on equality."[22] The Supreme Court "has never recognized that professors possess a First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship, despite opportunities to do so."[23] A concurring opinion expressed similar skepticism about the faculty claims:

> If it is the case that the public university's professors operate independently of state supervision and public accountability, then it is a surprise to me. And I am confident that it would come as a surprise to the public, who pays the professors' salaries in order that they may conduct important research for the public and without whose tax

without whom they cannot effectively function." *Id.* at 410 n.8. At oral argument, the professors "went so far as to suggest that the [statute] infringes on the academic freedom of any state employee who engages in 'intellectual work' analogous to the work of a professor." *Id.* The court referred to the "virtually limitless" nature of this suggestion. *Id.*

20. The 1915 principles were later compiled in a 1940 Statement of Principles on Academic Freedom and Tenure promulgated by the AAUP and the Association of American Colleges.

21. *Urofsky*, 216 F.3d at 411.

22. *Id.* at 412 n.13.

23. *Id.* at 414. The court did leave open the possibility that a denial of authority to access material "might raise genuine questions–perhaps even constitutional ones–concerning the extent of the authority of a university to control the work of its faculty . . . ." *Id.* at 415 n.17.

money the professors' research and writing would not be possible.[24]

The court concluded by saying that any constitutional right to academic freedom that might be said to exist is the university's, not a right of individual faculty.[25] To the extent the Supreme Court has constitutionalized a right of academic freedom, it "appears to have recognized only an institutional right of self-governance in academic affairs."[26]

III. *BONNELL*: ASSERTING THE INTERESTS OF THE UNIVERSITY

Bonnell v. Lorenzo[27] involved an appeal from an order enjoining a disciplinary suspension of John Bonnell from a teaching position he had held at Macomb Community College for more than thirty years. The defendants were sued individually and in their roles as the College's President, Vice President for Human Resources and Dean of Arts and Sciences.

A. The Facts

In a memorandum dated February 19, 1998, entitled "Obscene and vulgar language in the classroom," William MacQueen, the Vice President for Human Resources, informed Bonnell that the parent of one of Bonnell's students had filed a letter of complaint against him based upon a handout that Bonnell had circulated to the members of his class. The handout was a review of Bonnell's class prepared in 1991 by one of his former students. The student handout, as quoted in the memorandum, stated:

> Next, the language that was used during the first four weeks or so of class, in my opinion, was very inappropriate and distasteful. Never before have I encountered an English teacher who used the word

24. *Id.* at 424 (Luttig, concurrance).

25. "[T]o the extent the Constitution recognizes any right of "academic freedom" above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors . . . ." *Id.* at 409.

26. *Id.* at 412.

27. 241 F.3d 800 (6th Cir. 2001), *rev'g and remanding* 81 F. Supp. 2d 777 (E.D. Mich. 1999).

> "fuck" so openly and so frequently in a classroom discussion. In addition, the use of words such as "pussy" and "cunt" are simply uncalled for and very offensive to many, including me. I really feel that language such as this is very degrading to women.[28]

MacQueen's memo went on to inform Bonnell that, although he did not know the context in which the words were used, he was "concerned that [his] use of such language in the classroom will give rise to a claim of sexual harassment on the theory that this language creates a hostile learning environment for women."[29] Knowledge of his past use of such language, said the memo, placed the College under a legal duty to investigate whether Bonnell was creating a hostile learning environment. Accordingly, a meeting was scheduled with Bonnell. It is interesting how defensive, even apologetic, MacQueen's memo was. The Vice President for Human Resources seemed to be saying that he was acting on Bonnell's vulgarity in class only because he was forced to.

Bonnell defended his use of the language. He said that the terms were not directed toward particular students and were only used to demonstrate academic points. Bonnell claimed that he used the terms to "point out the chauvinistic degrading attitudes in society that depict women as sexual objects, as compared to certain words to describe male genitalia, which are not taboo or considered to be deliberately intended to degrade."[30]

After the investigation, MacQueen issued a warning to Bonnell in a memorandum dated March 4, 1998, entitled "Obscene and vulgar speech," which provided in part:

> Unless germane to discussion of appropriate course materials and thus a constitutionally protected act of academic freedom, your utterance in the classroom of such words as "fuck," "cunt," and "pussy" may serve as a reasonable basis for concluding as a matter of law that you are fostering a learning environment hostile to women, a form of sexual harassment. Federal and state law imposes a duty on the College to prevent the sexual harassment of its students and therefore requires that the College discipline you if it finds that you have created a hostile environment.[31]

28. *Bonnell*, 241 F.3d at 803.
29. *Id.* at 803.
30. *Id.* at 803.
31. *Id.* at 803-04.

Once again, the College's communication is striking because it sounds so defensive. It is surprising that the memo stated, with no legal support that I know of, that there is a constitutional right to academic freedom that includes the right to use words like "fuck," "cunt," and "pussy" if their use could be considered "germane" to the course. After again reiterating the "principle of academic freedom under the 1st Amendment," the memo "warned" Bonnell that "a general use in the classroom of words like 'fuck,' 'cunt,' and 'pussy' outside a professional exegesis may compel the conclusion that you are creating a hostile learning environment requiring disciplinary action."[32]

Every dean of any experience can guess what came next. Approximately eight months later, in November of 1998, another female student in Bonnell's English class filed a complaint alleging that his classroom language constituted sexual harassment. The complaint stated that the comments stemmed from stories that were assigned reading that "revealed sexual innuendos and implications." Rather than discuss them in a mature way, the student complained, he "took advantage of the conversations to express his own previous sexual experiences." Furthermore, she alleged that he intimidated his students from complaining about him, and "repeatedly made fun of students who had expressed offense or disgust and he also laughed at them."[33]

The Dean of Arts and Science, Gus J. Demas, scheduled a meeting with Bonnell and gave him a copy of the student's complaint. Bonnell, after redacting the student's name, made copies of the complaint and handed them out in all his classes and posted them on his bulletin board. At an investigative meeting on December 3, 1998, MacQueen warned Bonnell about disseminating the complaint in violation of the College's policy that student complaints are confidential. Bonnell responded by distributing more than 200 copies of the complaint to faculty members, attaching to each an eight-page satirical response entitled: *An Apology: Yes, Virginia, There is a Sanity Clause* (*Apology*).

Yet another meeting was held, on December 18, 1998, after which the Dean of Arts and Science issued a memorandum to Bonnell reciting that he had "used vulgar and obscene language without reference to assigned readings,"[34] giving specific examples. It referred to earlier notices, both

32. *Id.* at 804.
33. *Id.*
34. *Id.* at 805.

to the faculty in general and to Bonnell in particular, that discipline would be imposed for gratuitous and regular use of vulgar or obscene language not "germane to course content (and thus educational purpose) as measured by professional standards."[35] The Dean's memorandum concluded by informing Bonnell that he was suspended for three days without pay, commencing February 1, 1999 and ending February 3, 1999.

Several days later, after learning of Bonnell's dissemination of the complaint and other materials such as the *Apology*, MacQueen sent another memorandum to Bonnell, stating that Bonnell's posting and distribution "conveys the message that complaining students may be expected to be ridiculed by [him] and ostracized by their classmates, and thus may be deterred from complaining."[36] It directed him not to post, distribute "or discuss verbally or in writing"[37] specific complaints without written permission from "Dr. Rose Bellanca [the Provost] upon application of [his] union or attorney."[38]

Bonnell next sent a redacted copy of the student complaint and his *Apology* to the local media and told his students of his suspension. Nearly all of the students in his five classes declined to attend the classes of a substitute teacher and pre-signed attendance sheets indicating that they supported him and were protesting his suspension. The College then informed Bonnell that he was suspended, with pay and benefits, pending an investigation. He sued the university and its agents[39] who had taken action against him.[40]

The district court initially denied Bonnell's motion for a preliminary injunction and remanded the matter to the College for an administrative hearing. MacQueen presided over a May 25, 1999 hearing and, roughly two weeks later, issued a memorandum finding

> reasonable cause to believe that [Bonnell] . . . violated Federal and Michigan law, College policies and directives, and the collective bargaining agreement between [the faculty union] and the College. In addition, there is reasonable cause to believe that [Bonnell] con-

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. Bonnell subsequently amended his complaint to include pendent state law claims against the College's Board of Trustees for breach of contract.

40. Bonnell also sued the College's faculty union representative for failing to act on his behalf.

> tributed improperly to the disruption of the educational process in [his] classes.[41]

The memorandum charged Bonnell with: "1) insubordination; 2) breach of confidentiality; 3) retaliation; and 4) disruption of the educational process."[42] It informed Bonnell that he was entitled to a hearing, which Bonnell subsequently declined.

Approximately a month later, Provost Bellanca issued a memorandum concluding that Bonnell: [1] disrupted the educational process; [2] was insubordinate; [3] breached confidentiality; and [4] retaliated against the complaining student. The memorandum suspended Bonnell without pay for fourteen days for disruption and insubordination. In addition, referring to a "Guidance" published by the Office of Civil Rights within the United States Department of Education, the memorandum noted the College's obligation to take "strong responsive action" in the event of retaliation. It referred to case law supportive of "actions as severe as termination as being appropriate for breach of confidentiality." Nevertheless, "in deference" to Bonnell's length of service, "and in the belief that rehabilitation is still possible," his suspension for breach of confidentiality and retaliation was limited to four months without pay. In anticipation of his return to work, the College told him that his fringe benefits were to remain in place during the suspension.

Bonnell went back to the district court, which, unfortunately, granted a preliminary injunction against the College and ordered Bonnell reinstated. Bonnell returned to work and, to the surprise of no experienced university administrator, almost immediately generated another formal student complaint, this one alleging profanity and offensive language, denigration of the Jewish faith and denigration of women. The complaint suggested that if the College continued to employ "this perverted man," it should attach warning labels on the announcement of his course indicating "extremely explicit language and sexual content."[43] Mercifully for all of us, the College appealed the preliminary injunction.

B. The Reversal of The Injunction; Some Basic Rules

The Court of Appeals for the Sixth Circuit quashed the preliminary injunction and remanded the case for further proceedings consistent with

41. *Bonnell*, 241 F.3d at 807.
42. *Id.* at 807.
43. *Id.* at 808.

its opinion. The basic point was that the preliminary injunction was inappropriate because Bonnell failed to demonstrate a substantial likelihood that he would succeed on the merits of his First Amendment claim. The court gave two reasons why Bonnell was unlikely to succeed.

The first reason, which the court only addressed briefly, was the defendants' qualified immunity. "It is well-established that the defense of qualified immunity grants government officials engaged in discretionary activities immunity from individual liability for civil damages unless their conduct violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.'"[44] No court decisions clearly established that Bonnell's speech was constitutionally protected. The defendants were immune because they would not have understood that their actions violated Bonnell's rights.

The second reason for quashing the injunction, discussed at much greater length, is that Bonnell was not likely to succeed on the merits of his claim that his First Amendment rights had been violated. The court said that, as a public employee, in order to establish a claim that the defendants violated his First Amendment right to free speech, Bonnell had "to demonstrate that 1) he was disciplined for speech that was directed toward an issue of public concern, and 2) that his interest in speaking as he did outweighed the College's interest in regulating his speech."[45] Although the court agreed that some of Bonnell's speech "was protected as addressing a matter of public concern," it said that it was an error to conclude that Bonnell's speech interests "outweighed the College's interests in [1] prohibiting retaliation against students who file sexual harassment complaints, [2] maintaining the confidentiality of its students, [3] maintaining a disruption-free environment, and [4] maintaining its federal funding."[46]

C. The Mixed Speech

The court examined "the acts of expression for which [Bonnell] was disciplined," namely, his distribution of the *Apology* with the student's sexual harassment complaint to his students, fellow faculty members, and the media, and his use of classroom language "considered to be

44. *Id.* at 824 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

45. *Id.* at 809. On the other hand, if the "speech does not involve a matter of public concern, it is unnecessary for the court to scrutinize the reason for the discipline." *Id.* at 810.

46. *Id.* at 811. The court found error even though it said that the inquiry into whether Bonnell's interests in speaking outweighed the College's interests was a fact determination. *Id.* at 810.

obscene and not germane to the course content."[47] It found that only "a portion" of his speech "addresses a matter of public concern." Bonnell was "a mixed speech case," "perhaps the most difficult subset of employee speech cases to litigate," because the "speech at issue concerns both private as well as public matters."[48]

1. The Complaint

One act of expression for which Bonnell was disciplined was his distribution of the sexual harassment complaint lodged against him. The court acknowledged that, in the usual case involving a sexual harassment complaint, it is the party complaining of sexual harassment who alleges a First Amendment violation in retaliation for filing the complaint. Nevertheless, even though it was the alleged sexual harasser who was claiming a free speech right, the complaint "related to sexual harassment and therefore involves a matter of public import."[49] It did not matter that Bonnell "may have circulated the Complaint in the context of a heated dispute with the College and out of personal animus in retaliation against the complaining student."[50] The act of expression "was protected under the First Amendment."[51]

2. The Apology

The court said that Bonnell's *Apology*, "although expressed as a satirical diatribe fraught with references to [Bonnell's] personal disagreement with the student's characterization [of] and reaction to his classroom language–addressed a matter of public concern."[52] It did not matter that the title was in response to the remedy requested by the complaining student or that the document was retaliatory[53] or criticized the complaint and the College's response to it. Although the complaint appeared to be "a personal attack on the various parties involved, the content also addresses the

47. *Id.* at 811. Judges Clay and Cole disagreed with concurring Judge Nelson, who said that, in the absence of clear guidance from the Supreme Court on mixed speech cases, the appropriate course of analysis is to assume that all the speech is protected speech. *See id.* at 811 n.7.

48. *Id.* at 812.

49. *Id.* at 813.

50. *Id.*

51. *Id.*

52. *Id.* at 815.

53. The court comments:

> Based upon the nature of the *Apology*, one could conclude that Plaintiff was motivated by personal animus against the complaining student as well as against the College for its reaction to her Complaint, and that he circulated the *Apology* as a retaliatory gesture

College's sexual harassment policy as it relates to classroom language."[54] Furthermore, in the *Apology*, Bonnell "was speaking as a concerned citizen about the importance of the right to free speech under the First Amendment, and the need to protect that right in society."[55]

3. Classroom Language

The content of Bonnell's classroom language that was at issue is what the College referred to as profanity not "germane to course content." Reviewing the March 4, 1998 memorandum to Bonnell, relating the "unless germane" standard to the College's concern that Bonnell was "fostering a learning environment hostile to women, a form of sexual harassment," the court concluded that the College was not concerned with the content of Bonnell's speech but rather with its context and form:

> [I]t was not the content of [Bonnell's] speech itself which led to the disciplinary action; rather, it was the context and form in which [Bonnell] used the speech–i.e., in the course of his teaching where the language was not germane to the course content–that the College found to be in violation of its sexual harassment policy.[56]

The court noted that a recent United States Supreme Court decision opined that "[t]he protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it. Indeed, it may not be the content of the speech, as much as the deliberate verbal or visual assault, that justifies proscription."[57] After reviewing another profane professor case and a case in which a basketball coach used the term "nigger" to "motivate" his students, the court concluded:

> [J]ust as a university coach may have the constitutional right to use the word "nigger," but does not have the constitutional right to use the word in the context of motivating his basketball players, so too,

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against these parties.... However, even assuming that [Bonnell] was motivated by personal animus . . . the fact remains that in doing so, he addressed a matter occurring at the college which was of public concern.

Id. at 817.

54. *Id.* at 815.

55. *Id.* at 816.

56. *Id.* at 819.

57. *Id.* at 819 (quoting Hill v. Colorado, 530 U.S. 703, 716 (2000)).

> [Bonnell] 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 where they are not germane to the subject matter, in contravention of the College's sexual harassment policy. This is particularly so when one considers the unique context in which the speech is conveyed–a classroom where a college professor is speaking to a captive audience of students who cannot "effectively avoid further bombardment of their sensibilities simply by averting their ears."[58]

The court quoted with approval language from the basketball coach case indicating that an "instructor's choice of teaching methods does not rise to the level of protected expression."[59]

D. Balancing the Interests

1. The Interests of the College

The Sixth Circuit said that the lower court failed to balance the speech interests of Bonnell against the College's interests in its policy: 1) to discipline Bonnell for conduct that threatened the College's eligibility to receive federal funding under the Family Educational Rights and Privacy Act,[60] which forbids the release of educational records and personally identifiable information without prior written authorization; 2) to prohibit retaliation against students who file sexual harassment complaints, as expressly prohibited by the College's sexual harassment policy;[61] 3) to maintain the confidentiality of a student complaint as provided by the collective bargaining agreement between the College and Bonnell's union; and 4) to maintain a learning environment free of faculty disruption. Each of these interests is significant in promoting "efficiency and integrity" in the discharge of the College's official duties.

2. Bonnell's Academic Freedom

Bonnell claimed that his interests in free speech under the First Amendment and his interest in academic freedom outweighed the

58. *Id.* at 820 (citations omitted).

59. Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1190-91 (6th Cir. 1995).

60. 20 U.S.C. § 1232g (2003).

61. The court said that the issues are the same whether the sexual harassment complaint is brought under Title IX or pursuant to an internal sexual harassment policy.

College's interests. On the issue of academic freedom, which the court said is not "an independent First Amendment right," the court sounded very much like the court in *Urofsky*. The court emphasized that a university has academic freedom rights that are inconsistent with the freedom of individual faculty. "[T]he Supreme Court has . . . recognized that '*academic freedom thrives* not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, *on autonomous decisionmaking by the academy itself*.'"[62] The Sixth Circuit reiterated Justice Felix Frankfurter's famous reference to "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."[63] It quoted one of its own opinions that the term *academic freedom* "is used to denote *both the freedom of the academy* to pursue its end without interference from the government . . . *and the freedom of the individual teacher* . . . to pursue his ends without interference from the academy; and *these two freedoms are in conflict*."[64] Although the College "was not claiming an interest in academic freedom *per se*," the "autonomous decisionmaking" of the College must be weighed in the balance.

3. Balancing the Interests

With relatively little discussion, the court concluded that the College's interests, "including maintaining the confidentiality of student sexual harassment complaints, disciplining teachers who retaliate against students who file sexual harassment claims, and creating an atmosphere free of faculty disruption,"[65] outweighed Bonnell's "claimed free speech and academic freedom interests."[66] Most of the court's discussion focused on the issue of harassment:

> [C]olleges and universities are legally required to maintain a hostile-free learning environment and must strive to create policies which serve that purpose. While a professor's rights to academic freedom

62. *Bonnell*, 241 F.3d at 823 (citing Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985) (citations omitted) (emphasis added)).

63. *Id.* at 823 (citing Sweezy v. New Hampshire, 354 U.S. 234, 262-63 (1957) (emphasis added)).

64. *Id.* at 823 (citing Parate v. Isibor, 868 F.2d 821, 826 (6th Cir. 1989) (emphasis added)).

65. *Id.* at 823.

66. *Id.* at 824.

> and freedom of expression are paramount in the academic setting, they are not absolute to the point of compromising a student's right to learn in a hostile-free environment. To hold otherwise under these circumstances would send a message that the First Amendment may be used as a shield by teachers who choose to use their unique and superior position to sexually harass students secure in the knowledge that *whatever* they say or do will be protected. Such a result is one that a state college or university is legally obligated to prevent, and such a result would fail to consider the countervailing interests.[67]

A learning institution has "a strong interest in preventing" speech "that rises to the level of harassment–whether based on sex, race, ethnicity, or other invidious premise–and which creates a hostile learning environment that ultimately thwarts the academic process."[68]

IV. EXTERNAL CONSTRAINTS, SOCIAL CONTRACTS AND SEEKING THE TRUTH

A. *Urofsky*, *Bonnell* and the First Amendment

Urofsky and *Bonnell* appear to take different approaches but reach the same result. The *Urofsky* court might have said that Bonnell's speech was not protected because it was spoken in his capacity as an employee rather than in his capacity as a citizen. Instead, *Bonnell* said that much of Bonnell's speech was entitled to some First Amendment protection because it was directed toward an issue of public concern, but was sanctionable nonetheless because of the greater interests of the university. A concurring opinion in *Bonnell* expressed discomfort with stating that Bonnell was expressing himself "as a citizen" on "matters of public con-

67. *Id.* at 823-24.
68. *Id.* at 824.

cern,"[69] but noted that the outcome of the balancing approach was the same.[70]

The suggestion in both *Urofsky* and *Bonnell* that academic freedom rights exist in the university as an entity rather than in individual faculty is contrary to the AAUP's articulation of the American tradition of academic freedom. It is, however, consistent with significant judicial and scholarly opinion. In 1989, Professor Peter Byrne stated that, rather than protect the professional autonomy of individual faculty, "constitutional academic freedom should primarily insulate the university in core academic matters from interference by the state."[71] In Professor Byrne's view: "When presented with claims by faculty members that other academics, usually administrators and department chairs, have violated their rights to academic freedom, courts should only ascertain if the administrators can establish that they have in good faith rejected the candidate on academic grounds."[72]

These two cases, and scholarly commentary such as Professor Byrne's, provide welcome support for academic administrators who seek to hold aberrant professors accountable. We need not cower whenever deviant faculty assert their First Amendment "rights." Our hesitancy to police deviant and substandard classroom and other workplace

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69. In a concurring opinion, Judge Nelson comments:

> I am somewhat ambivalent . . . about our holding that the acts of insubordination committed by Professor Bonnell in publicizing his student's sexual harassment complaint–a breach of confidentiality against which he had repeatedly been warned—like his promiscuous broadcasting of the screed in which he sought to justify both the classroom recitals of his own sexual escapades and the apparently gratuitous use of coarse language in the classroom, rose to the level of speech in which the professor was expressing himself "as a citizen" on "matters of public concern."

Id. at 827 (Nelson, concurring).

70. Judge Nelson continues:

> If our disposition of the appeal had necessarily turned on our answer to the question whether Professor Bonnell was speaking "as a citizen" upon matters of public concern, I should probably have swallowed hard–thinking uncharitable thoughts about the nature of the assignment given us–and answer in the affirmative. As it happens, however, the outcome of the appeal would be no different if we answered the question otherwise–if we held, *i.e.*, that Professor Bonnell was speaking "as an employee" upon matters only of personal interest. Either way, given the inevitable result of our balancing of the parties' respective interests . . . the order granting a preliminary injunction would have to be reversed.

Id. at 828 (Nelson, concurring).

71. J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 252, 255 (1989).

72. *Id.* at 308.

behavior has damaged our academic environments and cost us significantly in public good will. The recent controversy over the University of Kansas's Human Sexuality course is another illustration of a very public controversy that hurts us all.

B. Improper Reliance on Third-Party Sources of Academic Freedom

Urofsky and *Bonnell* suggest two principal third party sources for academic freedom: the federal courts, applying the First Amendment; and market forces.

The extent to which there is a special First Amendment right to academic freedom is a matter of continuing controversy. The range of judicial opinion on the issue is likely to exceed the divergent views in *Urofsky* and *Bonnell*. One of the top scholars on our faculty has a manuscript under way advocating a First Amendment-based right to academic freedom. More conservative scholars would find a much more limited role for the constitution in academic administration and governance. Time will tell.

Nor is it clear how much protection for academic freedom can be expected to come from market forces. I believe, although I have no empirical basis for it, that *Bonnell* is correct that market forces tend to preserve a significant amount of academic freedom, at least at many institutions. The reputational effects of a significant move away from academic freedom could be very significant. There are markets for faculty, markets for administrators, markets for students, markets for contributed dollars and, especially in the context of graduate research universities, markets for contract and grant funding. A university, its governing boards and funding sources, are, to varying extents, subject to the external constraints of those markets. So, too, again to varying extents, are the people who appoint governing boards. On the other hand, external forces can also pull counter to academic freedom.

Those of us within the academy should not rely on the First Amendment or on market forces to protect academic freedom. We should be much more proactive.

C. Social Contract and Shared Culture

I believe it is most useful for us to consider academic freedom as coming about as a matter of a social contract. The long-term contractual relation-

ship is defined and evolves as a result of experience, culture and expectations. When academic freedom is viewed as a matter of social contract, we in the academy are faced directly with the question of what we should be doing to continue to earn academic freedom. What are the key provisions we must perform in our long-term contractual relationship with society?

My thesis is that our core mission is to seek truth. Historically, academic freedom has been permitted because universities and their faculties have been perceived and valued as seekers, teachers and publishers of truth. We have special respect, special deference, and are valued in various markets, because we are perceived as seekers of truth. If we want to advance the cause of academic freedom, we have to protect and advance the cause of truth-seeking on campus.

We need to insist, among ourselves and for others to perceive, that important truths are being sought and told by competent and productive professionals. This means we need to consider both individual and institutional accountability. We must put our own house in order. We should take measures that are within our grasp to define and protect academic freedom as a matter of social contract, institutional culture and faculty contract.

We also need to make sure that, with respect to academic freedom, we have important common understandings with our key external constituencies. It ought to be a matter of great concern if our key external constituencies perceive us very differently than we perceive ourselves. It ought to be cause for great concern if issues that are critical to us are unfamiliar or alien to them.

A recent survey of public opinion published by *The Chronicle of Higher Education* (*Chronicle*) suggested that there is a great disparity between on-campus and off-campus views of academic freedom and tenure. "Slightly more than half of respondents agree that tenure protects academic freedom, but far fewer agree that experienced college professors should be granted a job for life as long as they commit no serious misconduct."[73] While many within the academy would quarrel with the way the question in the survey was phrased, the divergence is clear. More importantly, the divergence was the greatest among those people who are likely to serve on boards of trustees. "Only 25% of respondents with annual incomes over $100,000 support tenure, compared with 50% of those with incomes under $25,000."[74]

73. *What Americans Think About Higher Education*, CHRON. HIGHER EDUC., May 2, 2003, at A14.

74. *Id.*

Let me offer an analogy that points the way for what I see as the task ahead. With our fund-raising hats on, we talk of establishing and nurturing a "culture of philanthropy" that is shared by students, faculty, alumni and others. It is critical that we establish and nurture a culture of academic freedom—a sense that we are seekers of truth in ways that are important to society. The core value of truth seeking is critical both to academic freedom and to the culture of philanthropy. In short, it is critical to our future.

V. THINGS WE CAN DO

There are many things we can do to perform our side of the social contract that grants us academic freedom. Most basically, we need to be accountable both at the faculty and at the institutional levels.

A. Holding Faculty Accountable

We are probably best at holding untenured faculty individually accountable. Even here, the experience varies greatly among institutions, and within a particular unit seems to vary depending upon whether teaching or research is the focus. Some schools or colleges that impose standards at or close to their true aspirations do so out of fear of being reversed by university promotion and tenure committees, provosts or presidents. For an individual faculty member, department chair or dean, there can be far more pain than gain in imposing high standards on colleagues, especially given the prevalence of allegations of improper motive.

We have not done as good a job at holding tenured faculty accountable. Nationwide, post-tenure review is being forced from the top down because we in the academic units have failed to do it.[75] Consider in particular the annual faculty contract. At many schools, a faculty member is each year given an assignment of responsibilities that breaks down the

75. The AAUP has been staunchly opposed to post-tenure review. "The Association believes that periodic formal institutional evaluation of each postprobationary faculty member would bring scant benefit, would incur unacceptable costs, not only in money and time but also in dampening of creativity and of collegial relationships, and would threaten academic freedom." *Post-Tenure Review: An AAUP Response*, ACADEME, Sept.-Oct. 1998 (reiterating the AAUP's "existing policy on post-tenure review, approved by Committee A and adopted by the Council in November 1983"). This Report was approved by the Association's Committee on Academic Freedom and Tenure, adopted by the Association's Council in June 1999 and endorsed that year at the Association's Eighty-Fifth Annual Meeting. *See generally* www.aaup.org.

year's contracted-for assignment into the three components of teaching, scholarship and service. At our university, for example, it is common for faculty to have from 25-35% of their assignment earmarked for research. Yet too many faculty have produced too little research. In some cases, it is not clear how the research advances institutional goals. University funding sources now look at the faculty payrolls, compare them to the faculty assignments of responsibility, come up with a dollar amount, and ask what they are getting for the money.

The *Chronicle* public opinion survey reflects widespread public skepticism about the research mission of faculty. Yet this is what we pride ourselves in at many of our institutions. How do we account to funding sources in ways that resonate with them? For example, what should we ask of a school or college with forty full professors, with an average salary of $100,000 per year and an average research assignment of 25%? How much scholarship should those forty faculty generate for the $1,000,000 they are being paid to do it? What should the nature of the scholarship be? Can faculty simply write on anything they like or on nothing at all? In many universities, faculty, department chairs and deans, and even provosts and presidents, have been too timid to hold tenured faculty accountable. We will lose some of the academic freedom we have if we do not do a better job. We will suffer if we fail to honor our side of the contract and the culture no longer supports what we value.

We also need to make sure that we maintain healthy academic communities that nurture academic freedom among a diversity of scholars. At least in law, scholars are often part of balkanized communities. Harvard Law's Professor Mary Ann Glendon has described her faculty as one that experienced a diminished regard for itself as a community of seekers, teachers and tellers of truth.[76] As discussed further below, many faculties have become politically imbalanced.[77] We need to value a diversity of opinion and of scholarship. We need to make room for many voices while avoiding becoming a Tower of Babel.

We need to protect the academic freedom of new faculty. We need to be honest with ourselves and with them about the kind of scholarship that is valued at our institution. One size does not fit all. Consider the example of law schools. At some schools, faculty who are not economically-oriented in their writing will not be valued. Some schools are refreshingly honest about this. Others are less forthcoming. At some institutions,

76. MARY ANN GLENDON, A NATION UNDER LAWYERS 206 (1994).

77. *See infra* text accompanying notes 80-85.

personal narrative will be viewed with skepticism, either at the law school or at the university level. A part of the academic freedom we owe to new faculty is clarity and honesty about the parameters within which it operates. We must be more specific about our expectations for them as scholars. If we are going to control what they write about and how they write about it, if we are seeking to purchase a specific kind of scholarly good, we ought to let them know when they are first offered a position.[78]

B. Institutional Accountability

We should also ask about institutional accountability for our academic freedom. Assuming that faculty will account for their assigned tasks, what should those tasks be? Most broadly, if we are to be respected institutions of truth seeking and telling, we need to seek truths that are important and that are valued by a significant element of our internal and external constituencies. There is great room for different institutional missions. Some schools can emphasize certain subject matters and others can emphasize a distinctive educational process or philosophy. To maximize our academic freedom, each of us should strive for tolerance and balance within our own mission. At a minimum, we must acknowledge and give proper respect to the truth seeking of others, both in the classroom and in our scholarship.

At our law school, we believe that philosophical inquiry must be at the heart of the educational experience. Philosophy is an organization of experience, experience with matters such as good and evil, right and wrong, the just and the unjust. We believe that we should prepare our students to deal with such weighty matters in their own lives, careers and communities by exposing them to rigorous consideration of the great issues. Especially in an era in which many undergraduates major in such subjects as hospitality administration or real estate, universities also must make available to their students the systematic exploration of the great philosophical and moral questions. History and philosophy must have a place of great importance in

78. Another threat to academic freedom is presented by faculty who are pulling or sending punches in their scholarship, or sending bouquets to curry academic, business or political favor. Faculty develop scholarly product lines for external markets. A faculty member who develops a specialty advocating for fiduciary duties may be less valuable as an expert witness after converting to contractarianism. Addressing "the effect of money and worldly ambition on scholarly writing and research," former Harvard University President Derek Bok wrote that "it is quite possible that the resulting dangers pose a greater risk to scholarship than any threats arising from conventional attacks on academic freedom." BOK, *supra* note 8, at 25.

our curriculum. So should the exploration of solutions to pressing contemporary problems. Interestingly, the *Chronicle* survey reported an extremely strong public sentiment for a broad-based undergraduate education.[79]

How are we going to make available to our students everything from core doctrine, to philosophy and ethics, to close investigation of solutions to social problems? We cannot all do all things. Most of us have limited resources and will need to define a core mission. We will decide to do some things rather than others. On the other hand, many of us have not fully deployed all the resources at our disposal. For example, law schools that are part of larger universities often remain remarkably isolated from the rest of campus. One way to teach more philosophy, economics or social welfare to law students is to collaborate with other units on campus. We need to make the teachings of particular faculties available to our students, and we need to use those individual faculty as a bridge between faculties. We can also use teleconferencing technology to bring people from other campuses, or from off-campus, to our students and colleagues in a cost-effective way.

C. The Sensitive Issue of Political Balance

An extremely sensitive aspect of institutional neutrality is hiring to correct or to avoid social or political imbalance of the faculty or administration. Some academics are shocked at the very suggestion that political or social imbalance should be taken into account in decisions. Merit, they would say, should in all cases control. On the other hand, merit is often in the eye of the beholder and universities, just like other organizations, can become inappropriately "clubby" to their own detriment. For example, most academics embrace the notion that university faculties should include more women and minorities. Most of them probably also embrace the notion that the requisite diversity will not be achieved in a timely way without institutional commitment and follow-through. Similar concerns exist with respect to philosophical and political diversity. Some academic institutions are perceived as having gotten too "clubby" on the right whereas others are perceived as having gotten too "clubby" on the left. The perception, of course, is often very much in the eye of the beholder. Although it is vital that we have colleges and uni-

79. "[A]lmost three in five Americans think it is very important for colleges to offer a broad-based general education to undergraduates . . . ." *What Americans Think About Higher Education*, *supra* note 73.

versities of diverse missions and philosophies, particular institutions, and particular classes of institutions, can weaken themselves if they cease to be balanced seekers and tellers of truth.

First, the richness of debate, in the classrooms, in the halls, in faculty offices and in scholarship, will suffer if an academic institution is captured by one ideology. Second, an academic institution or a class of academic institutions, that has become captive of a particular orthodoxy is likely to lose the support of those who do not share it. Public institutions can be particularly vulnerable in this regard. There is considerable sentiment that many academic institutions, particularly many public institutions, are tilted politically to the left. Although there has been a great deal of writing on "political correctness" on campuses, much of it is anecdotal, with little empirical support.

This spring, an article entitled *Conservatives Need Not Apply* appeared in *The Wall Street Journal*[80] reporting a study of 1994-2000 federal campaign contributions over $200 by law faculty at the top twenty-two law schools. The study reported that, although Americans are divided roughly evenly between Democrats and Republicans, 74% of all professors contribute primarily to Democrats with only 16% to Republicans.[81] The authors assert that these overall percentages actually "substantially understate the effect of the partisan imbalance at most schools."[82]

> Republican-contributing law professors are very disproportionately concentrated at two schools—the University of Virginia and Northwestern. In contrast, many other elite schools have few or no politically active Republicans. At Yale, where almost 50% of the faculty donate, almost 95% give predominantly to Democrats. At Michigan itself the ratio is eight to one. Sometimes the amounts donated can be instructive: in the last six years Georgetown law professors have donated approximately $180,000 to the Democratic Party, $2,000 to the GOP and $1,500 to the Green party.[83]

The conclusion of the study was that mainstream conservative ideas are no more represented "than those of the leftist fringe."[84] The study also

80. John O. McGinnis & Matthew Schwartz, *Conservatives Need Not Apply*, WALL ST. J., April 1, 2003, at A14.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

concludes that the debate is even more one-sided in the case of issues of public concern:

> [P]rofessors teaching economics-based subjects like antitrust and corporations are more conservative than their public-law counterparts. This leaves such subjects as constitutional law and international law–the subjects that set the agenda for debate on the hot-button issues of our time–with scarcely a conservative voice.[85]

Other popular media, such as *U.S. News & World Report*, have carried similar reports.[86] The *Chronicle's* recent survey of public opinion affirms that a majority of Americans view college professors as more liberal than themselves. There is considerable sentiment that the one-sidedness of the faculty is harming the student experience. "'Some colleges are so one-sided politically that students really don't have an opportunity to hear the other side, and that weakens their education,' says Jerry Martin, president of the American Council of Trustees and Alumni, a group that has opposed what it sees as political correctness on campus."[87] *U.S. News*'s John Leo concludes that "politicians, civic leaders, and alumni have to start browbeating universities into making facilities more open and diverse."[88]

Some university leaders have begun to take steps in response to overly ideological campuses. Often these steps are being taken quietly. Harvard's new President Lawrence Summers is an exception, undertaking bold corrections to what he sees as the lopsidedness and intolerance of campus culture.[89] For example, "[w]hile much of the university world took the view that the United States must in some important way have

85. *Id.*

86. John Leo, *The Absent Professor*, U.S. NEWS & WORLD REP., Sept. 23, 2002, at 14. In eight academic departments surveyed at Cornell University, 166 professors were registered in the Democratic Party or another party on the left, with just six registered with Republicans or another party of the right. Similar imbalance showed up in departments at the 19 other universities surveyed. At the University of Colorado-Boulder, the numbers were 116 to 5. It was 151-17 at Stanford, 54-3 at Brown, 99-6 at the University of California-San Diego, and 59-7 at Berkeley, the flagship of the University of California system. At Williams College, a poll turned up only four registered Republicans among the more than 200 professors on campus.

Id.

87. *What Americans Think About Higher Education, supra* note 73.

88. Leo, *supra* note 86.

89. *See* James Traub, *Harvard Radical*, N.Y. TIMES, Aug. 24, 2003, § 6 (Magazine), at 28.

been responsible for the [September 11] attacks, Summers says that he felt called to speak up for patriotic values."[90] He "seemed to be lecturing his own university and kindred institutions in public."[91] For further example, "he demanded the reversal of a policy that had prevented students from listing R.O.T.C. service in the yearbook and made a point of addressing the R.O.T.C. graduation ceremony at the end of the year."[92] The broader point is that presidents, provosts, deans, department chairs, and even individual faculty, can help to correct existing imbalances by jawboning and by making other subtle changes to increase intellectual tolerance and philosophical diversity on campus.

When if ever is it appropriate to tailor faculty hiring to end existing imbalances? It is accepted canon throughout the academy that racial and ethnic diversity is an important value. What about political diversity? Philosophical diversity? Is it ever appropriate to hire to correct greater political imbalance that is skewing campus dialog? Is it appropriate to hire to correct political or philosophical balance if virtually all of your faculty are of one political party or of one philosophy? Is it appropriate to do indirectly what can not or should not be done directly? For example, it is appropriate to change the emphasis within an organization by hiring people in subject matters that have an orientation that will, in the aggregate, tend to enhance the balance you seek? Summers' predecessor Bok suggested great caution but indicated some sympathy for a subject matter approach.[93]

90. *Id.* at 33.

91. *Id.* at 33.

92. *Id.* at 33.

93. BOK, *supra* note 8, at 28.

> To be sure, an institution may wish to provide opportunities to study a variety of major fields of thought and experience, and this effort may indirectly affect the ideologies represented within its faculty. For example, a decision to offer instruction in socialist economics will increase the chances of appointing a socialist to the extent that socialists are more likely to specialize in this subject. Even so, the underlying decision by the university involves a choice of field and not a determination to appoint a professor of any particular ideological persuation.

Id.

VI. CONCLUSION

As the law now stands, faculty have no special First Amendment right to academic freedom. Faculty are university employees who function within the terms of their contracts and campus culture. Both contract and culture have given faculty great latitude in defining their own work, particularly their research. We have been given this freedom because we have been perceived to be seekers, teachers and writers of truth.

The task for universities and their faculties is to continue to earn this special place. There should be increased accountability at both the level of individual faculty and at the institutional level. At the extreme, deviant behavior of the sort described in *Bonnell* should not be tolerated. Sexual harassment and other abusive faculty behavior should not be permitted to hide under the mantle of academic freedom. More broadly, universities and their faculty should pursue in balanced ways missions of truth-seeking that enrich campus debate on fundamental issues of importance to their key constituencies.

If a faculty within a particular school, college or university does not seek a meaningful mission of truth-seeking, and a balanced approach to that mission, the dean, university administration or external funding source may take action. The faculty may lose its freedom to define the institution. The dean might raise professorships or chairs to provide incentives to attract or retain specific types of faculty. Provosts, presidents or external funding sources may, with or without the encouragement of the dean, provide new monies, or renew old monies, only on the condition that they be spent for particular purposes.

If university administrations or external funding sources feel that redirecting a unit is inefficient or unpleasant, they may simply deploy resources elsewhere. The worst case scenario for higher education—especially in the public sector—is that funding sources turn their backs on us and cause us to wither away, not with a bang, but with a budgetary whimper.