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GOD TALK BY PROFESSORS WITHIN THE CLASSROOMS OF PUBLIC INSTITUTIONS OF HIGHER EDUCATION: WHAT IS CONSTITUTIONALLY PERMISSIBLE?

by

SARAH HOWARD JENKINS, BYRON R. JOHNSON, AND OTTO JENNINGS HELWEG*

A professor has a privileged position and influences students in ways many professors are unaware. With this position comes an obligation not to abuse the power to influence. Given this power to influence, there is an obligation to reveal one's theological and philosophical view of life to students. A professor who

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In the Fall of 1989, the authors presented three independent oral presentations on the issue of disclosing theological bias within the classrooms of public institutions of higher education to the Christian Faculty Forum, a gathering of professors who teach graduate and undergraduate courses at Memphis State University. The oral presentations addressed the ethical and biblical mandates for disclosing personal and theological bias and the constitutional limitations on such disclosure as reflected in existing case authority. These presentations were merged into one essay. The resulting essay was later modified to include a discussion of Bishop v Aronov, 732 F. Supp. 1562 (N.D. Ala. 1990). On June 29, 1992, approximately thirty days prior to the scheduled publication of this essay, the United States Supreme Court, without an opinion, denied certiorari in Bishop v. Delchamps, 60 U.S.L.W. 3154 (U.S. June 29, 1992) No. 91-286, to the reversal by the Eleventh Circuit of the district court's holding that a professor's occasional remark of his personal religious beliefs relevant to class discussion were protected speech and did not violate the Establishment Clause. The authors believe that the Supreme Court failed to address a critical issue – the permissible scope of a public university professor's free speech right to engage in relevant religious speech within the classroom of public institutions of higher education. The resulting silence by the Court leaves unaddressed an opinion, albeit with limited precedential value, that permits a state university to impose an absolute ban on religious speech by professors within classrooms of higher education.

> [T]he University seeks only to extricate itself from any religious influence or instruction in its secular courses.
>
> Heretofore, the University has apparently not found it necessary to remind its faculty that the expression of a religious position in a secular subject, no matter how carefully presented creates the appearance of endorsement of that position by the University. . . .

does not *consciously* disclose his or her biases may, nonetheless, communicate them to students less accurately than if discussed openly.[1]

Currently, our culture's privatization of religion inhibits the sharing of theological views by professors. This posture reflects a radical change from the historical development of education in general and modern higher education in particular. On university and college campuses, campus administrators and even campus attorneys are ignorant of the precise scope of legal constraints on disclosure of religious biases. Many assume the restrictions applicable to elementary and secondary teachers apply as well in higher education. Only recently has the issue been raised and addressed by the courts.[2] This essay identifies the constitutional constraints that limit both the professor's disclosure of theological biases and the state institution's effort to minimize disclosure of religious or theological bias.

The State,[3] as employer, may not impose by law or as a condition of employment a duty on faculty to disclose their biases.[4] Similarly, it is an established principle of law that teachers do not "shed" their First Amendment

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Bishop v. Aronov, 926 F.2d 1066, 1077-78 (11th Cir. 1991) (Gibson, J. writing for the court) (emphasis added). To reach these astonishing conclusions, the court relied on Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988), which recognized the right of school officials to apply reasonable restrictions on speech by **high school students** in a curriculum related student newspaper (a nonpublic forum) to implement the school's basic educational mission. *Bishop*, 926 F.2d at 1074. In holding that a total ban on religious speech was "reasonably related to legitimate pedagogical concerns," the Eleventh Circuit failed to distinguish the basic educational mission of public high schools and that of public universities. First Amendment rights must be applied in light of the special characteristics of the school environment. *Kuhlmeier*, 484 U.S. at 564. (See text, *infra*, at notes 121-135). These special characteristics include the age and maturity of the students, the nature and relevancy of the speech, and the educational mission of the institution. The Eleventh Circuit failed to focus on these factors. See *Bishop*, 926 F.2d at 1074. *See also* note 140, *infra*.

[1] In Crampton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247 (1978), Dean Cramton identifies and criticizes what he perceives as unarticulated values in modern law school classes -- a skeptical attitude toward generalizations, an instrumental approach to law and lawyering, a tough minded and analytical attitude towards legal tasks and professional roles, and a faith in man to make the world better through the use of reason and the democratic process. These values, he suggests, are taught implicitly. Later, in *Beyond The Ordinary Religion*, 37 J. LEGAL EDUC. 509 (1987), Dean Cramton argues that rather than being implicitly taught values should be "openly and forthrightly" taught. Professors, he continues, should have something to profess on ultimate questions that students address such as "Who am I?".

[2] Bishop v. Aronov, 732 F. Supp. 1562 (N.D. Ala. 1990), *rev'd.*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, Bishop v. Delchamps, 60 U.S.L.W. 3154 (U.S. June 29, 1992) No. 91-286. *See* note 140, *infra*, for a discussion of this case.

[3] The legal rules discussed and applied in this section are limited in application to professors in public institutions of higher education. The rights and limitations on professors employed by private institutions are governed by the contractual agreement between the parties.

[4] *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488 (1961) (state may not require declaration of belief in God as a condition of state employment); Wieman v. Updegraff, 344 U.S. 183 (1952) (state may not require its employees to establish their loyalty by extracting an oath denying past affiliation with communists); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (compulsory flag salute and pledge invades First Amendment rights).

freedoms at the schoolhouse gate or classroom door.[5] First Amendment freedoms are not forgone with the acceptance of public employment.[6] The State's need and interest as employer "in promoting the efficiency of the public services it performs through its employee" must, however, be balanced with the interests of the teacher in exercising his or her First Amendment right of expression which includes the right to express political and religious opinion on matters of public interest.[7] Juxtaposed to this interest is the State's Constitutional duty to avoid the establishment of religion by professors - state actors - when they engaged in disclosure of a religious nature.

This essay establishes, first, the professional aspects of disclosure. Second, it defines the equipoise between the State's interest in efficiency and the teacher's interest in exercising his or her First Amendment right of expression of religious opinion on matters of public interest. Third, the essay identifies expressive activities of the teacher within the classroom that should be accorded First Amendment protection pursuant to *James v. Board of Education.*[8] Fourth, the essay examines whether the professor's disclosure of personal and theological biases in a classroom constitutes state action and concludes that a professor fulfilling his or her assigned tasks within the classroom is a state actor. The essay then examines whether the classes of disclosure of personal and theological biases consistent with standards enunciated in *James v. Board of Education* violate the Establishment Clause.[9] This essay concludes that such disclosure does not run afoul of the *Lemon v. Kurtzman*[10] test and does not result in the Establishment of religion.[11]

PROFESSIONAL ASPECTS OF LIMITS

Religious Heritage of the Modern University[12]

When the invention of letters precipitated formal education, the priesthood and free citizens encouraged only limited formal education. The Greeks were the first to transfer education to secular control. Even then, the pantheon, the center of Greek worship, was an integral part of the curriculum. Christianity introduced education to the underprivileged. During the "age of faith" or the Middle Ages,

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[5] Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969).

[6] Pred v. Board of Public Instruction, 415 F.2d 851, 855 (5th Cir. 1969).

[7] *Id.* at 857; Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

[8] 461 F.2d 566 (2d Cir. 1972).

[9] *Id.*

[10] 403 U.S. 602 (1971).

[11] *See infra* text accompanying notes 82-99.

[12] See generally E.P. Cubberley, A BRIEF HISTORY OF EDUCATION (1922).

the primary emphasis was on moral training. Later, the renaissance reintroduced an interest in the classics such as Aristotelian ethics and logic.

After the collapse of the Roman Empire in the 5th and 6th centuries, the monastic and cathedral schools developed from educationally weak pockets of education to intellectual leadership in the 11th and 12th centuries. The first universities were organizations of students, the *studium* in Bologna around 1158 being the first. The Paris *studium* became famous for arts and theology. Oxford and Cambridge also came into being at this time. The 16th Century Reformation signaled another impetus to spread education to the masses. Christianity introduced the moral equality of men and women, but it was much later that women found acceptance into higher education.[13]

Public education in the United States was an outgrowth of the Reformation. "The Puritans . . . were determined that children should receive sufficient education to insure their ability to read the Bible and participate in religious services."[14] This religious heritage of public education was reflected in one Massachusetts law adopted in 1642 that imposed a fine if children were not taught "to read and understand the principle of religion and the capital laws of this country."[15] This was the first time that a legislative body in the English-speaking world ordered that all children be taught to read.

The first college in the United States was authorized by the General Court of Massachusetts in 1636 to "advance learning and perpetuate it to posterity; dreading to leave an illiterate ministry to the churches, when our present ministers shall lie in the dust."[16] Later this college was named "Harvard" in memory of the young clergyman, John Harvard, who died leaving his books and a sum of money to the school.

In 1701 Yale was established for the purpose of fitting the youth of the colony, "for Public employment both in Church & Civil State."[17] In almost all

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[13] See generally, T. Woody, A HISTORY OF WOMEN'S EDUCATION IN THE UNITED STATES (1966).

[14] C.F. Thwing, A HISTORY OF HIGHER EDUCATION IN AMERICA (1906)[hereinafter THWING, A HISTORY]. *See also* D. Boles, THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS (1965); L. Cremin, THE AMERICAN COMMON SCHOOL AN HISTORICAL CONCEPTION (1951).

[15] 10 Alvey, *Elementary Education*, in ENCYCLOPEDIA AMERICANA 209 (1989); *see also*, N. Schachner, CHURCH, STATE, AND EDUCATION 11, *reprinted from* 49 THE AMERICAN JEWISH YEAR BOOK 1947-48, American Jewish Committee (1947) (*quoted* in D. Boles, THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS (1965).

[16] 9 Kneller, *Post-Secondary Education*, in ENCYCLOPEDIA AMERICANA 689 (1989); *see generally* Lieder, *Religious Pluralism and Education in Historical Perspective: A Critique of the Supreme Court's Establishment Clause Jurisprudence*, 22 WAKE FOREST L. REV. 813 (1987).

[17] D.G. Tewksbury, THE FOUNDING OF AMERICAN COLLEGES AND UNIVERSITIES BEFORE THE CIVIL WAR 82 (1932 & reprint 1972).

of the early institutions of higher education in the United States, "[r]eligion was the strongest determinant of purpose and content."[18]

The cleavage between public and private education began with the Dartmouth College case in 1819.[19] This decision guaranteed private ownership of institutions of learning and guarded such institutions from encroachment by the state. Since that time, there has been a gradual secularization of higher education to the extent that the present professorate and student body are generally unaware of the religious heritage and foundation of colleges and universities. Though some may applaud this trend, its cost has been significant - the cost of failing to speak to the whole person - as noted in the Carnegie Foundation report.[20]

The University Must Speak to the Whole Person

The Carnegie Foundation launched a major effort to investigate the malaise of the present system of higher education.[21] The authors of the final report repeated, time and again, that the university evolved *from* an institution that spoke to the whole man, to an impersonal environment with students crying for existential answers.[22] Boyer felt that the colleges "lost their sense of purpose" and quoted Archibald MacLeish as saying, "There can be no educational postulates so long as there are no generally accepted postulates of life itself."[23]

The researchers found "a great separation, sometimes to the point of isolation, between academic and social life on campus."[24] Faculty and administrators were viewed as confused about their obligations in nonacademic matters. This led Boyer to ask, "How can the undergraduate college help students gain perspective and prepare them to meet their civic and social obligations in the neighborhood, the nation, and the world?"[25]

While there are other concerns confronting the academic such as the tension between teaching and research, the question this essay addresses is whether the university is more than a place where information is imparted. Is the university not also a place where young people are challenged to ask, "How ought I to live?" "Who am I?" "What meaning, if any, does life have?"

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[18] 9 Kneller, *Post-Secondary Education*, in ENCYCLOPEDIA AMERICANA 689 (1989).

[19] *Id., see* Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

[20] E. L. Boyer, COLLEGE: THE UNDERGRADUATE EXPERIENCE IN AMERICA (1987).

[21] *Id.* at vii.

[22] *Id.* at 178, 204.

[23] Boyer, *supra* note 20 at 3.

[24] *Id.* at 5.

[25] *Id.* at 6.

Increasing family instability has amplified the stress caused by universities in abandoning their role as integrators of knowledge. As a result of the fragmentation of the family unit, the entire educational system is being asked to take over functions that have traditionally been assumed by parents. Many single parent families, families where both parents work outside the home, blended families resulting from divorce and remarriage, and even traditional two-parent families fail to train their children in areas such as theology, sex education, alternative world views, and fundamental value systems essential for living in an open society. More and more, parents individually and society as a whole expect schools, especially elementary and secondary schools to be *in loco parentis*, "to tend to their [the students'] moral development."[26] This need arises at a time when universities have moved in the opposite direction.

In the early 1900's, college authorities -- the administration and faculty -- stood *in loco parentis* to their students in regulating the students' social and moral welfare[27] both on and off campus. As "parent," the university or college formulated regulations for the student's well-being.[28] However, this parent/child relationship was altered in 1971 with the passage of the Twenty-Sixth Amendment to the United States Constitution which guaranteed 18 year olds the right to vote. College and university students were no longer viewed as children submitted to the authority of the university but rather as "semi-autonomous citizen[s]"[29] often with values, views, and ideologies at war with those of the institution and its authorities.[30] No longer viewed as "parent", the university became a sanctuary for presenting, exchanging, and debating ideas; the "spawning ground for novel theorems and intellectual ferment;"[31] a haven for the heretical as well as the orthodox. Even so, educators believed that learning was more "than simply sitting in a classroom."[32] Personal communication among students fostered value development as an essential part of the educational process.[33]

While the university cannot and should not function as a parent, Boyer and

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[26] Doe v. Human, 725 F. Supp. 1503, 1507 (W.D. Ark. 1989), *cert. denied*, 111 St Ct 1315 (1991).

[27] *See, e.g.*, Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913); State *ex rel.* Ingersoll v. Clapp, 81 Mont. 200, 263 P. 433 (1928), *cert. denied*, 277 U.S. 591 (1928).

[28] *See generally* Jones, *In Loco Parentis Reborn:* Whitlock v. University of Denver, 34 W. EDUC. L. REP. 995 (1986).

[29] Doe v. Human, 725 F. Supp. 1503, 1507 (W.D. Ark. 1989), *cert. denied*, 111 S. Ct. 1315 (1991).

[30] Healy v. James, 408 U.S. 169, 197 (1972).

[31] Bender v. Williamsport Area School Dist., 741 F.2d 538, 547 (3rd Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986).

[32] Pratz v. Louisiana Polytechnic Institute, 316 F. Supp. 872, 880 (1970), *aff'd*, 401 U.S. 1004 (1971) (students brought class action seeking to have college regulations requiring students to reside in on-campus facilities declared unconstitutional).

[33] *Id.* at 880, 883.

others argue that universities should at least reverse the existing trend toward faculty-student isolation and revive the practice of mentoring. Personal communication of values between the faculty and students is as essential to the educational process as communication among students.

The Professor as Mentor

Mentor was the wise advisor to Odysseus and teacher of his son, Telemachus. Mentor accompanied Telemachus on long journeys, teaching him more than formal subjects and endeavoring to make him a complete adult by teaching him how to live. If present-day mentors followed the example of their namesake, they too would be involved in every aspect of the student's life. Boyer writes, "[T]here remains a vision of the undergraduate college as a place where teachers care about their students . . . ."[34] He continues

> [t]he American college is, we believe, ready for renewal, and there is an urgency to the task. The nation's colleges have been successful in responding to diversity and in meeting the needs of individual students. They have been much less attentive to the larger, more transcendent issues that give meaning to existence and help students put their own lives in perspective.[35]

Typical of the extreme criticism that professors have received from those decrying the present state of higher education is that of C. J. Sykes in his book, *ProfScam: Professor and the Demise of Higher Education.*[36]

> In the midst of this wasteland [university] stands the professor. Almost single-handedly, the professors - working steadily and systematically - have destroyed the university as a center of learning and have desolated higher education, which no longer is higher or much of an education.[37]

On the positive side, yet illustrating the paucity of professors who care, is the following statement of a Memphis State University student on his course evaluation:

> I felt that he [the professor] was a breath of fresh air. He cares about his students and whether or not they learn the material. He is a very effective teacher - an *exception* these days! [emphasis added]

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[34] Boyer, *supra* note 20 at 7.

[35] *Id.*

[36] C. J. Sykes, PROFSCAM: PROFESSOR AND THE DEMISE OF HIGHER EDUCATION (1988).

[37] *Id.* at 4.

As a department chairman, one of us [Helweg] has noticed that students quickly identify and appreciate professors who are concerned about them as individuals, especially when this concern is expressed outside of class and beyond the subject area.

The professor's historical role has been that of imparting values for the development of the whole person, not just the intellect. Thus, the heritage of *higher education*, the student's need for wholistic development along with the professor's role as mentor, strongly suggest that a professor has an obligation to disclose personal and religious biases.

Complicating the obligation of professors to be more than mere purveyors of knowledge is the position of many Christian professors that they should avoid including any religious content in their courses, even courses linked to religious themes. This position often results from the lack of knowledge of biblical imperatives mandating disclosure, and the misapplication of legal limitations on indoctrinating religious views in elementary and secondary schools to professors at state institutions of higher education.

CONSTITUTIONAL LIMITATIONS ON DISCLOSURE BY PROFESSORS

Free Speech Activity Within the Classroom

The heritage of the teaching profession in higher education and the needs of today's students establish a mandate for disclosure of philosophical and theological bias by professors. However, the professor's interest in exercising the First Amendment right of expression in disclosing biases must be balanced with the State's need and interest in efficiency and its obligation to adhere to Constitutional constraints on religious activity. Establishing a balance between these interests requires an assessment of the facts and circumstances surrounding the teacher's conduct, such as the wearing of religious or political symbols, the making of religious or political statements, or the assigning or teaching of certain ideas, materials, or books. This essay establishes that conduct by teachers should first satisfy the rationale enunciated in *James v. Board of Education.*[38] If the teacher's conduct does not result in a material interference with the operation of the class, it must then be tested under the Establishment Clause.

Factors such as the age and educational level of the students,[39] the nature and purpose of the class,[40] the content of the statement, expression, or materi-

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[38] 461 F.2d 566 (2d Cir. 1972), *cert. denied,* 409 U.S. 1042 (1972), *reh'g denied,* 410 U.S. 947 (1973).

[39] *Id.* at 573.

[40] Goldwasser v. Brown, 417 F.2d 1169 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 922 (1970) (civilian

al,[41] and the manner of expression - whether to indoctrinate or objectively communicate[42] - must be considered to determine whether the teacher's conduct or expression resulted in a material or substantial interference with the requirements of appropriate discipline in the operation of the school. These factors must be considered by teachers when they consider wearing religious symbols or including religious reading material in course curricula. The central question is whether the intended expression will materially disrupt class work, invade the rights of others, or cause substantial disorder given the students' age, educational level, and nature of the course.

Several general guidelines have been developed by courts to assess the equipose between the interests of the State and the teacher. For elementary and secondary school children, the First Amendment does *not* protect expressions by the teacher that indoctrinate the teacher's personal religious ideas or opinion.[43] Indoctrination is the attempt to persuade others that the espoused values and only the espoused values should be adopted.[44] "When a teacher is only content if he persuades his students that his values and only his values ought to be their values then it is not unreasonable to expect the state to protect impressionable *children* from such dogmatism."[45] Thus, the First Amendment rights of a teacher who is discharged for indoctrinating her religious beliefs in an elementary or secondary class are not abridged or violated by the discharge. The First Amendment does not protect the teacher's expression in such a case. The indoctrination of religious ideas or values by teachers in elementary and secondary schools is unprotected.[46]

However, the First Amendment is interpreted with greater flexibility in the context of higher education.[47] College students are deemed less impressionable and less susceptible to religious or political indoctrination than younger

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employed by the Air Force to teach a "quick training in basic English" to foreign military officers from diverse cultures in the United States at the invitation of the government).

[41] Parducci v. Rutland, 316 F.Supp. 352 (M.D. Ala. 1970) (teacher assigns short story containing several vulgar terms and a reference to an involuntary sexual act to high school juniors).

[42] J. Whitehead, THE FREEDOM OF RELIGIOUS EXPRESSION IN PUBLIC UNIVERSITIES AND HIGH SCHOOLS 22 (2d ed. 1985) (discussing School District of Abington Township v. Schempp, 374 U.S. 203, 225 (1963)).

[43] *James*, 461 F.2d at 573 (eleventh grade teacher wore black armband as religious and political expression of his antiwar beliefs).

[44] *Id. See also* J. Whitehead, THE FREEDOM OF RELIGIOUS EXPRESSION IN PUBLIC UNIVERSITIES AND HIGH SCHOOLS 46 (2d ed. 1985).

[45] *James*, 461 F.2d at 573 (emphasis added).

[46] *Id.*

[47] Kritchevsky, *Graduation and the Establishment Clause*, Fall 1988 Memphis State Lawyer (Alumni Magazine) at 6; *see, e.g.*, Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981).

students.[48] Undergraduates and professional students are presumed to possess the intellectual, rational, and experimental maturity to choose between competing value systems. Furthermore, exposure to competing value systems is deemed essential for continued self-government, self-fulfillment, and the acquisition of truth.[49]

Although indoctrination is not as great a concern for teachers in higher education, material presented and statements made in class should be relevant.[50] Thus, the Air Force did not violate First Amendment rights when it discharged a civilian employed to teach a class in basic English to foreign military officers.[51] The civilian teacher made statements of personal opinion on the Vietnam war protests and the prevalence of discrimination against Jews in the United States, including discrimination by his employer.[52] The District of Columbia Court of Appeals found little relevancy between the statements and the class objectives of teaching conversational English and upheld the discharge.[53]

The Fifth Circuit's opinion in *Pred v. Board of Public Instruction of Dade County, Fla.*[54] provides some insight on the degree of correlation needed between the expression or material and class objectives. In *Pred*, a Junior College teacher encouraged student participation in the local teachers association's demand for greater campus freedoms during a literature class.[55] The court rejected the Junior College's argument that statements by the teacher were not relevant to the course and therefore should not be accorded First Amendment protection.[56] Relevancy, the court stated, was not necessarily limited to the confines of "the technicalities of a particular subject or academic discipline."[57] The court viewed a discussion of freedom an appropriate one for a literature class.[58] Furthermore, the court perceived that restricting teachers to the technicalities of the subject matter would adversely affect the teacher-student

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[48] Tilton v. Richardson, 403 U.S. 672, 685-86 (1971), *reh'g denied*, 404 U.S. 874 (1971) (plurality opinion); *Widmar*, 454 U.S. at 274 n. 14; Board of Educ. of Westside Community Schools v. Mergens, 110 S. Ct. 2356, 2363-64 (1990).

[49] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting); see generally, Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy." Value Training in the Public Schools*, 1987 U. OF ILL. L. REV. 15, 20-25.

[50] Goldwasser v. Brown, 417 F.2d 1169 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970); Pred v. Board of Public Instruction, 415 F.2d 851, 857 n.17 (5th Cir. 1969).

[51] *Goldwasser*, 417 F.2d at 1177.

[52] *Id.* at 1171.

[53] *Id.* at 1177.

[54] 415 F.2d 851 (5th Cir. 1969).

[55] *Id.* at 853.

[56] *Id.* at 857 n.17.

[57] *Id.*

[58] *Id.*

relationship and the "teacher's role in character building."[59] If the goal of higher education is to expose the individual to a "market basket of ideas" in order to guarantee a form of self-government responsive to the autonomous individual, relevancy must not be limited to the technicalities of the subject matter, but should be broadly interpreted to implement the goal of educating the whole person. Again, the test applied is whether the conduct by the teacher will materially disrupt class work, or invade the rights of others, or create substantial disorder.

Finally, the content of the expression is a factor to be considered.[60] Appellate courts addressing the issue of whether statements made within the classroom should be accorded First Amendment protection rely on case authority addressing the content of statements made outside of the classroom.[61] Statements that are (1) false and knowingly or recklessly made or false although carelessly made on confidential subjects that relate to the day to day operation of the school; or (2) directed towards those with whom the teacher has daily contact in performing his or her professional duties and that adversely affect the harmony, personal loyalty, or confidence needed in a working relationship are *not* protected.[62] Speech that is disruptive, aimed at disrupting or likely to disrupt "the proper working relationship" between students and the administrator,[63] or the teacher and the administration[64] or the teacher and the students[65] is not within the scope of protected expression. Hence, a biology professor's statement criticizing the administration and other teachers was held unprotected.[66]

Specific Forms of Expressions

The foregoing general principles were applied by courts seeking to determine whether the discharge of a teacher or a failure to renew a teacher's contract, motivated by some expression by the teacher, constituted a violation of the teacher's First Amendment rights. From these cases, certain conclusions may be reached as to the kind of conduct that is entitled to First Amendment protection

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[59] "With its inexorable logic and predictability there may even be a great moral lesson in 2 x 2 equal 4." *Id. See* text *supra*, at note 21.

[60] *See* Pickering v. Board of Educ., 391 U.S. 563, 568-574 (1968).

[61] Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973); *Pred*, 415 F.2d at 858; Katz, *The First Amendment's Protection of Expressive Activity in the University Class: A Constitutional Myth*, 16 U.C. DAVIS L. REV. 857, 909-912 (1983).

[62] *Pickering*, 391 U.S. at 568-574.

[63] Birdwell v. Hazelwood School Dist., 352 F. Supp. 613, 621 (E.D. Mo. 1972), *aff'd*, 491 F.2d 490 (8th Cir. 1974) (teacher in algebra class stated that high school of 4000 should rid the campus of military personnel).

[64] *Birdwell*, 352 F. Supp. at 621 (algebra teacher confronts military visitor).

[65] *See, e.g.*, Resetar v. State Bd. of Educ., 284 Md. 537, 545, 399 A.2d 225, 232 (1979), *cert. denied*, 444 U.S. 838 (1979)(teacher calls students "jungle bunnies").

[66] Clark v. Holmes, 474 F.2d 928, 931 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973).

Akron Law Review, Vol. 25 [1992], Iss. 2, Art. 1

and should *not* be the basis for denying promotion or tenure, or justifying discharge of a university or college professor at a State or public institution.

1. Symbolic Expression

Teachers at the university level may wear religious insignia such as pins, crosses, or doves.[67] However, buttons stating Christian slogans or ideas including "Jesus is Lord" pins are no longer pure symbolic expressions. These must be treated as statements within the classroom.[68]

2. Teaching Material With Religious Content

Within departmental guidelines and course descriptions,[69] teachers in higher education are free to include any relevant material in the presentation of the subject matter. Thus, a biologist or geologist is free to include a biblical perspective on the earth's formation or the beginning of life; a philosophy teacher may distinguish Aristotle's view and Paul's view on free will or predestination. A literature class discussion on similes and metaphors might include parables from the gospel of Matthew as well as excerpts from Shakespeare's Hamlet. A course in history or literature may include the Bible as a required text. The religious material must be covered objectively "as part of a secular program"[70] with the goal of communicating information and not indoctrinating beliefs. However, given the age and educational level of the students, a presentation of the relevant biblical material coupled with the teacher's espousal or identification with the view and the acknowledgment of contrary views should be accorded First Amendment protection.

Additionally, a state statute, departmental guideline, or course description that directs a professor at a public institution of higher education[71] to omit references to relevant biblical views in course materials may abridge First Amendment

[67] James v. Board of Educ., 461 F.2d 566, 569 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972), *reh'g denied*, 410 U.S. 947 (1973).

[68] *See infra* text accompanying notes 108-121.

[69] The state or its designee may establish school curriculum. Epperson v. Arkansas, 393 U.S. 97, 104 (1968)(state has the right to establish curriculum but such authority may not be used to reflect the religious beliefs of the majority); Clark v. Holmes, 474 F.2d 928, 930 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973) (teacher failed to establish constitutional right to override judgment of superiors as to proper content of health course); Mercer v. Michigan State Board of Education, 379 F. Supp. 580, 585 (E.D. Mich.), *aff'd*, 419 U.S. 1081 (1974)(teacher brought a declaratory judgment action against state board of education asserting that his First Amendment rights were violated by state statute that prohibited the teaching of birth control in a sex and health education course in the Michigan public schools; held: the state or its designee, local school boards and communities, may establish school curriculum).

[70] Abington School District v. Schempp, 374 U.S. 203, 225 (1963); M. Yudof, WHEN GOVERNMENT SPEAKS, 214 n.5 (1983).

[71] Subject to contractual limitations, professors at private institutions may say whatever they please.

http://ideaexchange.uakron.edu/akronlawreview/vol25/iss2/1

rights.[72] The State may neither establish a religion including a humanistic perspective nor may it provide a persuasive advantage to one particular doctrine.[73] Just as the State may not *require* the teaching of creationism or creation science in elementary and secondary school because of the involuntary attendance of impressionable children,[74] the State may not require teachers to omit relevant religious material deemed appropriate by the teacher in the exercise of his or her professional judgment in classes of higher education.[75] Older students who voluntarily enroll in university and college courses are less likely to be subject to the kind of undue influence that results when role modelling authority figures engage in such conduct in elementary and secondary classes.[76] Therefore, other constitutional concerns such as the free exchange of ideas, the professor's right to speak on topics of religious significance and the right to teach, and the students right to learn must be given greater consideration.

3. Statements in Class

Between symbolic expression and teaching materials with religious content is the middle ground of making statements in class that either identify the teacher with a particular religious conviction or reflect a value judgment based on personal theological briefs.

a. *Statements Identifying the Professor With a Particular Religious Conviction.*

Are the statements: "I am a born-again Christian and my commitment to Jesus Christ, whom I believe is the promised Messiah, colors and conditions my perception of material issues", or the exclamation, "Praise the Lord!", protected speech?

First, both of these expressions contain protected subject matter, religious beliefs or religious terms.[77] Unlike profane language,[78] these expressions relate to the constitutionally protected right to hold and express religious beliefs, a

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[72] *Cf.* Epperson v. Arkansas, 393 U.S. 97, 105-106 (1968) (state statute prohibiting the teaching of any theory of man's creation contrary to Genesis in public elementary and secondary schools was the establishment of religion).

[73] Given the secular trend of modern society and its growing hostility toward religion, care must be taken to avoid the establishment of a "religion of secularism". *See Abington*, 374 U.S. at 225.

[74] Edwards v. Aquillard, 482 U.S. 578, 584 (1987).

[75] Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981).

[76] *Id.* at 267 n.5.

[77] Connick v. Myers, 461 U.S. 138, 147-148 (1983) (the content, form, and context of a statement must be considered).

[78] *See, e.g.*, Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986) (professor's use of profanity constitutionally unprotected).

matter of public and social concern and often a subject of public debate. Second, the first statement carries educational significance in that it is relevant to the teacher-student relationship. This statement honestly communicates the teacher's frame of reference when judging performance and critiquing course material. The second expression is an exclamation to reward student performance. As any exclamation of praise, such as "Wow!" or "Right on," the statement "Praise the Lord" encourages student performance and reflects the teacher's personal values on the source of knowledge and wisdom without indoctrination. Third, neither statement is an invasion of the student's right to hold beliefs contrary to the speaker's view. Finally, these statements are not critical of administrative or faculty personnel or policy; they are not prejudicial statements directed toward persons with whom the teacher has daily contact in performing his or her duties. Therefore, such statements are protected speech.[79] This conduct, when exercised, cannot serve as the basis for denial of tenure or promotion, or as a basis for discharge. Additionally, this same conduct may not be the *sole* basis for denying employment to a prospective professor with a reputation of engaging in conduct that results in disclosure of personal or theological biases.[80]

b. *Statements Reflecting Values based on Personal or Theological Convictions.*

Beyond statements such as "Praise the Lord," which identify the professor with a particular value orientation are statements of personal views and perspectives that are a byproduct of the professor's theological bias. In courses on constitutional law, criminal law, or family law, issues such as abortion, sodomy, obscenity, artificial insemination, and the death penalty necessitate a discussion of public policy and implicate personal and theological views. Is a Catholic professor's espousal of his pro-life view on abortion based on a theological bias protected? Yes![81]

The First Amendment protects and safeguards academic freedom on campuses of public colleges and universities.[82] The teachers' freedom to teach - to select methods, materials, and share ideas - is essential for the continuation of

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[79] Cooper v. Ross, 472 F. Supp. 802, 810 (E.D. Ark. 1979) (instructor's announcement that he was a communist is protected speech).

[80] *See* Keyishian v. Board of Regents, 383 U.S. 589, 608-09 (1967).

[81] *See, e.g.,* Cooper v. Ross, 472 F. Supp. 802 (E.D. Ark. 1979) (professor stated his personal and philosophical views based on Marxism). *But see*, Bishop v. Aronov, 732 F. Supp. 1562 (N.D. Ala. 1990) (christian professor referred to his religious belief on the creative force behind the human physiology), *rev'd*, 926 F.2d 1066, 1076 (11th Cir. 1991), *cert denied*, Bishop v. Delchamps, 60 U.S.L.W. 3154 (U.S. June 29, 1992) No. 91-286 (professor may only make relevant disclosure of religious views if asked by a student).

[82] *Keyishian*, 385 U.S. at 603; Sweezy v. New Hampshire, 354 U.S. 234, 249-250 (1957).

an environment that produces interactive discussion.[83] The professor is the catalyst. He or she must have the freedom to disclose relevant philosophical and personal perspectives, even those based on theological biases, if he or she so desires. The mission of the university is to be a marketplace of ideas, the breeding ground for novel approaches to age-old conditions.[84] To censure those professors whose views are based on a theological bias, especially given the prevailing social disapproval of religion, not only has the effect of communicating a disapproval of religious values or thought, but also results in a pall of orthodoxy on the university classroom.[85] Here, however, the orthodox is the irreligious.

As previously demonstrated, there are limitations on disclosure of personal views. First, the disclosure must be relevant. The disclosure must relate to the course content. In the context of legal education this includes relevance to professional ethics as well as establishing and maintaining the teacher/student relationship. Discussion of personal views by faculty are "the norm used to establish rapport between faculty and students."[86] Second, the class must not be materially disrupted. Disruption includes devoting such time to informing students of personal or theological views that instruction of the subject matter is impaired or proselytizing of students results.[87] Within these limitations, disclosure of personal views or values based on theological bias is protected speech. These limitations must also be applied to the wearing of buttons with religious slogans within the classroom. Unless relevancy can be established between the words or phrases on the buttons and either the course content, professional ethics, or the teacher/student relationship, buttons with slogans should not be worn.[88]

c. *Free Speech Activities Within the Classroom and the Establishment Clause.*[89]

In the public educational system, the exercise of free speech by a professor

[83] *See generally Developments in the Law -- Academic Freedom*, 81 HARV. L. REV. 1045 (1968).

[84] Healy v. James, 408 U.S. 169, 189 (1972); *Keyishian*, 385 U.S. at 603; Bender v. Williamsport Area School Dist., 741 F.2d 538, 547 (3rd Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986).

[85] If they [teachers] are free to interpose their own judgments, values, and comments that are not, cannot, or should not be closely monitored, we have introduced a sort of pluralism into the school environment.

M. Yudof, WHEN GOVERNMENT SPEAKS, at 216 (1983).

[86] *Bishop*, 732 F. Supp. at 1564.

[87] *See, e.g., Id.* at 1566; Cooper v. Ross, 472 F. Supp. 802, 811 n.5 (E.D. Ark. 1979).

[88] Monitoring and controlling this aspect of a professor's speech may result in excessive entanglement with religion. *See infra* text accompanying notes 136-140.

[89] U.S. CONST. amend 1.

may be subject to the limitations of the Establishment Clause.[90] The public university or college may seek to justify restrictions on free speech activity based on its constitutional responsibility to avoid the establishment of religion. Because the professor is the university's employee, the university may assert that the professor's free speech will be deemed state action, or action by the university in the eyes of its students or the public. Additionally, a student might initiate an action to enjoin a professor's free speech activity on the basis of the Establishment Clause.

To determine whether certain speech violates the Establishment Clause, a factual analysis must be made with emphasis on the circumstances of the individual case. In the absence of proof of a violation of the Establishment Clause, the university lacks the requisite compelling state interest to justify abridging the professor's free speech interest.[91]

State Action

The First Amendment prohibition against the establishment of religion is extended to the states through the Fourteenth Amendment.[92] However, neither the First Amendment nor the Fourteenth Amendment is a limitation on private action. Some nexus must exist between the state and the challenged action by the individual or entity.[93]

This essay identifies three classes of expression: (1) the individual professor's wearing of religious insignia - symbolic expression; (2) the professor's selecting of relevant course material from religious books or writings; and (3) the professor's disclosing of relevant personal or theological views to provide an alternative view on course material or issues, to reveal fundamental value orientation essential for an honest and forthright interpersonal relationship, and to encourage the development of student character. None of these activities entail officially organized or mandated conduct. Neither a statute nor university regulation dictates the activity.[94] Unlike the officially organized prayer or bible

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[90] *See* Widmar v. Vincent, 454 U.S. 263, 270-275 (1981); Bender v. Williamsport Area School Dist., 741 F.2d 538, 558 (1984). *See generally* Mincberg, *The Supreme Court and the First Amendment: the 1989-90 Term*, 8 N.Y.L. SCH. J. HUM. RTS. 1, 10 (1990).

[91] *See Bender*, 741 F.2d at 550; Bishop v. Aronov, 732 F. Supp. 1562, 1566-68 (N.D. Ala. 1990), *rev'd*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, Bishop v. Delchamps, 60 U.S.L.W. 3154 (U.S. June 29, 1992) No. 91-286.

[92] *See* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

[93] *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-351 (1974) (action by regulated utility challenged as "state action").

[94] *Cf.* Treen v. Karen B., 653 F.2d 897 (1981), *aff'd*, 455 U.S. 913 (1982); May v. Cooperman, 572 F. Supp. 1561 (D.N.J. 1983), *aff'd in part and dismissed in part*, 780 F.2d 240 (3rd Cir. 1985).

reading disapproved in *Engel v. Vitale*[95] and *Abington School District v. Schempp*,[96] the professor's disclosure of personal commitment or values relevant to course content or the student/professor relationship is not mandated by statute or university regulation. No nexus exists between the professor's expression and activity of the university or state. Of concern, however, is the establishment of religion by a "state actor" - a state employee engaging in purely personal conduct while fulfilling assigned tasks and duties.

The Federal District Court of Michigan confronted this issue in *Breen v. Runkel*[97] and held that the unauthorized personal activities of an elementary school teacher in praying and reading the Bible within an elementary school classroom involved state action and violated the Establishment Clause.[98] Because teachers were selected, suspended, and removed by the school board - creature of and controlled by state law - actions by teachers, in their capacity as classroom teachers, were those of "state actors."[99] The *Breen* court resolved the conflict between the assert free speech right of the teacher to pray and read the bible in the elementary classroom and the prohibitions of the Establishment Clause by relying on the Supreme Court precedent of *Abington Township School District v. Schempp*.[100] Any activity deemed impermissible for the state as an entity, such as statutorily imposed prayer and bible reading, was, the court held, likewise impermissible when engaged in by a state actor.[101] Unfortunately, in reaching its conclusion, the *Breen* court failed to determine whether the teachers' conduct -- the purported exercise of free speech -- satisfied a balancing test similar to that employed by the Second Circuit in *James v. Board of Education*.[102] This is the first hurdle that free speech activity within the public education system should be required to clear before being accorded First Amendment protection. The Bible readings addressed by the court in *Breen* were neither relevant to the subjects taught nor objectively presented.[103] Rather, the hypothetical facts considered by the court indicated an intent to indoctrinate young impressionable school age children.[104] Consequently, the teachers'

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[95] 370 U.S. 421 (1962).

[96] 374 U.S. 203 (1963).

[97] 614 F. Supp. 355, 358 (W.D. Mich 1985).

[98] *Id.* at 359-60.

[99] *Id.* at 358.

[100] 347 U.S. 203, 233 (1963).

[101] *Breen*, 614 F. Supp., at 360.

[102] 461 F.2d 566 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972), *reh'g denied*, 410 U.S. 947 (1973).

[103] As a religious activity, prayer within the public classroom authorized by the state or engaged in by a state actor has been uniformly held to be unconstitutional. See Wallace v. Jaffree, 472 U.S. 38, 41 (1985); Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963); Engle v. Vitale, 370 U.S. 421, 436 (1962).

[104] *See generally Engle*, 370 U.S. 421.

activities were unprotected speech.[105] The Establishment Clause analysis and the attempt to harmonize the tension between the Free Speech Clause and Establishment clause were, thus, premature.

Of concern here is the court's determination that the personal activities of the teachers were, effectively, state action - action by a "state actor". Three considerations underlie the court's assessment of personal disclosure in the public educational system and the application of the "state actor" doctrine. First, there is the potential for preferential selection - school boards or other governmental authorities may only select those individuals who will represent or espouse a specific value or religious orientation. Second, with notice of the teacher's activity, the failure of governmental authority to restrict expressive activities that establish religion might result in a ratification of the conduct, constituting state action.[106] Finally, when functioning in their capacity as classroom teachers, teachers fulfill a "public function."[107]

The first concern, preferential selection, has less validity and is a more tenuous justification for finding a "state actor" in the university and college setting than in primary and secondary schools. The prevailing milieu on American university and college campuses is a diverse intellectual and ethnic culture. Selection of college and university professors is made with the intent to create and maintain this diverse intellectual, cultural, and ethnic environment. A university's goal in both its academic and athletic programs is to prepare its constituents to compete effectively with students from other respected institutions in the nation. The institution is motivated by these goals to adopt hiring policies that promote breadth in its faculty rather than duplication of specific views.

The second concern, ratification, also lacks validity as a basis for subjecting individual disclosure to scrutiny under the Establishment Clause. The principle of ratification was applied by the Eleventh Circuit in *Jaffree v. Wallace*[108] when it addressed unauthorized prayer and Bible reading by individual teachers in public school classrooms. The record before the court established that school board members were informed of the prayer activities occurring within the classroom and failed to take steps to discourage activities which, if authorized by

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[105] *See supra* text accompanying notes 75-128.

[106] *See, e.g.*, Jaffree v. Wallace, 705 F.2d 1526, 1533-34 (11th Cir. 1983), *aff'd mem.*, (state action issue), 466 U.S. 924 (1984), *aff'd* 472 U.S. 38 (1985).

[107] *See, e.g.*, Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Company, 419 U.S. 345 (1974); Janusaitis v. Middlebury Volunteer Fire Department, 607 F.2d 17 (2d Cir. 1979); Libin v. Town of Greenwich, 625 F. Supp. 393, 396 (D. Conn. 1985) (volunteer fire department a state actor because of its interrelation with municipal government).

[108] 705 F.2d 1526, 1533-34 (1983).

the school board or state, would be constitutionally impermissible.[109] Here, the court found the school board's inaction "ratified the teachers' conduct"[110] to prevent a mockery of the Establishment Clause. However, the application of ratification is doctrinally unsound in this instance. Ratification requires the actor, whose conduct is later adopted by affirmative conduct or inaction,[111] to purport to act for or on behalf of the ratifier while engaging in the subject conduct.[112] This essential element of ratification, purporting to act for another, is lacking when the teacher or professor engages in personal disclosure. Thus, ratification is an inappropriate rationale for subjecting individual conduct to scrutiny under the Establishment Clause.

Neither preferential selection or ratification justify application of the Establishment Clause to personal disclosure by professors on public university campuses. However, college professors fulfill a public function in their capacity as classroom teachers. Where the state delegates its responsibility, power, duty or its public function to a private individual or entity, the individual or entity, in the exercise of the delegated task or responsibility, is a "state actor". As a state actor, the individual's conduct is subject to scrutiny for possible violation of the prohibitions applicable through the Fourteenth Amendment.[113]

State authorized bodies, such as the boards of regents or university trustees, are created by statute or legislative charter to fulfill the state's constitutional or statutory duty to encourage education and provide a means of educating the populace.[114] Under governing rules and academic regulations promulgated by such bodies, professors are delegated the task of instructing the student populace and assessing which students satisfy standards set by governing authorities for course completion, graduation, and/or certification. While teaching within the classroom,[115] for the purposes of the Establishment Clause, a university

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[109] *Id.* at 1534.

[110] *Id.*

[111] RESTATEMENT (SECOND) AGENCY §§ 93, 94 (1933)[hereinafter *RESTATEMENT*].

[112] *Id.* at §§ 84 and 85. *See also RESTATEMENT* at § 85 comment a.

[113] Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157-165 (1978) (discussing the public function doctrine but holding creditor's exercise of rights granted by statute did not constitute state action); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974) (insufficient nexus between state and action of regulated utility); Libin v. Town of Greenwich, 625 F. Supp. 393, 395 (D. Conn. 1985) (action by volunteer fire company subject to the Establishment Clause where town assumed under state law the responsibility for fire protection and delegated its responsibility to volunteer fire company); Breen v. Runkel, 614 F. Supp. 355, 358 (W.D. Mich. 1985) (teachers hired by local school boards that are created and controlled by state law are state actors when acting in capacity of classroom teacher).

[114] *See, e.g.*, TENN. CONST. art XI, § 12 (1970). The Tennessee general assembly declared in the Baccalaureate Education Savings for Tennessee Act that state government had a responsibility to maintain institutions of higher education; and to foster higher education to provide well-educated citizens. TENN. CODE ANN. § 49-7-902 (1990).

[115] Any extension of the concept of state actor to the teacher after the conclusion of the instructional

professor is a "state actor," and his or her expression must satisfy the test set forth in *Lemon v. Kurtzman.*[116] If the expression fails to pass under the *Lemon* test, a true conflict exists between the Establishment Clause and the Freedom of Speech Clause. This tension, designed by the drafters to promote and maintain balance through compromise and accommodation, must then be resolved.[117]

In *Bishop v. Aronov*,[118] the University of Alabama raised the Establishment Clause as a defense to an action brought by a professor challenging the University's directive that he refrain from "'interject[ing] religious beliefs and/or preferences during instructional time . . . and . . . [to cease] optional classes where a 'Christian Perspective' of an academic topic is delivered.'"[119] Neither the District Court of Alabama nor the Eleventh Circuit addressed the issue of state action and, hence, the propriety of the defense. The District Court's failure to address the issue coupled with its testing of the professor's conduct under the Establishment Clause suggests that the court assumed the state action requirement had been met. The challenged conduct was held constitutional under the Establishment Clause by the District Court.[120] The Eleventh Circuit did not address the issue.

JAMES[121] AND THE ESTABLISHMENT CLAUSE

This essay identifies three classes of expressive conduct that satisfy the standard enunciated in *James* and that should be accorded constitutional protection under the First Amendment Free Speech Clause. Even though permissible under the Free Speech Clause, these classes of conduct must now be scrutinized under the Establishment Clause. The three-prong test enunciated by the Supreme Court in *Lemon v. Kurtzman*[122] must be applied to these classes of expressive activity

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period, outside of the classroom, or beyond officially assigned tasks and responsibilities for Establishment Clause purpose must be examined with great care to avoid undue encroachment on the individual's right of free speech and a reduction in the proper tension between the two relevant clauses.

[116] 403 U.S. 602 (1971), *reh'g denied*, 404 U.S. 876 (1971), *aff'd*, 411 U.S. 192 (1973).

[117] Although the Supreme Court has not addressed resolution of a true conflict, several lower courts have made pronouncements on the methodology to be employed. *See* Bender v. Williamsport Area School Dist., 741 F.2d at 558 (competing interests protected by each constitutional provision weighed in light of the factual setting to determine the value of the opportunity to exercise the free speech right). *But see* Libin v. Town of Greenwich, 625 F. Supp. 393, 395 (D. Conn. 1985) (dictum: "state actor . . . cannot assert its own First Amendment right to free expression as a defense to any establishment clause violation").

[118] 732 F. Supp. 1562 (1990), *rev'd*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, Bishop v. Delchamps, 60 U.S.L.W. 3154 (U.S. June 29, 1992) No. 91-286.

[119] Bishop, 926 F.2d at 1069.

[120] *Id.* at 1070.

[121] James v. Bd. of Education, 461 F.2d 566 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972), *reh'g denied*, 410 U.S. 947 (1973).

[122] 403 U.S. 602 (1971), *reh'g denied*, 404 U.S. 876 (1971), *aff'd* 411 U.S. 192 (1973).

to determine if any violate the Establishment Clause. Emphasis is placed on the factual context in which the religious activity - the individual professor's speech - occurs. The free speech activity does not run afoul of the Establishment Clause if: (1) the speech has a secular purpose; (2) its primary effect neither advances nor inhibits religion; and (3) the speech does not foster excessive governmental entanglement with religion.[123] After first identifying the peculiar factual setting in which the religious activity occurs, the professor's conduct must be tested under each of the three requirements.

Factual Setting

The classes of expression addressed in this essay occur within the classrooms of public institutions of higher education. These environments are recognized as forums designed to encourage the exchange and development of novel and often controversial values, views, and ideologies.[124] These classrooms are environs where ideas are exchanged as in a marketplace and where new theorems are conceived.[125] The mission of the university is to educate a populace to guarantee continuation of our peculiar form of democratic self-government. Course offerings, both required and elective, present a wide-array of political, economic, theological, and sociological teachings and theories, as well as a variety of professors from which the student may choose.

The recipients of the expressive activity are mature young adults, "semi-autonomous citizens"[126] who have voluntarily enrolled in the college or university program. In some geographical areas and some advanced programs, the proportion of older adults - veterans, second career students, and "empty-nesters"[127] - may belie the term "young". No impressionable school age child is

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[123] *Id.* at 612-13.

[124] The UCLA catalogue of graduate study describes graduate study as the "pursuit of new knowledge through research." The environment is described as one that "promotes the quality of original work and study." UCLA General Catalog 1989-90, at 48.

The University of Vermont states in its 1990-91 catalogue that its mission is accomplished "[t]hrough a widespread spirit of inquiry and investigative rigor . . . faculty, staff, and students participate in extending humankind's knowledge of self and environment."

[125] Healy v. James, 408 U.S. 169, 189 (1972); *Keyishian*, 385 U.S. at 603; Bender v. Williamsport Area School Dist., 741 F.2d 538 (3rd Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986). The UCLA catalog invites potential students to its campus for the following experience:

> At UCLA you are taught by the people making the discoveries, so you learn the latest findings on *every* front. You may exchange ideas with faculty members who are authorities in their fields, and even as undergraduates you are encouraged to participate in research to experience firsthand the discovery of new knowledge.

UCLA General Catalog 1989-90, at 9 (emphasis added).

[126] Doe v. Human, 725 F. Supp. 1503, 1507 (W.D. Ark 1989), *cert. denied*, 111 S. Ct. 1315 (1991).

[127] Many older women students who have forgone higher education and career opportunities for the sake

involved. Rather, all undergraduate and professional students are presumed to possess intellectual and rational maturity. The educational goal is no longer to inculcate basic values but to challenge and test those basic values instilled in primary and secondary school at a time when the individual student has the sufficient maturity to choose between competing systems.

1. Secular Purpose.[128]

The three classes of expressive activity - wearing religious pins, insignia with slogans, selecting relevant material from religious books, and making statements that reveal theological bias relevant to substantive issues or the interpersonal relationship between professor and student - must have a secular purpose to satisfy the first prong of the *Lemon* test. Permitting professors to be identified as having a religious bias by wearing a cross,[129] using material from religious resources, and making statements based on theological bias, is consistent with the university's secular purpose of providing students with a broad exposure to new ideas and competing value systems. Students are given yet another insight on competing policy concerns on significant issues such as the death penalty, individual privacy, or origin of man.[130] The poetic style of Psalms and the sharp and concise similes of Proverbs, like Shakespeare, Milton, and Keats, provide rich material for literature classes.[131] Old Testament records of the origin of Middle Eastern political and cultural conflict provide a historical framework for discussing current problems and potential solutions.

On the typical university or college campus, the voices of "state actors" are numerous and varied. State actors speak from a Marxist[132] or third world perspective. The expression of the atheist state actor blends with that of the politically and theologically neutral, or the expression of African or Asian Americans. The addition of religious expression to this cacophony on the university campus is consistent not only with the university's mission, but with democratic values of tolerance and openmindedness. The addition of the religious expression avoids the potential of indoctrination in a single ideological point of

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of raising families are now entering student ranks of both undergraduate and professional programs.

[128] For a criticism of the secular purpose test see Culbertson, *Religion in the Political Process: A Critique of Lemon's Purpose Test*, 1990 U. ILL. L. REV. 915.

[129] Jewish professors may wear Stars of David or yatmulkes, skull caps worn by Jewish men.

[130] *See, e.g.*, Bishop v. Aronov, 732 F. Supp. 1562 (N.D. Ala. 1990) (christian professor referred to his religious belief on the creative force behind the human physiology), *rev'd* 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, Bishop v. Delchamps, ___ S. Ct. ___, 60 U.S.L.W. 3154 (U.S. June 29, 1992).

[131] *See* Roberts v. Madigan, 702 F. Supp. 1505 (D. Colo. 1989) (distinguishing permissible uses of biblical material from impermissible religious works in elementary school setting), *aff'd*, 921 F.2d 1047 (10th Cir. 1990).

[132] Cooper v. Ross, 472 F. Supp. 802 (E.D. Ark. 1979) (professor stated his personal and philosophical views based on Marxism).

view, the irreligious, and negates the potential to create an atmosphere hostile to religion. Thus, the expression has a secular purpose.

2. Primary Effect

The inquiry here is whether the university conveys to an objective observer in the student's position an approval of religion.[133] An objective observer enrolled in an undergraduate English literature class, a law school constitutional law course, a graduate biology class, or any of the many courses offered on modern American campuses is unlikely to perceive university approval of religion from the expressive conduct by the individual professor. The age and maturity of the students coupled with the cultural, philosophical, and ethnic mix of faculty is contraindicative of university approval or endorsement of religion. In *Widmar v. Vincent*,[134] the presence of a variety of student organizations on the university campus results in a benefit to a broad spectrum of groups, both religious and non-religious. The benefit to nonreligious groups is an index of the secular effect. In addition, a broad spectrum of doctrines, opinions, and ideologies benefit from speech by individual professors. Personal speech from professor's reinforces both the secular effect and the absence of university approval of religion. Moreover, just as college and university students are unlikely to attribute university endorsement of Marxism, homosexuality, non-violent civil disobedience, or feminism from statements of bias on these topics by professors within the classroom, so also are the students unlikely to attribute university approval of religion from statements by professors.

However, a restriction or ban on religious speech will convey a message of disapproval of religion, especially given the educational goals of universities. Hence, the primary effect of the religious expression by individual professors has a secular effect and does not result in any endorsement of religion. Permitting relevant religious speech serves a secular effect of preventing discrimination *against* religion. Any resulting benefit to religion from the permitted speech is incidental, as it is with other ideologies. The Establishment Clause does not prohibit incidental benefits resulting from speech with a secular purpose.[135]

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[133] Board of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226, (1990)(plurality opinion); Widmar v. Vincent, 454 U.S. 263 (1981).

[134] 454 U.S. at 274-75.

[135] Id. at 273 (granting all student groups equal access to university facilities makes the practice of religion more accessible and results in an incidental benefit to religion); McGowan v. Maryland, 366 U.S. 420, 422 (1961) (statute that prohibits sale on Sunday of non-exempt merchandise provides a uniform day of rest; the fact that the day has particular significance for a majority of religious sects does not violate the Establishment Clause).

3. Excessive Entanglements

The third and final test in determining whether the speech is prohibited, is a determination of whether there is excessive entanglement between the university and the religious expression.[136] The issue is a procedural question: whether "'continuing state surveillance will inevitably be required to ensure that [the] restrictions [of] . . . the First Amendment [are] respected.'"[137]

The excessive entanglements prong of the *Lemon* test, in this context, is violated if state or university officials must identify and distinguish religious statements from secular ones and, thereby, engage in continued surveillance of *faculty* speech to approve or interpret their statements. Here, prohibiting rather than permitting personal disclosure results in excessive entanglements.[138]

Statements in the classroom which are protected as Free Speech, relevant religious speech, do not involve excessive entanglements with religion. A greater risk of excessive entanglement is likely if all relevant religious speech is prohibited rather than permitted.[139] Continuous monitoring and interpreting of all faculty speech - speech by both the religious and the atheist - will be necessary to identify words or materials that have significance for religious purposes and that are otherwise secular and permissible. A non-discrimination policy avoids rather than creates impermissible excessive entanglements.[140]

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[136] This third prong has been criticized by several of the Justices. *See, e.g.*, Aquilar v. Felton, 473 U.S. 402, 420 (1985) (Rehnquist, J., dissenting); *Aquilar*, 473 U.S. at 430 (O'Connor, J., dissenting); Wallace v. Jaffree, 472 U.S. at 109-110 (Rehnquist, J., dissenting); Roemer v. Board of Public Works, 426 U.S. 736, 755, 768-69 (1976) (White, J., concurring).

[137] Bender v. Williamsport Area School Dist., 741 F.2d 538, 555 (3rd Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986) (quoting Lemon v. Kurtzman, 403 U.S. 602, 619 (1971), *reh'g denied*, 404 U.S. 876 (1971), *aff'd*, 411 U.S. 192 (1973)).

[138] In *Widmar v. Vincent*, the Supreme Court suggested that university enforcement of its policy to exclude religious worship or speech by denying religious student organizations access to university facilities and participation in the open forum created on campus results in excessive entanglements. 454 U.S. 263, 272 n.11 (1981).

[139] *See Widmar*, 454 U.S. at 272 n.11; *Bishop*, 732 F. Supp. at 1507.

[140] In Bishop v. Aronov, 732 F. Supp. 1562 (N.D. Ala. 1990), plaintiff, an assistant professor, made occasional remarks in class reflecting his personal religious beliefs concerning the subjects that he taught. He also informed students who questioned him concerning various academic stresses that his religious beliefs were more important than the sources of such stresses. He further shared that his beliefs enabled him to cope with academic stresses. The professor also conducted an after-class discussion of his course material from a religious perspective. Students were not compelled to attend the discussions, and the professor used an anonymous grading system for examinations. These activities, conducted on a state-supported university campus, were held by the District Court to be protected Free Speech. *Id.* at 1566-67. The District Court further determined that the professor's comments had a secular purpose and that their primary effect was neither to advance nor to inhibit religion. *Id.* at 1567. Hence, the conduct met the first two requisites of the *Lemon* test. Having made these determinations, the court found without discussion that plaintiff's activities would not "lead to excessive government entanglement with religion." *Id.* at 1568.
The Eleventh Circuit reversed the District Court. See introductory note for a brief discussion of

CONCLUSION

If it is determined that the professor's individual expressive conduct under the *Lemon* test has a secular purpose and effect and does not result in excessive entanglement, no Establishment Clause violation results. Therefore, no true conflict exists between Freedom of Speech and the Establishment Clause. Of significance here is the initial determination of the nature of the speech. Relevant, objective religious speech should be accorded protection on the university campus. Freedom of Speech is not an absolute right but is subject to limitations. If religious speech within the classroom exceeds the boundaries identified, it should not be afforded constitutional protection.

Steven N. Cahn argues that instead of shielding students from error, they should be subjected to all views.[141] He quotes John Stuart Mill, "He who knows only his own side of the case, knows little of that."[142] If professors do *not* offer their beliefs, theological as well as philosophical, for students to consider, students will be deprived of perhaps the most important view of all. Students who are not exposed to all major world views may select and follow one view based on incomplete information.

Legally, in the university setting a professor's theological statements relevant to course material or those statements designed to acquaint students with his or her approach to issues, life, and values are protected under the First Amendment, and this protection is essential to prevent the state's indoctrination of its ideas. It appears that many in academia have misunderstood the doctrine of "separation of church and state." Such a doctrine is not meant to eliminate religious issues from the classroom, but to prevent indoctrination and the establishment of a specific theological bias.

There are limits on espousing political, philosophical, or theological positions in classes where the positions espoused are irrelevant. Professors should be conscious of these limitations. The above discussion demonstrates the need for more than mere data transfer in institutions of higher learning. Professors in all disciplines should assume responsibility for satisfying this need.

The counter-balance, however, is the ethical obligation of professors not to exploit their position of power to indoctrinate a captive audience with their biases, whether political, religious, or social. Nevertheless, it would seem that professors

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the court's opinion. For a criticism of the court's analysis see Note, *Constitutional Law -- Freedom of Religious Speech -- When Freedom of Speech in the Classroom Conflicts with the Establishment Clause*, 14 UALR L.J. 83 (1991).

[141] S. CAHN, SAINTS AND SCAMPS: ETHICS IN ACADEMIA (1986).

[142] *Id.* at 6.

who submit their world views for students' consideration are more honest and demonstrate greater concern for the whole student than professors who do not. Professors owe at least this minimum involvement to their students. Professors who are willing to go beyond this minimum should provide opportunities to interact in an appropriate social environment outside of class.

Good judgment must be exercised to determine how much or how often professors reveal their biases in class. Certainly, professors are not legally obligated to conduct extracurricular discussions. However, their ethical obligation is another matter. Professors who have an articulated philosophy of life or religious beliefs to which they are committed should be motivated to bridge the gap decried by *Boyer*.