On the Boundaries of Academic Freedom

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Introduction

Universities are supposed to be places established for, among other things, intellectual inquiry. This inquiry can consist of professors’ (and students’) research projects as well as inquiry tied to classroom discussion and other activities. However, while the value of having such knowledge pursuing institutions is widely acknowledged and mostly unchallenged, it has never been the case that people at institutions of higher education have been completely unfettered in their pursuit of such knowledge. Indeed, oftentimes academics have been subject to quite serious sanctions for their views or writings. Such opposition has occurred in a variety of disciplines. Initially, universities were church sponsored, so professors were most likely to be sanctioned for heresy, or things of that nature. However, other controversial topics presented themselves. For example, in the antebellum South, professors faced sanction for opposition to slavery. During some periods of the twentieth century, professors risked discipline for sympathy (perceived or actual) to communism.

In some ways, the situation has changed significantly over the course of the twentieth century. The American Association of University Professors, founded in 1915, has emerged as a powerful force protecting professors as they pursue their work. Additionally, the Supreme Court has given its imprimatur to the idea that a democratic country like the United States has a strong interest in the protection of academic work

* This paper is a draft. Please do not quote it without permission of the author.
(and in fact does so, through the powerful means of the First Amendment). Furthermore, while communism is perhaps no longer regarded as a serious alternative to capitalism, the treatment of supposed communist sympathizers on American campuses during the 1950s and 1960s is almost unanimously regarded as, at best, a huge overreaction.

At the same time, the issue of what, if any, limits we should place on professors’ scholarly activities remains very much with us. While almost no one would suggest that, for example, a public university should (much less can) fire a tenured professor solely on the basis of a professor’s advocacy of Marxism, almost no one (the AAUP and the Supreme Court included) suggests that there are no appropriate restrictions that can be placed on scholarly endeavors.

This paper outlines a process for exploring these limits. My intent is not so much to craft an argument as to what I think these boundaries should be. Rather, I wish to examine the conflicts between a model that suggests that professors should be (virtually) completely autonomous in setting their own limits on inquiry and models which suggest that others (students, administrators, government officials, alumni, and the general public, to name a few) should play a significant, and in some cases determinative role in setting these boundaries.

There are, of course, different kinds of limits. In the broadest sense, some go to the chosen mode of inquiry, while others go to the substance of the inquiry itself. This project will discuss cases of attempts to set and enforce boundaries within each of those categories.
To conduct my study, I have tentatively selected four case studies, each from an institution of higher education. The particular cases, which will be described below, allow me to examine a number of different issues that this project raises.

First of all, two of the chosen universities are public, while two are private. The comparison between public and private schools will help to illuminate the relative importance of the First Amendment to academic freedom controversies. The Supreme Court has declared that academic freedom is “essential to the well-being of the Nation.”\(^1\) Thus, when public universities set and/or enforce academic freedom policies, they are to some degree confined by the dictates of the First Amendment and related case law. Private universities, of course, are not subject to the First Amendment. However, this is not to suggest that principles of academic freedom have no strength absent constitutional backing – certainly AAUP’s position on academic freedom (described in greater detail below) has never relied solely on the First Amendment as a means of providing protection to professors. Still, while the First Amendment may not make all the difference, it might make some, so including studies from both public and private schools should tell us something about how much difference (if any) it does make.

The study has also included both religious and secular institutions. The inclusion of a religiously affiliated school is important for the following reason. Any university is likely to have a mission statement. Thus, one issue within the “substance of the inquiry” category mentioned above is whether a given inquiry is compatible with the mission of the sponsoring university. In particular, a religiously affiliated institution, if it aims to remain a more than nominally affiliated, must concern itself with maintaining its religious character. Thus, we might ask ourselves what, if any, limits such an institution
sees as appropriate to place on its faculty members in the name of protecting and preserving its religious nature.

Finally, my research on these cases is at a very early stage. Because of this, I have included examples of other cases that raise similar issues to the ones I plan to focus on as this project develops, in order to help highlight the issues I consider to be especially important.

**Background: The Modern Development of Academic Freedom**

A. The Founding and Growth of AAUP

As mentioned above, professors have always risked the possibility of embroiling themselves in controversy or subjecting themselves to sanction for things related to their scholarly endeavors. Academics have faced pressure over charges of heresy as well as for expressing other contentious ideas. In addition, the conduct of professors in the classroom has also been the subject of debate, particularly in recent years with the development of university conduct codes and hostile environment law.

The AAUP was founded in 1915 as a response to such inquiry related pressures faced by professors. Again, these pressures were hardly new in 1915, nor was, presumably, a desire for protection against them. However, at this time, the wish for protection combined with a stronger desire on the part of faculty to play a greater role in university governance (a result of the Progressive Era) to produce action – the formation of AAUP. At the time, faculty members at some campuses had been fired over advocacy tied to the Progressive movement.

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In the year of its creation, AAUP released a statement on principles (later reaffirmed in a 1940 statement). According to this statement, universities operate as public trusts, but they cannot fulfill this function to the extent that scholars are subject to pressures beyond "their own scientific conscience[s]." AAUP also took note of the at the time growing role of universities as loci of scientific research, and argued that such research could not take place without "complete and unlimited freedom to pursue inquiry and publish... results." Additionally, AAUP argued that professors could not gain the respect of their students (a sine qua non of being effective instructors) if they were thought to be "a repressed and intimidated class who dare not speak with... candor and courage." Finally, AAUP noted the role of universities in developing experts for "the use of the community." AAUP argued that democratic governance was distinguished by its recognition of the critical place of experts in assisting governmental decisionmakers in making complex policy decisions. As with the aforementioned university roles, AAUP asserted that "It is obvious that here again the scholar must be absolutely free not only to pursue his investigations but to declare the results of his researches, no matter where they may lead him or to what extent they may come into conflict with accepted opinion."

AAUP has made two major contributions. First, its influence has helped gained wide acceptance for the principles of academic freedom. While there of course remain

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3 Id. at 396.
4 Id. at 398.
5 Id.
6 Id.
7 Id. at 399.
8 See RICHARD HOFSTADTER AND WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES, 484-90 (1955) (discussing the gradual acceptance and increased influence of AAUP principles on academic freedom).
disagreements over the exact meaning of academic freedom and what it does and does not protect, there is a general level agreement on the principles AAUP has promoted. Acceptance of these principles has gone far enough that the First Amendment may not be particularly important to the protection of professors’ scholarly work, for academic freedom is thought to be an important enough principle without even reaching constitutional analysis.

Secondly, AAUP carries out investigations of supposed infringements on academic freedom. These investigations—many of which are reported on in the AAUP’s bulletin, Academe—or in some cases simply the threat of investigations have also helped to protect the activities of university professors. As Walter Metzger has noted, “The threat of an investigation was often all that was needed to give administrators second thoughts when they contemplated questionable actions.”

B. Academic Freedom as a Constitutionally Protected Interest

While the First Amendment may not be the crucial factor protecting the activities of professors (particularly, it need hardly be said, when it comes to the activities of professors at private universities), this does not mean that there has been no consideration of academic freedom as a constitutional interest covered by the Amendment. The latter half of the twentieth century saw the development of a large body of case law to further the idea that academic freedom was included in the provisions of the First Amendment. In Keyishian v. Board of Regents, the Court declared academic freedom “a special

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9 Id. at 495.
concern of the First Amendment.” In an earlier explanation of why academic freedom deserved such status, Chief Justice Warren, speaking for a Court plurality, asserted that “To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation... Teachers and students must always remain free to inquire, to study, and to evaluate... otherwise our civilization will stagnate and die.”

While this statement as well as the Court’s comment in Keyishian that the First Amendment “does not tolerate laws that cast a pall of orthodoxy over the classroom,” seem very much tied to the academic freedom concerns of individual professors, one commentator has argued that the Court’s pronouncements on academic freedom have mostly been addressed to the freedom of universities as institutions to act autonomously, and not to the interests of individual professors. In a 1990 article, law professor Michael McConnell wrote that the Supreme Court’s “most famous formulation” on academic freedom was in Justice Frankfurter’s concurrence in the aforementioned Sweezy decision. According to Frankfurter, academic freedom consists of “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.” Though it is perhaps difficult to determine what is the Supreme Court’s “most famous” statement on a particular subject, surely McConnell is correct that the four freedoms mentioned by Justice Frankfurter go more toward control by the institution than by the individual professor—only the third of the four seem to address the interests of individual professors

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11 Id. at 603.
13 Keyishian, 385 U.S. at 603.
15 Sweezy, 354 U.S. at 263. See McConnell, supra note 14, at 305-06.
(though the other three may also implicate the autonomy, such that it is, of a particular
department or school within a larger university).¹⁶ And, the fourth of the freedoms—
control over admissions—was echoed in the Court’s famous Bakke decision, where
Justice Powell cited Justice Frankfurter’s opinion in defending Davis’ use of race as a
factor in admissions at least in part on academic freedom grounds.¹⁷ So, it can be said at a
minimum that academic freedom claims that go to institutional academic freedom rather
than professorial academic freedom have played a role in the Supreme Court’s
development of academic freedom as a category of speech entitled to First Amendment
protection. While the interests of professors and their institutions are often in harmony
with one another, as we shall see, they also occasionally conflict, as will be discussed
further below. Still, conflict or not it is clear that some notions of academic freedom are
recognized as constitutionally protected interests.

C. Limits on Academic Freedom

While the concept of academic freedom has found strong defenders in both
AAUP and the Supreme Court, neither AAUP or the Court has claimed that academic
freedom should be understood as meaning that there are no boundaries that can be placed
on the scholarly activities of professors. For example, while reasonable people may
disagree about the quality of a professor’s work, it is not a matter of serious controversy
that scholarly work should be held up to rigorous evaluation. AAUP’s 1915 report noted
that “The liberty of the scholar within the university to set forth his conclusions… is
conditioned by their being conclusions gained by a scholar’s method and… must be the

¹⁶ For a recent case that echoes McConnell’s claims, see Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 1999).
fruits of competent and patient and sincere inquiry.”18 AAUP also recognized that a professor in a classroom is in the position to be extremely influential and that this position should not be abused. The 1915 Declaration asserted that a professor’s freedom in the classroom was not to be used to “provide his students with ready-made conclusions, but to train them to think for themselves.”19 Along with the fear of undue influence, AAUP noted that a professor’s autonomy in directing classroom discussions should be tempered by a concern for germaneness. The 1940 Statement of Principles contended that while a professor was “entitled to freedom in the classroom in discussing his subject,” he was to “be careful not to introduce into his teaching controversial matter which [had] no relation to his subject.”20

On a somewhat different note, AAUP also showed a readiness to bend its principles to what it viewed as the necessities of wartime. In 1918, the AAUP Committee on Academic Freedom in Wartime released a report on the operation of academic freedom in wartime. The committee accepted the idea that normal principles of academic freedom could be curtailed to a degree during war. Among other possible scenarios, the committee asserted that a university could justify firing a professor of German ancestry who refused to “refrain from public discussion of the war,”21 though presumably pro-American statements would have been acceptable.

Similarly, the Supreme Court, in spite of its recognition of academic freedom as a constitutionally protected interest, has not upheld the view that the need to protect academic freedom is without limits, particularly (though not exclusively) when matters of

18 General Report, supra note 2, at 401.
19 Id.
20 Id. at 407.
national security are said to be involved. For example, in the aforementioned *Barenblatt* case, the Court affirmed Barenblatt's conviction for refusing to answer the questions of a Congressional committee investigating communist influence in education, in spite of its paean to academic freedom.

A further limit on the academic freedom of professors may be the academic freedom rights of a university as a university. This can take more than one form. One obvious example, alluded to above, is the right of a university to make judgments about the quality of work produced by professors—tenure review being the most common example of this. However, in addition to decisions that a university administration makes about who will be on the faculty, that administration must also make important choices with regard to what subjects will be taught, what classes will be taught, and the quantity of such offerings that will be available to students (the autonomy to make such choices being part of what Justice Frankfurter discussed in his earlier cited *Sweezy* opinion). Needless to say, the agenda setting power involved in such decisionmaking is rather large. Finally, a more specific example of such agenda setting that will be important in this study is the case of a religiously affiliated institution's efforts to maintain its religious character. These efforts may violate norms of academic freedom that are applied to secular institutions.

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21 See HOFSTADTER AND METZGER, *supra* note 8, at 504.
Part I: Limits on the Mode of Inquiry

A. Hostile Environment Law in the Classroom

The first types of limits I will discuss are limits on the mode of a particular professor’s inquiry. In other words, what, if any, restrictions can be placed on how a professor conducts him or herself in the course of his or her work? These “mode” questions are particularly (though not exclusively, as we shall see) likely to arise over a professor’s behavior in the classroom. The debate over these limits, and over the policies that attempt to define these limits, can be seen in many different fora. One of the most controversial has been the attempt to apply in the classroom standards similar to the “hostile workplace” standards now employed in much of the American workforce.

The effort to define and create remedies for sexual harassment did not begin with consideration of the specific context of a classroom setting. The title of Catharine MacKinnon’s influential 1979 book, Sexual Harassment of Working Women, suggests that the main focus of the book is on women employees who are harassed, not women students (though the latter are discussed in the book as well). However, the increased recognition of the problem created when professors take advantage of their relationships with their students and the U. S. Department of Education’s ruling that sexual harassment on campus is a violation of Title IX have meant that sexual harassment has become an issue for universities to address as well. While there exists more than one definition of sexual harassment, the definition established by the Equal Employment Opportunity Commission (EEOC) has been particularly important. EEOC defines sexual harassment as follows:
Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment; (2) submission to, or rejection of, such conduct by an individual is used as the basis for employment decisions affecting such individual; or (3) such conduct has the purpose or effect of substantially interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

The EEOC’s guidelines were adopted by the Supreme Court in an important sexual harassment decision, *Meritor Savings Bank v. Vinson.*

At first glance, the movement to impose penalties for sexual harassment in the classroom might not appear to be particularly controversial. If an employer can be sanctioned for pressuring an employee for sex, surely a professor should face similar penalties for pressuring a student for sex. However, as Michele Paludi and Richard Barickman note in their book, *Academic and Workplace Sexual Harassment,* the last part of the EEOC’s definition of sexual harassment, the creation of “an intimidating, hostile, or offensive working environment” “is significant, because it covers the most pervasive form of sexual harassment, the form most often defended on the grounds of ‘academic freedom.’” So, apparently sexual harassment law, and in particular the “hostile environment” standard, comes into conflict with claims to academic freedom, and in particular a professor’s right to autonomy in his or her classroom, which the AAUP argued was necessary so as to avoid professors becoming “a repressed and intimidated class who dare not speak with… candor and courage.”

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Again, at first it might not be so obvious why there is an apparent conflict.

Consider two of the examples that Paludi and Barickman give at the beginning of their book:

Dr. P gave me the creeps. Whenever we took a test, I’d look up from my paper, and there he would be, staring at my top or my legs. I quit wearing skirts to that class because I was so uncomfortable around him. I felt like I was some kind of freak in a zoo.24

I was discussing my work in a public setting when a professor cut me off and asked if I had freckles all over my body.25

Why should this be an academic freedom problem? Even the AAUP has acknowledged that professors should not abuse their authority. Among other things, AAUP argued that professors should not introduce things that are not “germane.” Surely there is nothing germane about leering at a student or inquiring if she has freckles all over her body.

However, what about the professor who challenges his or her students’ assertions that women never lie when claiming to have been sexually assaulted? Unlike the aforementioned examples, it is easy to imagine classroom situations where such a discussion might be quite germane (a class on criminal law, for example). However, to a student who believes that women never lie about sexual assault, might having his or her beliefs challenged create a “hostile environment”? Apparently. The situation described above has been the basis for charges or threatened charges against a professor in at least two documented cases (though in one the professor was exonerated and in the other the charges were never filed).26 Here, then, we see the basic conflict that sexual harassment law, and in particular the hostile environment standard, can create for academic freedom.

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24 *Id.* at 1.
25 *Id.*
The AAUP definition of academic freedom in the classroom suggests that professors be given a wide degree of latitude in determining not just the subjects studied, but in how classroom inquiry is carried out. The hostile environment standard, which relies on a student’s perception as to what is and is not acceptable, has the potential to seriously curtail the professor’s ability to run the classroom as s/he deems proper. Indeed, one commentator has argued that current definitions of sexual harassment have become “the greatest violation of freedom of speech to emerge in decades.”²⁷ Thus, we have a conflict over the appropriate limits that may be placed on the mode of inquiry, and on how to set policy with regard to such limits. Two of the case studies address such “mode” controversies, and I will now turn to a brief description of them.

Case 1: Wisconsin Writes A Code For Its Faculty

In May, 1997, the University of Wisconsin-Madison established an ad hoc committee to write a code to be used to govern the conduct of faculty in the classroom. While conduct codes are not a new thing for universities, a code of this type is particularly important because it addresses the conduct of faculty and not students. Thus, it addresses the problem suggested by the hostile environment example discussed above: What are the limits that exist on a professor’s autonomy to run her classroom as she sees fit? Among the questions the committee was charged with addressing were the following:

- Is a policy regulating professional conduct in regard to sexual harassment and expression in instructional settings necessary and/or appropriate?

²⁶ See DAPHNE PATAI, HETEROPHOBIA, 81-87 (1998).
²⁷ See id. at 87.
• What should be the balance between protecting academic freedom and ensuring a learning environment that is comfortable for a diverse student body?²⁸

At the completion of its work, in October, 1998, the ad hoc committee issued a report as well as a minority report. When the faculty senate considered the two reports, they chose, by a narrow margin, to reject the report of the committee and to instead approve a version submitted in the minority report. Several questions present themselves when considering this policymaking process. These include:

1. What materials, if any, did the committee members consult in crafting their policy? EEOC or other guidelines on sexual harassment? AAUP statements? Judicial opinions? Codes from other schools?

2. Why was the minority report chosen over the majority report? What was it about the majority report that troubled members of the faculty senate?

3. How did the committee see its mission? To protect professors? Students? The administration? Some combination? How, if at all, were the interests of students and/or the administration represented in the policymaking process?

Case 2: The Women’s Studies Conference at SUNY New Paltz

On November 1, 1997, the Women’s Studies department at the State University of New York (SUNY) New Paltz held its annual conference. The theme of the conference was female sexuality, and the conference was given the title “Revolting Behavior.” While academic conferences come and go without attracting attention from anyone other than the attendees, three events at this conference attracted widespread attention and caused a

huge controversy within the SUNY system and New York state government. The first was a conference workshop on sadomasochism entitled “Safe, Sane and Consensual S/M: An Alternate Way of Loving,” which critics charged was an effort at “recruitment” while the second was a conference workshop on “Sex Toys for Women.” The third event was a performance by a controversial performance artist, Shelly Mars, which critics charged was distasteful, anti-Semitic, and racist.

When news of the conference spread, it raised the ire of New York Governor George Pataki as well as members of the SUNY system’s Board of Trustees. While Roger Bowen, president of SUNY New Paltz, defended the conference, Governor Pataki asked the Trustees to look into what had occurred at the conference. As a result, the Board created a committee consisting of several professors and administrators from the SUNY system to investigate the conference. The Committee issued its report in 1998, by which time some of the controversy had died down. No further action was taken. Also in 1998, President Bowen was awarded AAUP’s prestigious Meiklejohn award in recognition of his defense of the conference. Like the Wisconsin case, the New Paltz episode raises several interesting questions. Among them:

1. Do standards of “germaneness”—whether the AAUP’s or some other group’s—apply to activities at a conference? If so, how can we determine what qualifies as germane? Whose views should be considered?

2. Does an academic gathering, whether at a conference or in a classroom setting, have certain standards to uphold, regardless of the type of subject being addressed? If so, who sets and applies those standards?

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29 See Review Into Women’s Studies Conference at SUNY/New Paltz, November 1, 1997 (Draft) 7.
30 Id. at 18.
3. What role should those in the position of ultimate responsibility for a campus (though with little day to day responsibility) such as its Board of Trustees/Regents or (in the case of a public university) the governor play in approving the mode of inquiry chosen by members of the faculty?

Part II: Limits on the Substance of Inquiry

Aside from questions on how inquiry should be carried out, frequently controversies arise over the substance of a professor’s inquiry. Such controversy can be over a particular conclusion or result reached and may also be over the subject chosen for study. Even more so than with limits on the mode of inquiry, attempts to place substantive limits on academic inquiry run head-on into basic AAUP principles on academic freedom. Recall AAUP’s declaration that professors must have “complete and unlimited freedom to pursue inquiry and publish… results,” limited only by such work being the product of “a scholar’s method and… the fruits of competent and patient and sincere inquiry.” Still, this does not mean that those who are not in agreement with AAUP policy have nothing to say in their behalf. This leaves us with the question, are there some things that we should not try to know? Additionally, we might ask, are there some conclusions we should not share? In answering these questions, it will also be important to take account of just who is attempting to impose such limits and why.

31 Though interestingly, AAUP did not appear particularly worried about such infringements. The introduction to the 1915 Statement asserts that “freedom of inquiry and research… is almost everywhere so safeguarded that the dangers of its infringement are slight.” General Report, supra note 2, at 393.
Example 1: Race and IQ

In the early 1970s, Arthur Jensen and Richard Herrenstein attracted a lot of attention for their work which suggested that at least some of the difference between white and black scores on IQ tests could be attributed simply to race, and not to other factors such as economic background. Not surprisingly, their work generated a tremendous amount of controversy. One of the more interesting responses to these studies was a two-part article published in the journal Philosophy and Public Affairs by Ned Block and Gerald Dworkin.

Block and Dworkin spent the majority of their two articles criticizing IQ tests and arguing that they are not good measures of “intelligence,” whatever one’s definition of the term is. As a result, they found Jensen and Herrenstein unconvincing on those grounds. However, beyond their attack on the accuracy of Jensen’s and Herrenstein’s work, they concluded the second article by arguing that even if this were not the case, and even if Jensen’s and Herrenstein’s work had some merit to it, it is work they should not have embarked on. They wrote

“We are going to argue first that Jensen does not make a convincing case for there being likely and important beneficial consequences of investigating genetic racial differences in IQ; second that there are serious and probably harmful consequences which flow from the interpretation likely to be placed on such research; third that Herrenstein and Jensen were negligent in failing to take precautions in the writing to mitigate such harm; and, finally, that in light of the difficulty of preventing such harms, the proper course would be to avoid undertaking such research altogether.”

Regardless of whether one agrees or disagrees with Block and Dworkin on the specifics of this case, their article raises an important challenge. To what extent should

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academics be responsible for the impact of their work? In particular, do professors have a special responsibility to see that their work is not misused, and, if they cannot avoid this result, to not carry out such work at all? Is there some information, such as (in the case of Jensen's and Herrenstein's work) that intelligence is tied to race, or, to take a more modern example, how to clone humans, that we would be better off not knowing? If we decide that we do wish to place such limits on inquiry, how should we decide what things we should not know, i.e. how do we create policies in this area? These questions all potentially raise challenges to AAUP's claim that academics should have "complete and unlimited freedom" in pursuing their research.

Example 2: Teaching Theology at a Catholic University – the Father Curran Case

At the time of their founding, many American universities had church affiliations of some sort, including such places as Harvard, Yale, and the University of Chicago. However, over time religious affiliations at many of these institutions (including the three just mentioned) have all but fallen away. Thus, to the universities that remain church affiliated, a central question has been what steps such a school must take to maintain its religious identity so as to avoid the secularizing trend that has befallen many other schools.

One way to maintain a school's religious identity is for the sponsoring church to exert influence over the institution. This control may take the form of making sure that a certain percentage of professors and administrators at the school are members of the sponsoring church. It may also take the form of the church exerting some control over

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professors' scholarly activities. This, of course, is likely to lead to claims that the professors' academic freedom has been violated.

Perhaps nowhere has this conflict between universities (and a church) seeking to maintain their identity and professors asserting claims to academic freedom been more evident than at America's Catholic universities. In particular, there is the case of Father Charles Curran, formerly a professor at The Catholic University of America (CUA). While there are a large number of Catholic universities in the U. S., CUA is the only one of this group with a papal charter. The plan to found CUA was approved by the Vatican itself, through the auspices of Pope Leo XIII in 1887. Thus, the tie between CUA and the Vatican is particularly strong, even relative to other Catholic universities.

Father Curran was for many years a professor of moral theology at CUA. He attracted widespread attention within the Church for his unorthodox views, including his writings challenging Church teachings on such things as euthanasia, divorce, and abortion. In March, 1986, the Vatican informed Curran that he would need to recant his views or he would be stripped of his license to teach Roman Catholic theology. When Curran refused to back down, he lost his license, and was barred from teaching theology at CUA. Curran sued CUA for breach of contract, but his suit was unsuccessful.

The Curran episode was a matter of great controversy in academia and among Catholics. One group of Catholic theologians described Curran's ouster as "incomprehensible on professional grounds... and indefensible in the light of traditional understanding of what a theologian rightfully does."\(^{34}\). AAUP issued a report critical of

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\(^{34}\) See Group Terms Vatican Action "Incomprehensible;" Theologians Condemn Curran's Punishment, LOS ANGELES TIMES, December 20, 1986, at Part 8, Page 2.
CUA in its journal, *Academe* and placed CUA on its list of censured administrations.\(^{35}\) AAUP’s investigating committee (which included members from religiously affiliated schools Boston College and Southern Methodist University) concluded that Curran’s suspension had been caused by publications that should have been protected under AAUP’s 1940 Statement as well as by CUA’s own internal policies.\(^{36}\)

On the other hand, one supporter of the steps taken by the Vatican and CUA described these actions as “overdue and very timely,”\(^{37}\) while another argued that the suspension was justified because the Church needs to speak in one voice.\(^{38}\)

The Curran case raises the usual issues about a professor’s “right” to speak his mind in the classroom. Surely, a professor being told to recant his views because they conflict with the views of those in power seems to smack of just the sort of interference with professors that motivated the founding of AAUP in the first place. However, the Curran case sets these professorial claims against a rather different backdrop than did the previous examples. Here, the institution’s claims to academic freedom are particularly strong. If, as Justice Frankfurter argued in his *Sweezy* opinion, academic freedom includes the right to decide “who may teach, what may be taught, how it shall be taught,” then should this not encompass CUA’s right to decide who can teach Catholic theology and how Catholic theology shall be taught? This question is particularly relevant in light of the Catholic Church’s position that it speaks authoritatively on certain issues. For example, a claim by, say, the University of Michigan, that it speaks authoritatively on the

\(^{35}\) *See Academic Freedom and Tenure: The Catholic University of America, ACADEME, September-October 1989 at 27-38.
\(^{36}\) *See Id.* at 37.
\(^{37}\) *See Robert Di Veroli, Maher Lauds Vatican in Ban on Theologian, SAN DIEGO UNION-TRIBUNE, September 27, 1986, at A12.
\(^{38}\) *See Romanus Cessario, The Church Must Speak in One Voice, LOST ANGELES TIMES, March 1, 1988, at Part 2, Page 7.*
issue of how to teach sociology or American history might not seem to be an especially persuasive claim. However, should not a church, and its university representative, be able to define for itself how its own theology is to be taught? Does not a negative answer to this question interfere too much with CUA’s mission to be “[f]aithful to the Christian message as it comes through the Church”?39 If a Catholic university cannot decide for itself what it means to be a Catholic university, then does it not run the risk of losing its Catholic identity? This, of course, begs the question of why we should be concerned with maintaining distinctively Catholic (or other church sponsored) universities. In responding to this question, Professor McConnell argues that “To impose the secular norm of academic freedom on unwilling religious colleges and universities would increase the homogeneity—and decrease the vitality—of American intellectual life.”40 In other words, if CUA becomes indistinguishable from, say, its District of Columbia neighbor George Washington University, it may be in some sense a gain for professors in Father Curran’s position, but it is a loss for intellectual life as a whole. Thus, paradoxically, when we decrease the scope of what is acceptable at an institution with religious ties, we thereby increase the scope of viewpoints available to us in the whole of academic life. This, it seems, is a critical point to bear in mind when we view the actions of religiously affiliated institutions as they attempt to maintain their distinct identities.

39 This quote comes from CUA’s Aims Statement. See The Catholic University of America, Aims, found at <http://www.cua.edu/about_cua/aims.html>.
40 McConnell, supra note 14, at 304.
Case 3: The Hiring of Peter Singer at Princeton

In 1999, Princeton University hired Australian philosopher Peter Singer to teach at its campus. The hiring caused a firestorm, in large part because of Singer's views on euthanasia. In particular, his view that newborn infants do not become "persons" until "they develop some kind of awareness of themselves as existing over time," and that therefore "when we kill a newborn infant there is no person whose life has begun," created an uproar on the campus. Protestors from disabled rights and pro-life groups showed up at his first day of class, and Princeton has had to take steps to protect his safety. Additionally, Singer's supporters and critics have waged a heated battle in, among other places, the Letters to the Editor section of the Princeton Alumni Weekly. Singer has had his critics on both the left and the right. Pro-life groups see his views as an extension of the philosophy that allows for legalized abortion in the first place, while his critics on the left argue that his readiness to allow parents of disabled children to kill their children has echoes of Nazism.

From either side, Singer's critics see his views as being unacceptable in a civilized society and at Princeton. The protests over his views and over his hiring raise the sorts of questions raised by the earlier discussed example of IQ and race: Are there just some ideas, or some conclusions, that a university should exclude from its community? Are there just some things you should not say? How does a university set policies or implement existing policies on such issues? Other questions to be asked in an investigation of the Singer case include:

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41 See Dangerous Words: Professor of Bioethics Peter Singer and His Views on Life and Death Have Challenged the University and the World at Large, PRINCETON ALUMNI WEEKLY, January 26, 2000.
1. When the university decided to hire him, to what extent did they consider the controversial nature of his views?

2. Is there a point at which his views would be considered so radical as to be considered unacceptable, regardless of scientific standards?

3. How important is the reaction of the public and Princeton alumni? Can either or both of these groups set limits on professorial inquiry? How might a university in Princeton’s position go about making such decisions?

Case 4: The Episcopal Mandate and *Ex Corde Ecclesiae* at Notre Dame

In 1990, Pope John Paul II issued the encyclical *Ex corde ecclesiae*, which addressed the role of a Catholic university within the Catholic Church. The document discusses, among other things, the place of theology as an academic subject. According to the Pope, “Theology has its legitimate place in the University alongside other disciplines. It has proper principles and methods which define it as a branch of knowledge. Theologians enjoy this same freedom so long as they are faithful to these principles and methods.”

However, he also noted that “since theology seeks an understanding of revealed truth whose authentic interpretation is entrusted to the Bishops of the Church, it is intrinsic to the principles and methods of their research and teaching in their academic discipline that theologians respect the authority of the Bishops, and assent to Catholic doctrine according to the degree of authority with which it is taught.”

Clearly, the implication of these two statements is that while in some sense theology will be treated like other academic disciplines—subject to disagreement, debate,

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43 *Ex corde ecclesiae*, ART. I, §29.
and competing theories—there will also be some limitations on what is acceptable from
teachers of theology, i.e. that they have to answer to the Bishops. In a subsequent portion
of the encyclical, the Pope wrote:

“Each Bishop has a responsibility to promote the welfare of the Catholic
Universities in his diocese and has the right and duty to watch over the
preservation and strengthening of their Catholic character. If problems
should arise concerning this Catholic character, the local Bishop is to take
the initiatives necessary to resolve the matter, working with the competent
university authorities in accordance with established procedures and, if
necessary, with the help of the Holy See.”\textsuperscript{45}

Thus, if a local Bishop feels that something is amiss at a Catholic university in his
diocese, it is up to him to take appropriate action. And, of course, we know from the
earlier quoted sections that the Bishop is already supposed to have a role in determining
what is acceptable doctrine within the theology department. This left the question of just
how American Bishops should fill the role outlined for them in \textit{Ex corde ecclesiae}. The
answer, in part, came in a November, 1999 vote by the American Bishops. This group
voted to require theology professors at Catholic colleges and universities to obtain
certification, or a “mandate,” from their local Bishop stating that the professor teaches
“authentic Catholic doctrine.”\textsuperscript{46}

In the United States, there are more than 200 Catholic post-secondary institutions.
Perhaps none is as well known as the University of Notre Dame. This fact by itself makes
events there that relate to Catholic education and the church particularly significant. What
also makes Notre Dame important to the Episcopal mandate is the fact that not only does
the university have a theology department, it has a two-semester theology requirement for

\textsuperscript{44} Id.
\textsuperscript{45} Id. at ART. V, § 2.
\textsuperscript{46} See Gustav Niebuhr, \textit{Catholic Bishops to Require Certification for Theologians}, \textit{NEW YORK TIMES},
November 18, 1999.
all undergraduates. Thus, how this issue is handled has an impact on all undergraduates at Notre Dame.

I would like to examine the response to *Ex corde ecclesiae* and in particular to the recent vote by the Bishops requiring that Catholic theology professors obtain a mandate. I think that the following questions will be important:

1. To what extent (if at all) do theology professors and/or administrators at Notre Dame see the new requirement as a problem? If the answer is “not at all,” why?

2. What steps, if any, have professors and/or administrators taken in response to the new rule? How did they decide on this course of action?

3. What effect, if any, has the new rule had on faculty hiring and retention?

4. Have there been conflicts so far between the university and the local Bishop? If yes, what steps has the university taken in response?

5. Have Notre Dame’s experiences with the new rule been similar to those of other Catholic schools with theology departments?

Conclusions

As should be clear by now, this study is at a very early stage. Because of this, it might seem odd to have a section entitled “conclusions”—better to first have some results to use to draw conclusions! While I do not have results to discuss, what I do have in this paper hopefully has illuminated why I see this project as interesting and why it raises some important questions.

Given an audience of professors, it is presumably not terribly controversial to assert that the growth of AAUP has been a net gain (to put it mildly) for academics. At
the same time, while AAUP definitions of academic freedom, which are very “professor centered,” have become extremely influential, they have not gone unchallenged. And, some of the challenges (including those discussed here) have been quite legitimate and have raised real concerns with the use of a completely “professor centered” definition of academic freedom. Because of this, it is important for members of the profession to continue to consider what appropriate boundaries we can put on ourselves or accept from “outsiders.” How these limits are established and enforced is something for us all to be concerned with.