Professorial Academic Freedom:

An Essay of Second Thoughts
on the Third "Essential Freedom"

IHELG Monograph
93-1

(forthcoming in Stanford Law Review)

Michael A. Olivas
Professor of Law and Associate Dean
University of Houston Law Center
Houston, TX 77204-6370
(713) 743-2078
University of Houston Law Center/Institute for Higher Education Law and Governance (IHELG)

The University of Houston Institute for Higher Education Law and Governance (IHELG) provides a unique service to colleges and universities worldwide. It has as its primary aim providing information and publications to colleges and universities related to the field of higher education law, and also has a broader mission to be a focal point for discussion and thoughtful analysis of higher education legal issues. IHELG provides information, research, and analysis for those involved in managing the higher education enterprise internationally through publications, conferences, and the maintenance of a database of individuals and institutions. IHELG is especially concerned with creating dialogue and cooperation among academic institutions in the United States, and also has interests in higher education in industrialized nations and those in the developing countries of the Third World.

The UHLC/IHELG works in a series of concentric circles. At the core of the enterprise is the analytic study of postsecondary institutions—with special emphasis on the legal issues that affect colleges and universities. The next ring of the circle is made up of affiliated scholar whose research is in law and higher education as a field of study. Many scholars from all over the world have either spent time in residence, or have participated in Institute activities. Finally, many others from governmental agencies and legislative staff concerned with higher education participate in the activities of the Center. All IHELG monographs are available to a wide audience, at low cost.

Programs and Resources

IHELG has as its purpose the stimulation of an international consciousness among higher education institutions concerning issues of higher education law and the provision of documentation and analysis relating to higher education development. The following activities form the core of the Institute’s activities:

Higher Education Law Library

Houston Roundtable on Higher Education Law

Houston Roundtable on Higher Education Finance

Publication series

Study opportunities

Conferences

Bibliographical and document service

Networking and commentary

Research projects funded internally or externally
Professorial Academic Freedom:
An Essay of Second Thoughts on the Third "Essential Freedom"

Michael A. Olivas
University of Houston Law Center

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

Academic freedom, often used as a claimed defense against retribution for a variety of speech and conduct, is a concept that is often poorly understood and ill defined. It is rooted in European traditions and in the recognition that "institutions of higher education are conducted for the common good...[and] the common good depends upon the free search for truth and its free exposition...." The AAUP in its 1940 Statement of Principles on Academic Freedom defines academic freedom as follows:

1
Academic Freedom

(a) Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

(c) College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their
profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.³

The search for truth through academic freedom requires that scholars be protected in posing new, controversial, and even unpopular ideas through their teaching and research, and publication of their research. The tradition of academic freedom has been translated into practice by several means, particularly constitutional interpretations of first amendment penumbral rights, including freedom of inquiry, freedom of thought, and freedom to teach. These rights of academic freedom are most evocatively articulated by Justice Douglas in Griswold v. Connecticut:

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice--whether public or private or parochial--is also not mentioned. Nor is
the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights. . .[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read...and freedom of inquiry, freedom of thought, and freedom to teach...indeed the freedom of the entire university community. . .Without those peripheral rights the specific rights would be less secure.4

First amendment protection requires the requisite state action to be present, and may provide minimal protection for faculty in private institutions. Therefore, protection of academic freedom in private institutions must come either through state constitutional protections that reach private institutions, or through contract principles.5 Contract law may provide the basis for protection where AAUP Principles on Academic Freedom and Tenure or other
customs or practices are adopted expressly or by implication in the contract of employment. More recently, there has been a trend towards explicitly providing for academic freedom protection in faculty contracts resulting from collective bargaining or other organized labor activity.

The most interesting elaborations upon academic freedom have been, for me, the attempts to reconcile the concept's essentially paradoxical qualities, of protecting the scholarly enterprise from outside interference (grand juries, witch-hunting public officials, funding agencies, and other assorted patrons/critics/do-gooders) even while not guaranteeing full protection to professors' intramural speech or classroom activities as measured against institutional interests. For the leading scholars in this fertile field, academic freedom has been a search for the perfect professional paradigm. The preeminent historian of the field, Walter Metzger, describes the 1940 statement as "these three axiomatic dedications to principle," but allows that "conceptual mappings" chart a hilly terrain:
And though most who do these conceptual mappings divide academic freedom, like Caesar’s Gaul, into three main parts, some insist that good logic would divide it into only two (freedom to teach and freedom to do research, arguably the only professional relevant freedoms, with citizen or extramural freedom ceded to the large neighboring country of ordinary civil liberties, and a few would divide it into four (the three that go with the faculty’s rules plus one attached to the students’ status) or even five (all of the four individual academic freedoms, along with institutional autonomy).⁹

One of the most careful legal scholars of academic freedom is William Van Alstyne, who in twenty five years of writing about the concept has consistently tried to draw principled distinctions between free speech generally and the more particularistic concept of academic freedom.¹⁰ The Supreme Court has characterized academic freedom as a "special concern" of the First Amendment, but the concepts are symmetrical and overlapping, not synonymous.¹¹ Van Alstyne has noted that the AAUP’s 1915 Declaration¹² set out academic freedom norms for professors, but also exacted reciprocal
professional obligations, including the obligation to adhere to faculty norms and standards both in conducting scholarship in teaching and in reviewing other colleagues' work. The 1915 Declaration, however, only poses preliminary authority to faculty review, serving as adjudicators to be subject to plenary institutional review for fairness and thoroughness. This established the contours for faculty peer evaluations which should be overridden by higher institutional bodies only if when impartial professorial review procedures and norms were not employed.

Mark Yudof's characterization is the academic freedom's "three faces," incorporating notions of professional autonomy, government expression, and institutional authority. In a series of well researched essays, Dean Yudof has explored these three faces, arguing persuasively against a unified theory of the whole, and insisting there are only "multiple strands of the concept. If academic freedom has only one face, it surely is not tuned towards the heavens."

Matthew Finkin, a distinguished labor scholar, argues for a single, well-developed professional autonomy face, employing as his
historical antecedent "the pre-industrial artisanal ideal,"

"one to which the nation may be returning in some aspects of the unfolding law of employment." Most usefully, Professor Finkin's work has provided examples of how his world of work would prevail in a world governed not by Pickering but by Connick v. Myers, where higher weight is accorded public employers' need for worker "discipline" and "harmony."

Through 1983 and the Connick decision, several professors won cases in which their unpopular actions had caused them to be fired, but the record was mixed. In Starsky v. Williams, an untenured professor who missed classes in order to attend an off-campus rally was reinstated when the court held that the board and president impermissibly dismissed him: "The Board fails to distinguish those circumstances in which Professor Starsky spoke as a professional, under circumstances where the interests of the school balanced First Amendment interest sufficiently to warrant a narrower professional standard of speech, from those circumstances in which [he] spoke publicly as a citizen and had the right to the same broad constitutional protection afforded every citizen...and the
major emphasis in the charges is so clearly based upon protected ideology, that this court must conclude that the primary reason for the discipline of Professor Starsky is grounded in his exercise of his First Amendment rights in expressing unpopular views." In *Peacock v. Board of Regents*, a suit against the same Regents, the court treated a tenured faculty dismissal quite differently. Professor Peacock had disagreed with his dean, and was removed as department chair and then removed as a tenured professor, with only a post-suspension hearing. The court upheld the dismissal, citing a "common law of the campus" for the proposition that administrative appointments were at-will. In *Stastny v. Board of Trustees of Central Washington University*, a professor who ignored specific warnings that he not leave the country to lecture, causing him to miss classes, was found to be insubordinate. His request to travel was not an academic freedom issue, since the denial was grounded in his teaching obligations to students.

*Connick* significantly changed the contours of public employees' status to dissent, either publicly or privately. Within a year of *Connick*, cases brought by college professors on *Pickering*
grounds were being been lost by the professors. As one example, *Landrum v. Eastern Kentucky University*,\(^{28}\) held that *Pickering* cases "would have been different under *Connick*": "In frankness, the court must state that it reads *Connick* as deliberately intended to narrow the scope of [*Pickering cases*], even though they were not expressly overruled. A careful study of all these decisions leads to the inevitable conclusion that the First Amendment in the employment context is now to be more narrowly interpreted to give greater scope to the legitimate rights of governmental entities as employers, and also to reduce the burdens on the courts caused by the burgeoning of litigation initiated by the decision upon which plaintiff relies here."\(^{29}\)

Finkin’s remedy, echoing that of William Van Alstyne before him, would be to enact a less-permeable core of freedom of inquiry, joined to first amendment jurisprudence, and give faculty broader intramural speech rights, grounded in the artisanal guild archetype, than they are to be afforded under the restrictive *Connick* covenant. Just so. Notwithstanding Dean Yudof’s\(^{30}\) and Dean Paul Brest’s\(^{31}\) demurrers, Professor Finkin’s ideal has much to
recommend it, even if, to use Yudof's excellent example, one person's charge of sexual harassment is either "a private employee grievance or a matter bearing upon public policy." Professor Finkin has considered many academic freedom cases, and even his ostensibly - rhetorical examples of faculty having to guess where their protected utterances might lie ("A complaint to an accrediting association?" A protest of unfair treatment of a colleague? An expression of lack of confidence in the administration?) are each grounded in what one of my seminary professors once labelled "still-life examples."

Having reviewed the variety of paradigms and metaphors available to me, I now adopt my own, that of the kaleidoscope, the wonderful child's toy that, with a turn, reconstitutes one mosaic into another while using the same shards of glass and refracted light. The tableau I turn to is one that virtually any theory of academic freedom would recognize and protect, the third of Sweezy's "Four Essential Freedoms," how it shall be taught in the learning community. Today's large enrollment lectures, high technology laboratories, satellite - transmitted distance learning, or
computer assisted instruction may not resemble the ideal of studying with Mark Hopkins on one end of a log, but scale aside, it is virtually incontestable that the heart of the academy is a teacher interacting with students. While many of the cases -- and, unfortunately, there are numerous examples -- involve administrative or external controls upon faculty curricular choices or teaching styles, few of these cases arise from student objections to professorial prerogatives. This relative paucity of student dissatisfaction taken to court is due in part to the relative powerlessness of students, but is also clearly attributable to the near-absolute autonomy accorded professors under traditional academic freedom norms. However, several recent developments have the potential for opening up teaching styles and methodologies to more scrutiny. Some of these issues are old wolves guised in new clothing, but several pose new and unexplored questions for Yudof’s "first face," that of professional autonomy.

The Supreme Court has never accepted a case on the question of "how it shall be taught" or a college teacher’s classroom methodology, while the federal cases provide a drunkard’s reel in
the absence of a definitive higher court resolution. However, despite the impressive rhetoric reserved for teachers' expressive rights in the classroom, one cannot help but notice the modest formal protection accorded a professor's classroom prerogatives in choosing a teaching style, pedagogy, methodological considerations, and even grading.\textsuperscript{38} The law appears to have carved out a majestic cordon sanitaire around college classroom instruction, protecting professors from governmental intrusion into foreign language instruction (in Meyer, protecting "the calling of modern language teachers"),\textsuperscript{39} into visiting guest lectures (in Sweezy, inveighing against "an atmosphere of suspicion and distrust"),\textsuperscript{40} into public employment contracts (in Wieman and Keyishian, striking down loyalty oaths and characterizing teachers as "priests of our democracy"),\textsuperscript{41} and into other facets of the teacher-student relationship, as in the Epperson,\textsuperscript{42} Tinker,\textsuperscript{43} Aguillard\textsuperscript{44} line of cases upholding professional autonomy interests against governmental restrictions. This magnificent line of cases, though, protects the interests of college institutions relative to the state legislature, not individual faculty members in their
professional autonomy capacity.

A developing line of cases has emerged to test the contours of faculty members' professional autonomy relative to students' expressive rights. Although the Tinker case-lineage\textsuperscript{45} appears to give wide sweep to the ostensibly coterminous rights of students and faculty ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"),\textsuperscript{46} it is inevitable that their respective rights will be in conflict. In any equation where students' rights are pitted against those of faculty, where laws of gravity and academic tradition prevail and influence flows downward, faculty rights will trump.

The history of race relations in the United States has made the treatment of the subject very difficult for many teachers and students. Both teachers and students come to class with longstanding experience and fears about the subject, and an entire eloquent law review literature has developed, using stories, fables, and racial references to illustrate larger legal points and to explain important legal doctrines.\textsuperscript{47} Of course, key cases in
many classrooms are about race in its various guises, as in
constitutional law, contracts, torts, and property courses.\textsuperscript{48} In
many institutions, the presence of small (or large) numbers of
students of color or minority professors has prompted consideration
of race in the classroom.

At Stanford, Professor William Shockley, a Nobel Prize-winning
professor of engineering, was administering an examination in his
electrical engineering course when fifteen students entered his
classroom and challenged him to a debate over his views on race.\textsuperscript{49}
Shockley’s published views on race were characterized as eugenic,
or as holding that blacks were intellectually inferior to whites.
The students were disciplined and brought a Section 1983 claim,
also arguing that their First Amendment rights had been denied
because Professor Shockley "must debate his views publicly if
challenged."\textsuperscript{50} The court held that there was no such obligation
for him to respond to the challenges in class: "Such a requirement
would in itself be a potential inhibitor of academic freedom, since
many individuals simply do not have the personality or talents to
perform comfortably and adequately in oral debating."\textsuperscript{51}
But the court could have avoided this formulation, as the students were not even enrolled in Shockley's class, a course not even in genetics or psychology but engineering. And they chose an exam day to provoke the issue. They had no predicate for asserting free-floating First Amendment rights, and the judge correctly dismissed their claims.

Fifteen years later, another incident occurred at Stanford, this time at the Law School. Derrick Bell, a visiting professor from Harvard Law School, was teaching an introductory Constitutional Law course, employing the same text as the professors teaching the other two sections, when he began to notice resistance to his teaching by several vocal white students.\textsuperscript{52} He is a black scholar, and author of a widely used text on race.\textsuperscript{53} After several weeks, he noticed over a dozen students had stopped coming to his class, though as a visitor, he did not press the issue. When he was asked to participate in a lecture series on basic constitutional law issues, he agreed, until he discovered -- after being told by black students -- that the series had been organized by other faculty members as a "series of 'enrichment"
lectures' intended to supplement coverage of [his] course. Once the real purpose of the series was made known, a great outcry of protest was heard and the lecturers were cancelled. The next year, the new Stanford Law School dean invited Professor Bell back to Stanford and offered a public apology.

Once again, Stanford students had protested a professor's views on race, but this time, the complaining students were white and the teacher was minority. Rather than storm into a class to protest his philosophical view on race, these students silently protested by not attending class and by convincing other faculty that there was a need to organize the shadow lectures. Professor Bell, a distinguished scholar and founder of the Critical Race Studies legal movement, had been recruited to teach Constitutional Law and a seminar on Race and the Law; Professor Shockley had sought to teach a course on eugenics, but was denied permission to do so by Stanford.55

A third case forms an almost perfectly symmetrical balance with the first two, Levin v. Harleston.56 A tenured professor of philosophy at the City College of New York, Bernard Levin, had,
like Shockley, written that blacks were less intelligent than whites.\textsuperscript{57} Although students had not formally complained that he acted upon these beliefs in class, CUNY began to offer shadow sections of his courses. These courses, scheduled at the same time as his sections, were offered not to meet student demand but to give students an alternative to Professor Levin.\textsuperscript{58} As a result, enrollments decreased in his course. He felt he was stigmatized due to his political views, which he had not expressed in class in any event. The court found that his academic freedom had been violated:

Formation of the alternative sections would not be unlawful if done to further a legitimate educational interest that outweighed the infringement on Professor Levin's First Amendment rights. However, although appellants contended below that they created the alternative sections because Professor Levin's expression of his theories outside the classroom harmed the students and the educational process within the classroom, the district court saw no evidence that this was a factually valid concern. Given the complete lack of evidence to support
appellants' claim of a legitimate educational interest, we are unable to say that the district court erred.\textsuperscript{59}

These three examples reveal clearly the application of Van Alstyne's specific constitutional academic freedom: Professors Shockley, Bell, and Levin were all teaching within their trained fields of professorial competence in, respectively, engineering, constitutional law, and philosophy. Not to allow faculty to teach on all matters within their professional expertise would undermine the autonomy essential to critical inquiry, and would deny students (and by extension, the community) the fruits of professors' labors. Professor Van Alstyne notes that professors are required to undertake study and to publish and disseminate their work, and that it would be counterproductive to forbid or limit its expression; by this equation, forbidding discussion or expression of pertinent subject matter or insisting upon orthodoxy would violate first amendment academic freedom.\textsuperscript{60} This is Edwards v. Aguillard's holding, in that the Louisiana statute favored the theory of creationism over that of evolution.\textsuperscript{61} Under this reasoning,
Professor Van Alstyne would presumably find no protected right for Shockley to discuss eugenics in his engineering class or to teach eugenics and Professor Bell is clearly protected in his treatment of slavery and the role of race in the U.S. Constitution. What is not immediately clear is the extent to which Professor Levin, trained as a philosopher, could incorporate research on psychometrics, developmental psychology, and measurement statistics into an introductory philosophy course.Van Alstyne has noted that there is a "cost of exceptional care in the representation of [the truth as one sees it], a professional standard of care." In this analysis, academics who engage in careless teaching or make major misrepresentations in disseminating ideas may be entitled to less protection than was Pickering, who made errors of fact in his letter to the editor disagreeing with the school board’s actions.

Thus, a chemistry professor completely unfamiliar with psychometric theory and not trained in cognitive or developmental psychology who avers in class that women are less-well suited for math careers because they test less well on the SAT may be engaged in unprofessional, unprotected behavior, especially if it is said
to demean or discourage women in the class; conversely, a graduate student who wished to undertake a discussion of men and women's spatial-reasoning skills in a class he was teaching on "comparative animal behavior" but who feared prosecution under codified hate speech regulation convinced a federal judge that his first amendment rights would be violated.\textsuperscript{65} Controversial ideas or discussions that probe normative behavior, or running room for questioning the status quo must be protected, even at the risk of discomfort for the teacher or class.

This claims both more and less than other unified intramural utterance theories, for using the professorial function approach renders classroom utterances protected as long as they flow from professional standards, including training, developed expertise, and scrupulous care in presenting material in class. For example, a mathematician who insisted that $2 + 2 = 5$ could be fired for failing to meet professional measures of competence, but an English teacher, police file clerk, or telephone operator could not be fired for holding such a belief.\textsuperscript{66} The calculus would get more complex for interdisciplinary fields or for polymaths,\textsuperscript{67} but the
relevant professional standard of care is one routinely invoked in peer reviewed journals and tenure files. It is, in short, common academic practice.

A necessary corollary, however, is that a heightened professional core of protection need not translate into more protection for other intramural utterances (non-professorial speech) than for other situated non academics. Thus, a philosophy professor who writes a pornographic novel or president who makes an obscene and harassing phone call from campus could not claim any more or less protection than would any other member of the community. Were I creating the world, I would provide everyone with at least as much freedom to speak as was granted the errant Mr. Pickering and certainly more than was granted the hapless Ms. Myers, perhaps misinformed of her rights from a Con Law course. But if a special protection is to be afforded responsible professorial classroom instruction, the more principled path to symmetry is to exceed Connick and increase everyone's political speech rights. If free speech protects all members of the polity, faculty are entitled to special consideration only if their work in
transmitting and changing culture is unique. In the classroom, I would argue, it is. But I believe, as does Professor Van Alstyne, that the free speech clause is supple enough to protect the activity, and that to claim more for academic freedom's special right may stretch and break the concept. Accordingly, there should be a permeable border or floating level between professorial speech and non-professorial speech. The closest analogy I have found is that proposed by Professor David Rabban, who, in distinguishing between academic freedom and the general free speech clause, urges:

The distinctive professional functions of professors provide the basis for applying a special first amendment concept to them. But what is the first amendment justification for treating the aprofessional speech of professors differently from the speech of anyone else?

The only plausible justification is that the line between professional and aprofessional speech may be controversial, and that protection for clearly aprofessional speech is needed to give "breathing room" to the professional speech that is the special
subject of academic freedom. Such a drastic prophylactic rule is unnecessary and would be likely to generate more resentment against the "special pleading" of professors than even a narrow and convincing conception of academic freedom inevitably does. A generous definition of professional speech is a feasible and better response to this legitimate concern.

There are legitimate first amendment reasons for protecting the political speech of public employees generally. Indeed, the Supreme Court has done so while rejecting the "right/privilege" distinction popularized by Holmes. But as the Supreme Court has recognized, it is the free speech clause, not the special first amendment right of academic freedom, that provides the constitutional basis for this protection.\(^73\)

Under Rabban's attractive approach, courts would produce a "coherent and convincing specific conception of constitutional academic freedom,"\(^74\) specifically acknowledging professional speech by teachers and distinguishing it from other first amendment-protected speech. He cites Ollman v. Toll,\(^75\) Doe v. Michigan,\(^76\)
Piarowski v. Illinois Community College District, and Cooper v. Ross, and Selzer v. Fleisher as partial examples of his specific theory of academic freedom, and it has the attractive feature of harmonizing such cases, hinging as they do upon protected beliefs, such as Marxism, or affiliations such as membership in the Progressive Labor Party, with an approach such as I have suggested, where core professorial speech is to be protected at all costs, subject to norms of professional practice.

Even if a more fully articulated professorial speech theory were to be accepted by the courts, flowing from an appropriate Supreme Court case, the rub may be in an accommodation of student academic freedom rights, where a professor arguably exceeds professorial authority in classroom instruction. It is to this narrow issue I turn, as the small number of cases in this vein directly confront the theory of professorial speech developed to this point. I will conclude by arguing for breathing room in this zone for students to bring grievances when their rights as learners have been violated, but only if professorial speech is well wide of the mark, i.e., unprotected speech made in the context of classroom
instruction and judged by peers to be not deserving of professorial freedom of speech. Of necessity, I will try and carefully craft the examples that follow.

Max Lynch taught mathematics at Indiana State University, and felt compelled by his religious beliefs to read aloud from the Bible at the beginning of each class period. Following complaints, the University ordered him to desist, and when he refused, a dismissal proceeding was held to determine his continued employment. After the faculty proceeding, he was dismissed.

On the issue of the students’ rights, the trial court found that Lynch’s practice of allowing students to absent themselves—essentially, standing outside class until the prayers were over—was not enough to preserve their rights. The appeals court held, "for the students in his mathematics classes, the indisputable effect of Lynch’s Bible reading was the advancement or promotion of Lynch’s particular religious views and practices. Peer pressure, fear of the teacher, concerns about grades, and the alternative of standing outside the classroom in the hall, severely limit the freedom of a student to absent himself from class during a Bible
reading." The court easily found that the University was required to discontinue the practice, by traditional Establishment Clause reasoning, although it made specific reference to the students' religious freedoms.

*Lynch* is an easy call. Not as easy is *Bishop v. Aronov*, in which an exercise physiology professor expressed his religious beliefs to his class, invited students to point out deviations between tenets of Christianity and his lifestyle, and offered extra class sessions during which he explained his philosophy, linking Christianity and physiology. The sessions were optional and the examination was graded by exam number, not by students' names.

When students complained about his injecting religious beliefs into the exercise physiology course, he was warned by University of Alabama officials to discontinue this practice. He sued, on the grounds that his academic freedom and free speech rights had been infringed. At the district court, Professor Bishop prevailed, the court finding that he could "divulge personal views in the classroom as long as they are not disruptive of classroom activities." The judge found that the University only proscribed
religious views in the classroom, and then, only Christian perspectives.\textsuperscript{88}

The appeals court disagreed, in a decision that may have been the right result for the wrong reasons.\textsuperscript{89} Drawing from the \textit{Hazelwood} student newspaper case,\textsuperscript{90} an unfortunate K-12 case that has inexorably crept into higher education, the 11th Circuit held that a university holds wide authority over faculty, and that even in a classroom, "a teacher's speech can be taken as directly and deliberately representative of the school",\textsuperscript{91} a view that exceeds by a wide margin the force necessary to find for the University in this case. A more carefully reasoned argument could have been fashioned from higher education cases that religion is sui generis, that supplementary lectures and personal remarks on religious beliefs are highly suggestive, that religious views are not germane to an exercise physiology (or math) class, and that a faculty committee had reviewed the matter and given Bishop the opportunity to explain his pedagogical choices.\textsuperscript{92}

The worrisome reasoning in \textit{Bishop} led AAUP Counsel Ann Franke to characterize the case as one that "substantially erodes the
legal underpinnings of faculty free speech. Even so, the AAUP chose not to urge an appeal for Supreme Court review, in all likelihood due to the close call on his actual behavior.

Religion proselytizing cases such as Lynch and Bishop may not be the best examples on which to base a theory of professorial rights or student rights, as Establishment Clause jurisprudence will almost inevitably take precedence over a teacher's putative rights to discuss religious beliefs in non-religion courses. Professors Lynch and Bishop would likely have been entitled to more latitude if they had been divinity scholars teaching a comparative religion seminar or epistemology course.

Cooper v. Ross provides a secular example, where a self-professed Marxist professor announced his beliefs and indicated that his political theory guided his teaching, but where he did not insist others hold such beliefs and where he did not require that students agree with his philosophy. In deciding that he had been improperly denied reappointment due to his beliefs, the court narrowly held that the university's reasons were pretextual, and
thus declined to hold on the larger issue of the extent to which a University could "prohibit teaching from a Marxist point of view."\(^97\)

In *Carley v. Arizona Board of Regents*, the pedagogical issue was Professor Denny Carley's insistence that his art students perform their work independently and without supervision.\(^98\) He attempted to instill this sense of student independence by not attending classes and by regularly leaving the supervised studio sessions unattended. When his teaching evaluations were poor and many students complained, an Art department faculty committee voted not to retain him. After several administrative levels of review, the Northern Arizona University President concurred in the decision not to reappoint him. Professor Carley sued, claiming that this teaching methodology was protected speech and that it was improper to use student evaluations. The trial and appeals courts disagreed, concluding, "the decision not to retain Carley, even if based, in part, upon student evaluation expressing disapproval of his teaching methods, did not violate his first amendment
It is not clear from the pleadings what evaluation criteria Professor Denny would have an institution employ in considering teaching competence. A faculty committee reviewed his classes, the teaching materials he submitted for review, and the student evaluations. To a varying degree, this procedure is the universally employed model, followed by virtually all such faculty review committees. Even if it were grounded in genuine pedagogical principles, many faculty will be skeptical of a teaching record that includes not supervising classes and not meeting other instructional supervision obligations. Most faculty would consider this an abdication of teaching responsibilities rather than a protected form of professional speech.

_Martin v. Parrish_ presents a more recognizable claim, where an economics instructor, exasperated by his students' class participation, cursed them in no uncertain terms. For example, students complained that he had regularly excoriated them in class: "the attitude of the class sucks," "[their attitude] is a bunch of
bullshit," "you may think economics is a bunch of bullshit," and, "if you don’t like the way I teach this God damn course there is the door."102

Professor Martin was warned by the administration not to continue in this fashion, but even after the warnings, he resumed his cursing. After a series of administrative hearings, he was terminated. The court placed his dismissal squarely in the Connick stream, and found that the epithets were not a matter of public concern: Martin "has not argued that his profanity was for any purpose other than cussing out his students as a expression of frustration with their progress -- to 'motivate' them -- and has thereby impliedly conceded his case under Connick."103 Judge Jones dismissed his academic freedom claim with a footnote: "Appellant also argues vigorously that he has a first amendment right to 'academic freedom' that permits use of the language in question. It is, however, undisputed that such language was not germane to the subject matters in his class and had no educational function. Thus, as in Kelleher v. Flawn, we find it unnecessary to reach this
issue.\textsuperscript{104}

One need not be a prude to object to Martin’s classroom manner, especially once students had complained of the intimidating tactics. Notwithstanding the Professor Kingsfields\textsuperscript{105} of the world, general invectives, hostile language, and teaching-by-terror have virtually no place as a regular teaching methodology in a classroom, except conceivably in a trial tactics or simulation course, where it might be possible to show which rules of evidence would cover such outbursts, or some other highly stylished purpose. The Fifth Circuit found Martin’s tactics would be inappropriate behavior for trial attorneys and elected officials, suggesting that the speech would not be protected even outside professorial responsibilities.\textsuperscript{106}

The record does not reveal that students in Martin’s class objected directly to him. However, in McConnell v. Howard University,\textsuperscript{107} a black student in Alan McConnell’s math course objected to his admonishments in class, where he had urged students to study harder and told them the tale involving a monkey who did
not concentrate upon its task.\textsuperscript{108} When the student called him a "condescending, patronizing racist," Professor McConnell demanded an apology and banned her from his course. She was told by a Howard University administrator that her conduct was not appropriate and that she would be disciplined if she did not cooperate in class.\textsuperscript{109} When she refused to apologize, Professor McConnell refused to continue teaching until the administration removed the student from his math course.\textsuperscript{110} Ordered to return to his class, McConnell refused to do so and was terminated by the Board of Trustees, even though a faculty committee had found "mitigating circumstances ... within a broader context of professorial authority interest in the teacher-student relationship...[A university professor] has the right to expect the university to protect the professional authority in teacher-student relationships."\textsuperscript{111}

The trial court dismissed McConnell's breach of contract claim on summary judgment,\textsuperscript{112} but Circuit Judge Harry T. Edwards\textsuperscript{113} vacated the trial judgment, and remanded for a determination of the contract obligations in light of all the surrounding facts and
circumstances and the prevailing professional norms". At the subsequent jury trial, McConnell lost his action.

As in several cases discussed earlier, race appears to have played a subtle role in McConnell. McConnell, an Anglo, used a folk tale with its central character a monkey, that the students took to be a pejorative racial reference. While the faculty at the predominantly Black institution found for the professor, the Board felt that his behavior was a dereliction of his duties. Suggesting that African American students are "monkeys" may be understood as an unfortunate racial reference, one even more likely to be recognized as offensive in an institution with the racial character of Howard.

In another case involving an historically Black college, hurling angry epithets and boorish behavior were not limited to faculty. In Parate v. Isibor, the Sixth Circuit found that even administrators' "unprofessional" conduct in berating a professor in his classroom in front of students did not constitute a violation of the professor's first amendment rights. Under the
circumstances and extraordinary facts underlying Parate, if this case does not prevent a textbook example of a teacher's protected professorial zone of speech and conduct, no case will likely ever be found:

During both the 1983-84 and the 1984-85 academic years, [Tennessee State University department chair] Samuchin and [dean] Isibor engaged in a variety of retaliatory acts against Parate due to [a grading incident]. Samuchin and Isibor challenged Parate's grading criteria in other courses; sent him a letter critical of his teaching methods; and penalized him with low performance evaluations. By refusing Parate's requests for authorized professional travel and appropriate reimbursements, Samuchin and Isibor impeded Parate's research efforts and his presentation of papers at professional conferences. Ultimately, Samuchin and Isibor recommended the non-renewal of Parate's teaching contract.

In late September 1985, one of Parate's classes was interrupted by a graduate student. This student demanded that Parate change his
final grade in a course which had ended the previous year. On October 2, 1985, two Nigerian students complained about the grades they had received on a "Statics" course examination just returned by Parate. These students demanded "As" on the exam; questioned Parate's teaching competence in front of his other students; and threatened to go to Isibor. These students also stated that they would insure that Parate would not teach the "Statics" course in following semesters.

Two days later, on October 4, 1985, Parate held his "Statics" class as scheduled. Isibor and Samuchin, however, had preceded him into the classroom unannounced. After Parate began to call the roll, he was immediately interrupted. Isibor shouted from the back of the room: "Stop the roll call, don't waste time; circulate the paper for a roll call." Adhering to Isibor's directive, Parate began to teach his class, but was again interrupted by Isibor's shouts. Isibor next ordered Parate to complete one of the problems from the textbook. After Parate began to work out the problem on the blackboard and explain it to the students, Isibor again interrupted him.
Isibor demanded that Parate complete the problem on the blackboard without addressing the students; that the students complete the problem on paper; and that Samuchin copy Parate’s work from the board. Isibor soon approached the blackboard himself and began to work on the same problem that Parate and the students were completing. After severely criticizing Parate’s teaching skills in front of his students, Isibor collected the students’ papers and left the classroom.

After this class, Parate was summoned to a meeting with Isibor, Samuchin, Malkani, and a professor from the TSU Department of Industrial Arts and Technology. Isibor again began to berate Parate. He said that some of Parate’s students were more intelligent than their teacher, and that Parate’s salary could be stopped at any time. Isibor then removed Parate from his post as instructor of the "Statics" course, but directed Parate to attend the class as a student. Parate attended the class for five or six sessions, but was then told that Isibor no longer wanted him to attend. During that semester, Parate was never reinstated as the instructor of the
"Statics" class. In the remainder of Parate's final academic year, 1985-86, Isibor and Samuchin continually sent faculty observers to his classroom.119

Under this extraordinary set of events, all of which followed a dispute where the dean had ordered Parate to change the grade of a student in a previous term, most fair readers would have believed that the chair and dean had exceeded the bounds of any fair and impartial evaluation. Both the trial court and the Sixth Circuit panel found the administrators behavior "unprofessional,"120 but, citing Vasquez and McClary,121 held that Parate had "failed to prove that the defendants' conduct ... was so severe, so disproportionate to the need presented, and such an abuse of authority"122 as to constitute a deprivation of Parate's substantive due process rights. They found that the bizarre incident cast no "pall of orthodoxy over the classroom,"123 and they determined that the TSU administrators were "free to observe, review or evaluate faculty teaching."124

39
To compound this surreal drama, the Court reviewed the grading incident that appears to have precipitated the bad blood, and found that Parate's first amendment right to post grades had been violated:

We believe that the acts of the defendants deserve exacting First Amendment scrutiny. First, we consider Parate's First Amendment right to academic freedom and his interest in eliminating the defendants' arbitrary interference in the assignment of his course grades. Second, we consider Parate's First Amendment right to be free from compelled speech. By insisting that Parate sign the grade change memoranda without including his reservations or the notation "per the instruction of the Dean," the defendants compelled Parate to conform to a belief and a communication to which he did not subscribe. We then balance Parate's interests against defendants' interest in having Parate personally change Student "Y's" grade. Arguing from their First Amendment right to academic freedom, the defendants assert an interest in supervising and reviewing the
grading policies of their nontenured professors. If they deemed Parate's grade assignments improper, however, the defendants could have achieved their goals by administratively changing Student "Y's" grade. We conclude that by forcing Parate to change, against his professional judgment, Student "Y's" grade, the defendants unconstitutionally compelled Parate's speech and chose a means to accomplish their supervisory goals that was unduly burdensome and constitutionally infirm.\textsuperscript{125}

The trial court had followed \textit{Hillis},\textsuperscript{126} \textit{Lovelace},\textsuperscript{127} and \textit{Hetrick},\textsuperscript{128} which involve grading standards and the broad right of colleges to review teaching practices. The Parate court's opinion on a professor's right to grade is a breakthrough opinion, one that extends considerable deference to a theory of professorial academic freedom. Even where there is some evidence that professors have used inconsistent grading standards or misstated their grading practices,\textsuperscript{129} or where a medical school advertises that students failing their exams may retake them and then does not allow a
failing student to do so\textsuperscript{130} -- colleges have won their cases against students; there is no reported case where a student has effectively overturned a grade.\textsuperscript{131} However, Parate's strong endorsement of professional discretion to award grades would seem to constitute the protected predicate to overturn his dismissal in the teaching evaluation fiasco and pattern of unprofessional administrative harassment that so clearly flowed from the original grading dispute itself. Parate's students surely made the connection between Parate's grading practices and his fall from favor: students began to demand reconsideration of their grades, and threatened to go to dean Isibor if he would not change their grades.\textsuperscript{132} The court could readily have found the necessary nexus between the protected grading activity and Parate's harassment, which would have been a principled slap on the wrist of unprofessional and unscrupulous administrators, preserving the plenary right of colleges to reasonably review teaching competence through acceptable peer review or other traditional evaluative instruments.
This essay has triangulated among a series of excesses: students storming a class, faculty behaving badly, and deans acting unprofessionally. Clearly, this is no way to understand what constitutes good practice and a robust marketplace of ideas. I began this project believing that the traditional doctrinal analysis of higher education case law would yield crystalline theory, or that panning through enough nuggets would yield a sense of an academic common law of acceptable classroom practice. I envisioned that recent successful challenges to grading practices, such as the Article 78 appellate court in *Susan "M"*,\(^{133}\) where the court appeared to agree with a dismissed student that her grade had been improperly and arbitrarily assigned, and the survival from summary judgments in other grading cases (*Ochsner v. Trustees of Washington Community College\(^{134}\) and *Bergstrom v. Buettner\(^{135}\)*) might lead to more scrutiny in this arena than had ever been the case. At my own law school, a state district judge had insisted upon reviewing examination books and redacted examination answer sheets in a racial challenge to blind grading practices; although the
professor was exonerated of racial bias, it was the first time in my experience that a judge had satisfied himself of a professor’s bona fides by actually reviewing exams. I also have been involved in a case in which my client was falsely accused of cheating on a medical school exam, and we have successfully challenged his expulsion by showing how prejudicial the hearing process was and by convincing four courts that the medical school did not adhere to its own procedures.

These experiences, as well as recent developments in the law of persons with disabilities, where institutions have been required to accommodate persons with physical and learning disabilities -- even to modifying class and exam formats, led me to believe in undertaking research for this article that a modest revolution was occurring. Several highly publicized incidents between students and professors, where students accused their teachers of engaging in racist, sexist, or homophobic instructional practices also led me to believe that formal challenges to the traditional academic deference given to colleges by judges could
begin to erode. Hence, my "Second Thoughts" on the subject. Nonetheless, more careful study of the recent cases, especially *Levin v. Harleston*¹⁴¹ and *Parate v. Isibor*,¹⁴² has caused me misgivings. *Levin* in particular has given me pause, as I believe it was correctly decided but ignored an important dimension: the assumption that students had not raised objections to Professor Levin’s published views on racial differences. It may be technically true that students had not insisted upon the shadow sections, but it is not correct that students were unaffected by his views. Indeed, there were regular and vocal student demonstrations and disruptions of his class, after the president drew public attention to Levin’s controversial views.¹⁴³ In my travels, I met and spoke at length with two of Levin’s former students, one African American and the other Puerto Rican, who are now both law students. When I discovered they had been City College students, I asked them if they had been in Levin’s Philosophy 101 class; both had, although the black student had opted to take the alternative shadow section, after discovering
from other students what Levin's views on racial heritability were. The Puerto Rican student had not availed herself of this alternative, as she had already bought the book and was ready to take the course by the time the other section was organized. She said she regretted not having made the switch, as she felt that Professor Levin's views made her feel unwelcome in class. Although he never made disparaging remarks or was discourteous, she believed he considered her uneducable and inferior to white students. She strongly believed that he favored white students in class and that he more sharply questioned students of color.¹⁴⁴

While it may be true that a substantial number of students feel unappreciated by their teachers, and believe that others are favored or encouraged, she seemed credible and genuine to me. I remembered, and told them, of an incident in one of my own first year law classes, where I felt a professor had made several unfortunate remarks (having to do with "Indian givers" and the class resembling the United Nations). I had gone to speak to him privately, where he was very resistant to my feelings on the
matter; he said, in rebuttal, that Richard Pryor had made an album with the word "Nigger" in the title, and that I was being too sensitive. Moreover, he raised a type of "standing" defense, inasmuch as I was not Native American. I left, but made sure I was prepared for that course. It was a good thing, as he began the next class by apologizing for any insensitive remarks, and then he called upon me four straight times, including one case that called for a Spanish-to-English translation.

My discussions with Professor Levin's students and my own experiences as a student and professor lead me to believe that any comprehensive theory of professorial authority to determine how it shall be taught must incorporate a feedback mechanism for students to take issue, voice complaints, and point out remarks or attitudes that may be insensitive or disparaging. At a minimum, faculty should encourage students to speak privately with them to point out uncomfortable situations. Professor Bishop asked his students to point out inconsistencies between his Christian perspectives and his lifestyle. This is excessive, and could itself provoke
anxiety on the part of both Christian and non-Christian students. But a modest attempt to avoid stigmatizing words and examples is certainly in order for teachers, and law schools should have in place some mechanism to address these issues and resolve problems. I cringe when I see exam questions that consign Jose and Maria or Rufus to criminal questions, or when in-class discussion hypotheticals use "illegal aliens" or sexist examples and stereotypes to illustrate important legal points, especially in rape and consent fact patterns.¹⁴⁷ Our students have a right to expect more thoughtful pedagogical practices from us.¹⁴⁸

But I can see colleagues cringing at the perceived political correctness ax being ground and hear dismissive remarks suggesting self-censoring. I believe in self-censoring, and if it sacrifices the perfect bon mot or perfectly placed riposte, it is a modest price to pay that I think before I make a hurtful remark or employ an inappropriate example in my free-associational way of lecturing. Nor does my highly protective professorial academic freedom of necessity flatten the opportunity for self-expression among
students or "dumb down" the discussion. Faculty and students have a great amount of elbow room in class, and a self-imposed code of professorial teaching conduct is no loss of autonomy or essential authority. We may not all be Mark Hopkins on a log, but we should strive to keep the Dean Isibors and Professor Kingsfields from becoming the norm.
FOOTNOTES

Michael A. Olivas is Professor of Law, Associate Dean for Research, and Director of the Institute for Higher Education Law and Governance, the University of Houston Law Center. He would like to acknowledge the extraordinary assistance of Cynthia Freeman, Lisa Luis, and Deborah Jones. A version of this paper was presented at a Stanford Law Review symposium on Civic and Legal Education, March, 1993.


The German principles of Lehrfreiheit and Lernfreiheit were transplanted into U.S. soil, giving root to more formal academic freedom principles and jurisprudence: "By Lehrfreiheit, the German professor meant the right of the university professor to freedom of inquiry and to freedom of teaching, the right to study and to report on his findings in an atmosphere of consent." Frederick Rudolph, The American College and University (New York, 1962) at 412. "Lernfreiheit, the freedom of the student, assumed less importance in the American definition, in part perhaps because the elective curriculum was enlarging the domain of student freedom." Id. at 413. See also Metzger, infra at note 8; Rabban, infra at
note 73; Yudof, infra at note 15; Finkin, infra at note 17.


5. For example, in the case of a tenured Stanford English professor dismissed for advocating violence, the institution took the position that it should be treated as if it were a public employer. Franklin v. Stanford University, 218 Cal. Rptr. 228 (Cal. App. 6 Dist. 1985) at n. 3 ("The Faculty Advisory Board which recommend plaintiff's termination committed the University in this case to affording him the same constitutional protection as that available were he employed a state school.")


7. A professor was dismissed from his tenured position for serving marijuana-laced brownies to his students. An arbitrator reinstated him, according to authority granted her by a collective bargaining agreement. In Lansing Community College v. Association for Higher Education, the Appeals Court reinstated the professor, holding that the agreement governed
9. Id. at 8-9.
(1988).


18. Id. at 379.


24. Peacock v. Board of Regents, 510 F.2d 1324, 1326 (9th Cir. 1975).


29. Id. at 247.

30. Mark Yudof, "Intramural Musings on Academic Freedom: A Reply to Professor Finkin", 66 Tex. L. Rev. 1351 (1988). Dean Yudof prefers more modest claims for academic freedom: Professor Finkin "has not identified a set of arguments unique to academicians as academic freedom." Id. at 1357.

31. Paul Brest, "Protecting Academic Freedom through the First Amendment: Raising Unanswered Questions", 67 Tex. L. Rev. 1359 (1988). Dean Brest, offering several critiques, notes that "[Finkin’s] claim that the penumbra of intramural speech is inextricably linked to the core of true academic freedom of inquiry needs a stronger argument than I have heard so far." Id. at 1361 (citation omitted).

32. M. Yudof, supra note 30, at 1357.


36. An early president of Williams College, Mark Hopkins was reputed to be an extremely inspirational teacher; "The ideal college is Mark Hopkins on one end of a log and a student on the other." Frederick Rudolph, Mark Hopkins and the Log: Williams College, 1836-1872 (New Haven, 1956), at 225.

37. Of course, the court has considered closely - allied subject matter, as in Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978) (how much process is due student dismissed for academic reasons), and Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985) (whether student has property right in retaking a medical school examination).

38. In an article on teachers' expressive rights, Albany Law School professor Kathryn D. Katz notes that "What little precedent exists does not support any generated right of faculty members to exercise complete freedom in presenting assigned subject matter, let alone freedom to use the classroom as a forum to discuss other interesting but assigned topics." Katz, "The First Amendment's Protection of Expressive Activity in the University Classroom: A Constitutional Myth", 16 U.C. Davis L. Rev. 857, 862 (1983).


50. Id at 1282.

51. Id. at 1282


53. Bell, Race, Racism and American Law.


57. In one letter published in the American Philosophical Proceedings, Professor Levin wrote, "It has been amply confirmed over the last several decades that, on average, blacks are significantly less intelligent than whites. ... The significance of these findings for our profession (as for the rest of society) is that black representation in a field can be expected, absent any discrimination, to decrease as the intellectual demands of the field increase." Levin v. Harleston, 770 F.Supp. 895, 902-903 (S.D.N.Y. 1991).

58. The dean sent a letter to Professor Levin’s students that said, in part, "You may know - and otherwise, I expect would soon learn from sources other than this letter - that Professor Levin has expressed controversial views on such issues as race, feminism and homosexuality. ... I should add
that I am aware of no evidence suggesting that Professor Levin’s views on controversial matters have compromised his performance as an able teacher of Philosophy who is fair in his treatment of students. Taking into consideration the rights and sensitivities of all concerned, and wishing to permit informed freedom of choice for students ... I have in this instance decided to open a second [section]..." **Levin v. Harleston**, 770 F.Supp. 895, 908 (S.D.N.Y. 1991).


60. Van Alstyne, "Specific Theory", **supra** note 10 at 77-78.


62. While Levin used philosophical sources in his writings, he also used psychometry and statistical "evidence," which he asserted to be "factual matters." 770 F.Supp. 895, 901-903 (reviewing I.Q. data on blacks and whites).

63. Van Alstyne, "Specific Theory," at 76, **supra** at note 13.


66. MIT philosophy professor Judith Thompson makes a similar point concerning belief systems in faculty hiring. In an interesting essay on the appropriate norms for considering scholarly orthodoxies, she considers the candidacy of an astrology expert and rejects the field of study as not
sufficiently scientific: "As a member of the committee, I was under a duty precisely to bring my past experience to bear on, among other questions, the question what fields are worth investing in. Given my past experience, I would have failed in that duty if I had refrained from voting against astrology." Thompson, "Ideology and Faculty Selection," 53 Law & Contemp. Probs. 155, 160 (1990).

67. It might be possible for a genuinely original and brilliant scholar to assert that he or she is unreviewable by peers because there are none, but this is highly unlikely to prevail in a university setting. It was argued tangentially in Kay v. Board of Higher Education that the philosopher Bertrand Russell should not be appointed to a mathematics post at the College of the City of New York: "his appointment violates a perfectly obvious canon of pedagogy, namely, that the personality of the teacher has more to do with forming a student’s opinion that many syllogisms.... It is contended
that Bertrand Russell is extraordinary. That makes him the more dangerous." 18 N.Y.S. 2d 821, 829 (1940). In an informed consent case against the renowned heart surgeon and medical school professor Denton Cooley, the widow of one of Cooley's patients argued that Dr. Cooley had experimented upon her husband without full and informed permission; it was argued that Dr. Cooley was such an extraordinary surgeon that his techniques constituted the appropriate medical standard.

Karp v. Cooley, 493 F. 2d 408, 420 (5th Cir. 1974).


69. The president of American University, Richard Berendzen, was found by police to have installed a private phone in his desk from which he called women and made harassing and obscene phone calls. See, N.Y.Times, April 25, 1990, Sec.A, 19, col.1.


74. Id. at 246.


82. **Lynch v. Indiana State University Board of Trustees**, 177 Ind.App. 172, 175, 378 N.E.2d 900, 903.

83. **Lynch v. Indiana State University Board of Trustees**, 177 Ind.App. 172, 180, 378 N.E.2d 900, 905.


89. **Bishop v. Aronov**, 926 F.2d 1066 (11th Cir. 1991).


100. There is a vast literature on teacher evaluation, both by students and by peers. For examples of the genre, see Laura Goodwin and Ellen Stevens, "The Influence of Gender on University Faculty Members’ Perceptions of ‘Good’ Teaching," 64 J. Higher Educ. 166 (1993); Ronald Smith and Patricia Cranton, "Students’ Perceptions of Teaching Skills and Overall Effectiveness Across Instructional Settings," 33 Res. in

101. Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986).
102. Martin v. Parrish, 805 F.2d 583, 584 (5th Cir. 1986).
103. Martin v. Parrish, 805 F.2d 583, 585 (5th Cir. 1986).
104. Martin v. Parrish, 805 F.2d 583, 584 (note 2) (5th Cir. 1986); Kelleher v. Flawn, 761 F.2d 1079 (5th Cir. 1985).
106. Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986).
108. 818 F. 2d 58, 60, (D.C. Cir. 1987).
109. Id. at 60-61.
110. Id. at 60-61.
111. Id. at 60-61, citing Appendix to Brief for Appellant.


113. Judge Edwards, a former law professor at the University of Michigan and Harvard, is an acknowledged expert in higher education law and labor law. See Harry Edwards and Virginia Nordin, Higher Education and the Law (Cambridge, Massachusetts, 1979) and cum. suppl.; H.T. Edwards, Labor

114. 818 F. 2d 58, 71 (emphasis added).


117. Interestingly, the Board did not appear to have been motivated by the remarks in class. 818 F. 2d 58, 63 (D.C. Cir. 1987) at note 5. ("It should be emphasized that the remarks made by Dr. McConnell that [the student] found objectionable did not form the grounds for the University's attempt to terminate his appointment, and have no bearing on this case.") (emphasis in original)

118. Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989)

119. Parate v. Isibor, 868 F.2d 821, 824-825 (6th Cir. 1989)

120. Parate v. Isibor, 868 F.2d 821, 831 (6th Cir. 1989)

121. Vasquez v. City of Hamtramck, 757 F.2d 771, 773 (6th Cir. 1985); McClary v. O'Hare, 786 F.2d 83, 88 (2d Cir. 1986); Parate v. Isibor, 868 F.2d 821, 833 (6th Cir. 1989).


126. Hillis v. Stephen F. Austin University, 665 F.2d 547 (5th Cir. 1982).

127. Lovelace v. Southeastern Massachusetts University, 793 F.2d 419 (1st Cir. 1986), as cited in Parate v. Isibor, 868 F.2d 821, 830 (6th Cir. 1989).


131. But see, Keen v. Penson, 970 F.2d 252 (7th Cir. 1992), where student’s grade was changed by the administration after the student had a prolonged and bizarre dispute with her professor.


136. try to track this data down - Judge Felix Salazar was the judge in Houston Dist. Ct. about 4-5 yrs.


139. After a medical student was diagnosed as having cognitive deficits and weaknesses in processing discrete units of information, a medical school made a number of class and exam accommodations, including makeup tests. When these did not suffice for the student to pass all his courses, he sued to have the multiple choice examination format declared discriminatory. The first circuit held that the school had made substantial alternations in their usual pedagogical practices, and that it was not required to provide fundamentally different exam formats. *Wynne v. Tufts Univ. School of Medicine*, 976 F.2d 791 (1st Cir. 1992).

140. See, e.g., *McConnell*, supra note 107. Another such example included a visiting professor at Harvard Law School, who was accused by some students of using demeaning and sexist examples, even after students had raised complaints. See, Bernstein, "On Campus, How Free Should Free Speech Be?", N.Y. Times, Sept. 10, 1989, at 4-5, col. 1. In another incident, a Texas A & M University police academy instructor was cleared of sexual harassment charges when he required a woman student to blow into a breathalyzer tube attached to an artificial
penis, and showed pictures of topless women in class slide shows. Mark Smith, "Instructor’s Joke Not Misconduct", Houston Chron., Jan. 17, 1993, at 1D. Additional examples include an art professor who created a sexually hostile academic environment for students by using photographs by Robert Mapplethorpe and nude photos of himself in class; and a tenured University of Wisconsin professor who was fired for harassing students and having sex with some of them in his office. "Faculty Notes," Chron. High. Educ., Feb. 24, 1993 at A18.


144. I promised these students confidentiality, and that I would only summarize their conversations. The conversations took place at a talk I gave at the Association of the City Bar of New York. For a summary of the evening’s program, see Michael Olivas, Introduction, 63 J. Higher Educ. 479 (1992)

145. Richard Pryor, Bicentennial Nigger (______ Records, 1976). Since that time, the comedian has sworn off his use of the term, conceding it is offensive and degrading.

147. For an example of the difficulty in teaching rape, see James Tomkovicz, "On Teaching Rape: Reasons, Risks, and Rewards", 102 Yale L.J. 481 (1992). See also, Page, "Where Narrow Minds Stifle Debate", Chic. Trib., Dec. 23, 1990, at 3-C, (citing incident in which New York University Law School withdrew a moot court problem involving a lesbian mother's custody battle because students did not want to take the father's side in the case). For an example of a casebook instance, a new Michie pretrial discovery text includes an entire chapter that constitutes a case-study of a petty thief being processed into jail for an outstanding parole violation. There is an elaborate scenario stemming from a graphic strip search, involving Taser guns, leering guards, and a miscarriage from the Taser shocks. The name of the criminal, the only recognizably-ethnic name in evidence, is "Maria Garcia." Theodore Blumoff, Margaret Johns, and Edward Imwinkelried, Pretrial Discovery: The Development of Professional Judgment (Charlottesville, 1993), Ch 2.

148. The newly-reconstituted Office for Civil Rights has also announced that it will develop a policy for governing classroom "hostile" racial climates. Douglas Onley, "OCR Targets Instructors' Role in Fostering Racial Hostility," Educ. Daily, March 12, 1993 at 1, 3.