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THE VALUE OF THE MARKETPLACE OF IDEAS: ACADEMIC FREEDOM IN THE AMERICAN ACADEMY

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by
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ABSTRACT

THE VALUE OF THE MARKETPLACE OF IDEAS:

ACADEMIC FREEDOM IN THE AMERICAN ACADEMY

Daniel J. Perrone

This dissertation surveys several landmark U.S. Supreme Court cases of academic freedom in the 20th and 21st century to argue for the value of a tolerant and liberal interpretation of unrestricted academic freedom. Central to its argument is a defense of Oliver Wendell Holmes 1919 ruling in *Abrams* that society is best served where all expressions are tested in a "marketplace of ideas," a term first used by John Stuart Mill in his 1859 essay, "On Liberty." In an era of increasing casualization of academic labor (the adjunct labor force) and political paranoia about terror, I conclude that the continual defense and affirmation of academic freedom as a concept is particularly necessary to counterbalance repressive forces on academic knowledge production. I argue that the idea of academic freedom in America, expressed in the American Association of University Professor's *1940 Statement of Principles on Academic Freedom and Tenure*, has been greatly limited by social and political developments in the 20th and 21st centuries.

The consequence of the erosion of academic freedom within the American academy is that generations of future students will not question or challenge the status quo. By looking at the erosion of academic freedom, I will argue that the philosophical basis of academic freedom must reside in the "marketplace of ideas," and that

contemporary labor practices threaten to extinguish academic freedom as it has been defined for over 100 years.

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Thanks as well to my family and friends who provided much needed distractions and laughs along the way, and I also remember the good and decent people who aren't here, including my aunts, uncles, cousins, extended family, and friends -- you are all missed and loved.

PREFACE

This dissertation surveys several landmark U.S. Supreme Court cases of academic freedom in the 20th and 21st century to argue for the value of a tolerant and liberal interpretation of unrestricted academic freedom. Central to its argument is a defense of Oliver Wendell Holmes 1919 ruling in *Abrams* that society is best served where all expressions are tested in a "marketplace of ideas," a term first used by John Stuart Mill in his 1859 essay, "On Liberty." In an era of increasing casualization of academic labor (the adjunct labor force) and political paranoia about terror, I conclude that the continual defense and affirmation of academic freedom as a concept is particularly necessary to counterbalance repressive forces on academic knowledge production. I argue that the idea of academic freedom in America, expressed in the American Association of University Professor's *1940 Statement of Principles on Academic Freedom and Tenure*, has been greatly limited by social and political developments in the 20th and 21st centuries.

The dissertation has chapters on academic freedom as a "special concern of the first amendment" in *Keyishian v. Board of Regents* and the indirect walking back of that sentiment in *Garcetti v. Ceballos*; early 20th century cases tangentially and directly related to academic freedom beginning with *Patterson v. Colorado*, the introduction of Holmes' "marketplace of ideas" in *Abrams v. United States* and a defense of academic freedom in *Adler v. Board of Education*; a chapter on adjunct academic freedom and due process for adjuncts in *Perry v. Sindermann* and *Board of Regents v. Roth* as well as the concept of "adjunctification" and the corporatization of the academy; a chapter on the War on Terror and the repression of academic free thought in *Holder v. Humanitarian*

Law Project as well as case studies of two academics; and finally a chapter on student academic freedom via free expression in *Tinker v. Des Moines Independent Community School District*, campus affiliated student clubs in *Healy vs. James,* and *Christian Legal Society Chapter of Univ. of Cal., Hastings College of Law v. Martinez,* as well as a discussion of student academic freedom through the lens of student postings and academic production.

The consequence of the erosion of academic freedom within the American academy is that generations of future students will not question or challenge the status quo. By looking at the erosion of academic freedom, I will argue that the philosophical basis of academic freedom must reside in the "marketplace of ideas," and that contemporary labor practices threaten to extinguish academic freedom as it has been defined for over 100 years.

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INTRODUCTION

Preamble

This dissertation argues that academic freedom is the lifeblood of a civilized society. Thinking, debating, and putting into action ideas without fear of sanctions are imperative for societies to progress. Although this kind of debate can take place anywhere, a university provides a dedicated space to think freely, think for oneself, and have the confidence to propose how the knowledge gained can be used outside of the university. Embracing an expansive definition of academic freedom is one of the best defenses against societies sliding into despotism and authoritarianism. Fear of repression leads to stagnation and dogmatism, and older ideas are never challenged and can be manipulated and used for nefarious purposes. An idea that goes unquestioned and unchallenged can provide adequate cover for dictators to increase restrictions on citizens, using the dogma as a weapon against critics. The academy provides a space for students to try out new ideas.

A civilization usually organizes itself around "laws". Laws can help or hinder the continuing challenges to academic freedom. In the United States, the U.S. Supreme Court as the final arbiter has directly and indirectly commented on academic freedom, providing an interesting reflection on how academic freedom is valued (or not valued) with a systemic framework. Throughout the 20th and 21st centuries, the U.S. Supreme Court has shifted from a narrow to expansive view of academic freedom by acknowledging that new ideas have some constitutional capital in the academy and students have a modicum of speech rights on campus, but in the intervening years has placed limits on the scope of academic freedom through a lack of protections for the contingent work force as well as privileging the academic freedom of a university.

The ideal of "academic freedom" has to constantly re-invent itself as challenges to true intellectual autonomy continuously appear. In the early 20th century, "academic freedom" was not on the high court's radar, and the concept of a marketplace of ideas took time to be accepted. During the Cold War, academics had to be careful for fear of being labeled as enemies. And today, adjunct laborers, usually without the protections of tenure, have to be careful of teaching or researching ideas that can irk administrators; the prevalence of adjunct laborers in the university has lead to an "adjunctification" of the university. Although two U.S. Supreme Court cases give some adjuncts a form of procedural protection from summary dismissal, the large majority of adjuncts do not have academic freedom. Since adjuncts make up a large proportion of university educators*, the large majority of university educators* do not have academic freedom. In addition, with the increase in the "corporatization" of the university system, adjuncts are viewed as a cost-saving measure, and universities are marketed more by their amenities than their ideas. During the "war on terror", a U.S Supreme Court case lent credence to the idea that teaching may be re-purposed as a crime depending, among other things, on the audience. Also, two professors (Ward Churchill and Steven Salaita) tested the academic freedom mantra and found that academic freedom is not without limits, especially for ideas labeled repugnant and far worse. Although three U.S. Supreme Court cases provide a measure of academic freedom to students through a marketplace of ideas ideal, the freedom is limited. All ideas are not viewed the same, especially for ideas defined as threatening, and educators as well as students can be sanctioned for ideas that are "uncivil" or offensive to others, which is especially exacerbated in the digital age and through vehicles such as social media. Although academic freedom will always be a

politically defined concept and sometimes hard to defend (and today controversial social media use by faculty and students makes academic freedom even more difficult to sustain) I argue that academic freedom is a concept which is crucial to maintaining a fair and open society.

Dissertation Overview

This dissertation surveys several landmark cases of academic freedom in the 20th century to argue for the value of a tolerant and liberal interpretation of unrestricted academic freedom. Central to its argument is a defense of Oliver Wendell Holmes 1919 ruling in *Abrams* that society is best served where all expressions are tested in a "marketplace of ideas," a term first used by John Stuart Mill in his 1859 essay, "On Liberty." In an era of increasing casualization of academic labor (the adjunct labor force) and political paranoia about terror, I conclude that the continual defense and affirmation of academic freedom as a concept is particularly necessary to counterbalance repressive forces on academic knowledge production. I argue that the idea of academic freedom in America, expressed in the American Association of University Professor's *1940 Statement of Principles on Academic Freedom and Tenure*, has been greatly limited by social and political developments in the 20th and 21st centuries. The consequence of the erosion of academic freedom within the American academy is that generations of future students will not question or challenge the status quo. By looking at the erosion of academic freedom, I will argue that the philosophical basis of academic freedom must reside in the "marketplace of ideas," and that contemporary labor practices threaten to extinguish academic freedom as it has been defined for over 100 years.

Primary Materials

The primary materials of this dissertation are U.S. Supreme Court cases and secondarily lower federal court cases. However, at present academic freedom rarely holds much weight in the U.S. Supreme Court, which has not clearly defined "academic freedom," instead conflating it with a non-scholarly first amendment speech right. Focusing on several key cases of the 20th century, I will show that the courts have wrestled -- unsuccessfully -- with Justice Oliver Wendell Holmes' 1919 decision in *Abrams v. U.S.*, drawn from John Stuart Mill's 1859 *On Liberty*, that an open "marketplace of ideas" is the best means of advocating for American academic freedom. By examining the rhetoric of the most salient American legal cases related to academic freedom, I will argue that the American academy can only achieve the most legitimacy from a legal system that allows for wide discretion in the research, writing, and speech of members of the academy.

Scholarship Overview

Although scholarship on academic freedom has typically focused on the rights of tenured full-time faculty, my dissertation will also explore the meaning of academic freedom for two populations within the academy who are essential in the daily operations of the academy: adjunct faculty and students. The first group, adjunct faculty, self-censor because of their lack of tenure and governance rights, which has become more acute in a corporate educational environment. The second group, students, is viewed as mere receptacles benefiting from their professor's academic freedom. Both groups are

historically unacknowledged but importantly emergent members of the American academy.

Project Structure

The structure of my project encompasses five case study chapters. I provide a legal case (or legal cases) that provide a backdrop for the main focus of each chapter, and then provide scholarly commentary interpreting the issue. My rhetorical analysis focuses on the court's direction and the scholarly discussion and how this could affect the academic freedom of faculty members and students, which is central to the work of this dissertation. I accomplish this by introducing the core concepts of this dissertation, academic freedom and a marketplace of ideas, which provides a foundation to apply these concepts substantively in the remainder of my dissertation.

Chapter one provides a current analysis of the interpretation of academic freedom by the U.S. Supreme Court. This will inform the reader about the basic concept of academic freedom and how courts have wrestled with this concept in the late 20th and early 21st century. Chapter two analyzes the legal concept of a marketplace of ideas. I discuss language used in historical court decisions for the purpose of learning from past limitations on academic freedom to protect us from current attacks on academic freedom. Chapter three demonstrates adjuncts lack of a legal right to academic freedom. This vulnerability is demonstrated through a freedom of speech standard and a lack of tenure for the purpose of showing this situation threatens to destroy academic freedom for everyone. Chapter four advocates that academic freedom is squelched for fully tenured professors in two ways. First, faculty might refrain from researching issues related to the

war on terror because of a fear of being branded a terrorist sympathizer. Second, faculty research styles have been challenged as “uncivil” when in actuality the speech itself is at issue. I conclude my dissertation with chapter five. I demonstrate that academic freedom for students can be supported within the framework of John Stuart Mill's marketplace of ideas, which has been embraced by the courts.

Chapter 1 -- A Precarious Balance: Academic Speech between *Keyishian* and *Garcetti*

The dissertation begins with an overview of two important court cases from 1967 and 2006 that discuss the current state of academic freedom in America, essentially validating the concept of academic freedom by first labeling it a special concern of the First Amendment, but then subjecting it to limitations in an employment context. In the 1967 case *Keyishan v. Board of Regents*, which challenged a SUNY rule that all faculty must sign a certificate which disclaimed Communist Party affiliation, the court ruled that academic freedom is a “special concern” of the First Amendment; it is important -- but without clarification (Nelson). The lack of clarification is what is at stake here; by having an educator's speech evaluated on a case by case basis, applying the nebulous term "special concern" whenever a controversy comes before the courts without some guidance, it re-litigates the concept of academic freedom, implying there are limitations -- perhaps substantial, depending on the speech and context -- to a core concept of academia.

A companion piece to *Keyishan* that demonstrates how the concept of academic freedom has changed in the 21st century is the 2006 case *Garcetti v. Ceballos*, in which a

California prosecutor was sanctioned after he reported that a law officer had lied in an affidavit supporting a search warrant. In other words, the Garcetti case showed that the court defended employers' right to discipline workers (such as faculty) despite their first amendment rights to "free" expression. The court ruled that public employees do not have constitutional protection when they speak “pursuant to their official duties” -- which is a core tenant of what educators do through their research, writing, and teaching. It takes the freedom out of academic freedom. If taken even further, such as if an educator’s ideas are not seen as their own and viewed as a “work for hire” (as discussed in Chapter 1 in a different context in *Cmty. for Creative Non-Violence v. Reid*), an educator’s existence become commoditized. Academic freedom loses its agency.

Taken together, *Keyishan* and *Garcetti* illustrate that academic freedom is essential for the forward progress of our society, acknowledging that continual prodding, questioning, and pushing the boundaries is a hallmark of growth. However, we are continually in pursuit of the ideal when applied in practice, with uneven results. This has been demonstrated throughout the years when controversies have arisen regarding students forming organizations on campus (*Healy vs. James*), continued employment rights for adjuncts (*Perry v. Sindermann* and *Board of Regents v. Roth*), teaching groups the government deems terroristic (*Holder v. Humanitarian Law Project*), and, in a fairly recent case that somewhat distinguishes itself from the facts in *Garcetti*, public employees who give truthful sworn testimony, required by subpoena, outside the course of ordinary job responsibilities (*Lane v. Franks*). The journey is as meaningful -- perhaps even more meaningful -- than arriving at the ideal. This “journey” of recent facts is more important than the ideal of academic freedom since the concept is universal -- it is a

fundamental tenet of teaching and learning, to be forever applied when teaching and learning takes place, in places and with practices that we cannot even imagine yet.

Chapter 2 -- Major 20th Century Academic Freedom Cases

In chapter two I examine three important cases that support my claim that the courts have historically struggled with unpopular ideas, which inevitably leads to a blunting of academic freedom. First, I analyze *Patterson vs. Colorado (*1907), in which the court ruled some forms of speech could be sanctioned as promoting a "bad tendency" contrary to the public welfare. Second, I discuss the concept of a marketplace of ideas as introduced by Justice Oliver Wendell Holmes in a dissent in the 1919 case *Abrams v. U.S*. Third, I look at *Adler v. Board of Education* (1952), where the court noted political affiliations can be used as a bar to teach in public schools. These cases demonstrate the lack of academic freedom during the early to mid 20th century.

I will draw on William Van Altyne's critique of the "bad tendency" ruling, as well as his critique of a marketplace of ideas. Particularly useful to my argument is Van Altyne's claim that academic freedom had a limited scope as early as World War 1. This was the case because, in addition to the view that "bad tendency" speech could be prohibited by law, public employees (including educators) were not shielded from this since employment was voluntary -- educators voluntarily give up their free speech rights as a condition of employment (83). The employers' or governments' "rights" argument to discipline a "bad tendency" of people speech, however, runs counter to Holmes' introduction of a marketplace of ideas, since the blunt instrument of a bad tendency to restrict ideas is incompatible with humankinds search for greater truth (Van Alstyne 98).

An enlightened marketplace of ideas concept was still not considered the ultimate standard, as a later case justified sanctioning one's political affiliation. This chapter shows that although the marketplace of ideas gained traction in the 1920's onwards, the civil politics around disciplining workers (i.e.: teachers) has never gone away either. So the story I tell is that even though the "marketplace of ideas" became an important concept of academic debate in the 20th century, it arose in slow and difficult ways against much stronger repressive cultures of patriotism and business interests during World War 1 and the Cold War.

I conclude that the rhetoric of the legal reasoning in these cases made academic freedom vulnerable. This is instructive today, since the limits on academic freedom in the past guide us to advocate that this concept needs to be based in something stronger, a more inviting rhetoric that allows for members of the academy to explore unpopular ideas to benefit society.

Chapter 3 -- Adjunct Academic Freedom and the Corporatization of the Academy

In chapter three, I demonstrate the significance of articulating a clear position on academic freedom that is not tied to employment status. I argue that the lack of legal protection in the current era of the corporate university, where adjuncts are the majority of educators in the academy because of their economic benefits, creates a huge rift between the ever-shrinking pool of full-time and tenured professors who produce knowledge and adjuncts whose lone expectation is to teach the knowledge created by others. This is also demonstrated by the corporatization of knowledge, as well as in online classes and in a corporate religious university setting.

Two cases from 1972 that further this discussion are *Perry v. Sindermann*, in which an adjunct who criticized the administration in class was not given a reason why he was not being rehired, and *Board of Regents v. Roth*, in which an adjunct was not rehired after he testified about the attributes of becoming a four year university in direct opposition to the school board's assessment. The court recognized an adjunct's right to speak as any other person, even as they do not have a right to formally challenge their non-reappointment.

I will draw on Van Altyne's critique of the adjunct's "lesser" amount of protection related to her speech, and Ellen Schrecker's argument that docile adjunct labor is a crucial part in the current academy-corporatized structure. Particularly useful to my argument is Van Altyne's claim that adjuncts have academic freedom in theory, but not in practice.

Taken together, these two cases suggest that adjuncts have theoretical rights, but they are seldom actionable ones: in other words, an adjunct cannot be terminated if it is clearly established he was terminated based upon constitutionally protected speech, but an adjunct has a right to be notified for the reasons of his non-reappointment (and to challenge them) *only* if there is no clear statement that his employment as an adjunct is not expected to be extended. An employer can effortlessly avoid this morass by employing boilerplate language in an employment contract at the beginning of each semester such as "employment is for a fixed term of this semester, contingent based on course availability and budgetary constraints". And as a result, the academic freedom of more than one half of the university workforce is indeed theoretical, but otherwise non-

existent in terms of job protection. In other words, this is not academic freedom in practice.

Chapter 4 -- Academic Freedom and the War on Terror

Chapter four argues that it is essential that knowledge-making through debate and discussion is not completely quashed within the American academy. This is demonstrated especially through new mediums that can increase participation in the discussion, and the new truths borne of those fruits that benefit society. Politics has been cramping academic freedom just like it did in the Cold War and World War I. The consequences of this type of "exception" are a virulent strain of anti-intellectualism in which intelligence takes a back seat to security. The War on Terror since 9/11 has witnessed the firing of two professors without much respect for academic freedom, and this chapter will focus on several of these cases.

First, I unpack the 2010 case *Holder v. Humanitarian Law Project*, where the court noted that teaching about lawful and peaceful activities to a group designated as a terrorist organization is banned because teaching in this circumstance connotes material support for terrorism. I will draw on Andrew Moshirina's critique of the "material support" ruling. Particularly useful to my argument is Moshirina's claim that a slippery slope can be created in which eventually a lack of research about groups who the government deems terroristic can result in a blighting of knowledge that could benefit the public. A lack of informed debate about the group deemed terroristic can result in an intellectual black hole in how to counter these groups -- if controversial research is

quashed, we will have few tools to counter terrorism, which may not necessarily address or solve the immediate or larger problem.

Second, I analyze the firing of two professors, Ward Churchill and Steven Salaita, by looking at different kinds of documents other than court cases. Churchill and Salaita were terminated because of their incendiary comments (the former called 9/11 victims "little Eichmans", and the latter hoped for Israeli children to be kidnapped). In both cases, they were not fired directly for the comments they made, but terminated for other reasons. Churchill was found guilty of poorly footnoted scholarship and self-plagiarism, and an offer of employment to Salaita was rescinded because of his lack of “civility”. I will draw on the critique of Robert O'Neil, as well as Henry Reichman, Joan Wallach Scott, and Hans-Joerg Tiede, who comment on how self-censorship can result from professors being questioned about their academic speech, even if the speech is in furtherance of their discipline. Particularly useful to my argument is their claim that universities will tend to challenge a professor's speech indirectly through sanctioning other aspects of their scholarship and questioning their civility.

In both cases, there was not a direct challenge to the content of their speech. I argue that by using procedural and indirect means to oust those deemed hateful while still claiming that academic freedom is not at issue creates a Cold-War type of self-censorship over the entire academy, in which there is no true academic freedom. This is also demonstrated in extramural speech, especially involving digital rhetorics which include social media, as well as by analyzing academic freedom as a cultural concept and the idea

of what a university is. The controversial ideas are not debated and discussed; the end result is the only debate.

Chapter 5 -- Academic Freedom and the Marketplace of Ideas: A Student Prerogative

In chapter five I argue that viewing students as contributors in knowledge building, especially by crafting a valid argument for student academic freedom in a legal context, creates the ideal in Mill's marketplace of ideas analysis -- the only utterly meaningless idea is the idea that is never uttered in the town square. By nurturing academic freedom for students within a marketplace of ideas framework, I argue this provides the greatest possibility for students to be contributors within the academic endeavor, while acknowledging their responsibility in being responsible participants.

I begin by asserting the enduring value of Holmes' ruling in *Abrams* even to the 21st century, especially as it applies to students. I accomplish this by analyzing John Stuart Mill's marketplace of ideas concept. The concept essentially states that no idea should be repressed -- all ideas deserve to be uttered in public, and the populace, through debate and discussion, will determine the validity of the idea. This kind of controversial freedom ensures that current ideas do not grow stale and become dogma, as only through new ideas entering the public discourse can a society grow and flourish.

I will draw on Elmer Thiessen's analysis of the modern conception of the marketplace of ideas in the context of academic freedom. Particularly useful to my argument is Thiessen's discussion about a balanced view of academic freedom in which

educators and researchers can break through their scholarship limitation responsibilities in an ongoing search for truth -- a marketplace of ideas. (63).

Second, I argue that this marketplace of ideas should encompass students deserving scholarly recognition for their knowledge production; they can make contributions to the academy as well as professors. Marc Bousquet has advocated for equality between the faculty and students in terms of sharing capital towards the ultimate goal of societal productivity (*University* 154). He has defined this as student academic freedom (*Ritalin* 199). However, in attempting to quantify student academic freedom within the sphere of knowledge production, there is surprisingly a dearth of scholarship. Louis Menand notes professors virtually monopolize the business of knowledge production in many areas, but proposes that academic inquiry, at least in some fields, may need to become less exclusionary and more holistic (*Marketplace*). Students are not explicitly stated as a part of that endeavor.

Menand doesn't think much about students and I, in contrast, want to enlarge our view of university knowledge production. Bruce Macfarlane addresses this in his argument that the traditional definition of academic freedom is condescending to students, relegating them to a mere by-product; students and faculty are scholars learning together (*Freedom to Learn* 24). Published term papers, acting as research assistants, being involved in student groups and education, and participating in service learning is more than the mere realm of student "work". I argue that defining student academic freedom as participating in the knowledge production of the university is worthy of scholarly recognition. An analysis of student academic freedom through several examples

demonstrates the push and pull of taking students intellectual pursuits seriously, especially for the most shocking and offbeat ideas that universities classify as threats. Also, university speech codes and the concept of "offensiphobia" in which ideas that offend others and are not considered a part of the university marketplace of ideas results in a simultaneous muting of student and faculty academic freedom. Free speech zones also limit the intellectual pursuits of students, and social media has not been fully embraced as a venue for students to enjoy academic freedom.

Third, I apply the concept of a marketplace of ideas to three US Supreme Court cases. Two cases from the civil rights era support the notion of a marketplace of ideas. One case allowed high school students to wear black armbands to protest the Vietnam War (*Tinker v. Des Moines Independent Community School District*), and a second case allowed students to form an on-campus organization opposed by college administrators, provided their organization meets the standard put forth by the university as determined after a hearing *(Healy vs. James)*. A more recent case from 2010 in which a law school denied full recognition to a student organization (the Christian Legal Society) that wanted to limit membership to students who abided by Christian principles (*Christian Legal Society Chapter of Univ. of Cal., Hastings College of Law v. Martinez)* reaffirmed the marketplace of ideas theory. Student groups cannot be singled out because of their point of view-- a college can only prohibit non-expressive speech that does not alter the group's message. I argue that the marketplace of ideas should stay open for business.

I will heavily draw on Philippa Strum and William Van Alstyne's critique of *Healy*, and how their critique relates to how the courts view academic freedom for

college students. Particularly useful to my analysis is Strum's argument that it can be inferred from court decisions that students, as a part of the educational endeavor, are included in the marketplace of ideas, and Van Alstyne's discussion regarding *Healy* about how administrators can impose reasonable limitations on student groups provided they do not alter the substance of the student's speech.

Postamble

In this dissertation I show academic freedom provides the space for educators and students to expand on conventional ways of thinking and, more importantly, take the un-conventional ways of thinking and apply them to improve society. There is no one way to approach this. From making it clear that all ideas are welcomed (without the exception that some ideas are not ideas) to the “less is more” approach where universities do not privilege any one idea over another (although some may voice reproach at ideas that impose on other’s freedoms) the end result is valuing thinking without inducing a reflex to censor. If life at a university (and life in general) is about “the journey”, impediments on the journey should be few and far between, with struggles serving a purpose and not merely to insist on dogmatic allegiance.

PROLOGUE

The concept of academic freedom has existed, in one form or another, for centuries, but its 20th century form in the United States was shaped by frictions between corporate business interest and the academy. As Shannon Dea notes in her survey of the history of academic freedom, some aspect of independent thinking in an educational setting has been celebrated at various times in human history. Dea notes that approaches to scholarship in the university was surprisingly varied in the 10th and 11th century in the Middle East and North Africa; a later re-awakening of academic freedom in 19th century Germany was assisted by educational reforms. Educator Wilhelm von Humboldt magnified the ideal of academic freedom through the concepts of a freedom to teach in the university (Lehrfreiheit), as well as a freedom to learn in the university (Lernfreiheit). The idea of "freedom" in a structured environment such as a university began to slowly take root.

In fact, academic freedom became a source of pride and honor for Germany. As A. Lodewyck noted:

> …Germany became the land of academic freedom. The spirit of freedom permeated more and more all academic institutions. This spirit was their pride and the source of their greatness. The State abstained as far as possible from all interference in the internal administration of the universities. The professors, although paid by the State, enjoyed a large measure of personal independence. They were free in the choice of the objects of their researches and the method promising the best results, and published these results without let or hindrance

> from anybody. When filling vacant chairs, the recommendations of the faculties were nearly always accepted. (88)

Universities were, in a sense, sacrosanct. The university had a "higher calling" and was one of the main engines of the continued growth and success of the state. Professors were part of a professional class of the highest order, viewed in a way as infallible in intellectual pursuits. There was an understanding that the greatness of the university mirrored the greatness of society. After all, if German students became productive members of German society, the inference was that universities (and university professors) provided the linchpin for this greatness.

Students as well had an expectation of some form of academic freedom. As Lodewyck states:

> The students enjoyed no less freedom than their teachers. They were not bound by any rigid curriculum, as is mostly the case in British universities, were not compelled to attend the lectures of any specified professor or lecturer, and often changed over from one university to another. This great freedom, left to students, may have had some drawbacks for the weaker ones, but was looked upon as the best way to promote independent thought, cheerful work and the sense of responsibility. University education chiefly aimed at the development of independent scientific thought and research. (88)

It is interesting in how student freedom is framed here. Unlike in many systems of education, where students are coddled, saddled with numerous restrictions, or viewed as "less than", the *initial assumption* here was that students were *intelligent*. They were not viewed with suspicion or derision, but were *expected* to be independent. Academic

freedom was viewed as a *learning strategy* and not as a luxury only given to the best and brightest, or, even more unfortunately, viewed as a sign of negligence on the part of the university for not "teaching" students in a more top-down fashion. Humans learn through thinking and doing. Although there is no perfection and things may not always go as planned (see the eventual de-evolution of Germany in its embrace of Nazism and squelching independent thought) it would be hard pressed to find an abundance of educational systems that ascribe to the Lehrfreiheit and Lernfreiheit idea of academic freedom.

In the United States, the modern concept was most notably memorialized in a 1915 document by The American Association of University Professors (AAUP) which was formed in response to threats to academic freedom in American universities when growing business and industry leaders began to exert influence on college boards.

As discussed in this dissertation, a driving force behind the creation of the AAUP was a dispute between Stanford University co-founder Jane Stanford and Stanford economics professor Edward Alsworth Ross in 1900. Jane Stanford was married to the president, Leland Stanford, and Ross was handpicked by the President to lead the economics department. Jane Stanford, who was a powerful force in her own right and took over the university when her husband died in 1893, didn't like Ross's attitude. Ross was a proponent of "Free Silver", and was something of a populist who saw himself as fighting corporate and banking interests of his day. In short, the "Free Silver" movement assumed that silver miners would be provided with government support. However, those involved in world markets, such as financial and commercial interests, as well as textile and machinery manufacturers, supported a gold standard (Frieden 369).

Ross was not without fault though; some of his ideas he espoused while at Stanford were narrow minded and explicitly nativistic and racist: “The civilization of the Orient failed to lift up women or bid the lowly aspire, and hence it was never able to deliver man from nature's grim agencies for adjusting numbers to the food-supply-war, famine, misery, plague, and vice. The civilization of the Middle Ages succeeded no better, and the surviving peoples of that type in eastern Europe show a profligacy that scourges them with misery, hunger-migration, and an appalling infant mortality” (“Edwards Alsworth Ross on Western Civilization and the Birth Rate”). Also, as Brian Eule states, Ross argued against Chinese people immigrating to the United States because of their high birth rate, which Ross believed would bring down Americans standard of living.

Beyond his economic and racial beliefs, Eule also states Ross was a passionate firebrand who challenged authority. Ross stepped on the toes of Jane Stanford numerous times, once for embracing an economic philosophy that went against Stanford’s economic orthodoxy. Ross also indirectly took jabs at her late husband Leland who was a railroad magnate: Ross was critical of Leland’s legacy, implied railroad owners were thieves, and suggested that a period of government ownership of street railroads could benefit American cities which would be in direct opposition to Stanford’s private railroads.

As Eule notes, Ross's dismissal by Jane Stanford set in motion a chain of events that made academics more organized in their defense of academic freedom: “Ross's dismissal drove a wedge between Stanford faculty and the administration and resulted in

a spate of resignations by other professors. More broadly, it galvanized efforts to codify protection of academic freedom and indirectly led to the establishment of tenure."

Out of that spark came a lasting legacy: philosophy professor Arthur Lovejoy, who was one of the Stanford professors who also resigned, teamed with Columbia University's John Dewey to form the AAUP in 1915 and publish the subsequent "Declaration of Principles on Academic Freedom and Academic Tenure."

Interestingly, the 1915 Declaration seems to have been partly directed at corporations who were university patrons and donors who felt entitled to meddle in professional teaching and research. They sometimes wished to silence a professor's viewpoint if it was deemed bad for their business. The 1915 Declaration notes, "It is, then, a prerequisite to a realization of the proper measure of academic freedom in American institutions of learning, that all boards of trustees should understand—as many already do—the full implications of the distinction between private proprietorship and a public trust". The AAUP understood that universities hold themselves out as bastions of learning for the betterment of society; the university is unfaithful to its mission if the contemplation of ideas is hamstrung by private interests.

While we in our present age interpret academic freedom as a general right for faculty to think and publish expansively, the 1915 Declaration seems to have been initially intended to protect the *professional claims* of faculty as a class of experts in a given area, which is not the same thing as a right to intellectual whimsy. John Wilson noted "the primary focus of the AAUP in the 1915 Declaration was not academic freedom itself but the elevation of the profession" (2). Although the Declaration discusses academic freedom, viewing educators as professionals is noted on several instances in the

Declaration. When describing the nature of the academic calling, the Declaration notes "For, once appointed, the scholar has professional functions to perform in which the appointing authorities have neither competency nor moral right to intervene". The term "professional functions" is important here. The Declaration asserts that educators have formal training which demonstrates mastery of their discipline; they publish articles that demonstrate continued competence; they explore new concepts and theories within their disciplines; they provide service to the university to benefit the university community, and they impart their knowledge to students who will contribute to society and move civilization forward. This affirmation actually validates faculty having expertise that buttresses their right to speak on their area of research.

Also, in enunciating practical proposals, the 1915 Declaration clarifies the idea of a professor as a leader rather than a mere worker. As a reminder this is a retention argument, not a "respect" argument, necessarily: "To render the profession more attractive to men of high ability and strong personality by insuring the dignity, the independence, and the reasonable security of tenure, of the professorial office." All faculty (and staff for that matter) should be treated with respect. A lack of respect destroys morale, and, for educators, a good number will simply leave if they are expected to endlessly toil without recognition of their self-esteem or self-worth to their institution, an institution that holds itself out as relying on educators to trade in ideas.

The 1915 Declaration was revised in 1940; and a continuing anxiety about competence might have inflected that revision as well. In fact, one might argue, in sympathy with Frank Donoaghue, that the 1940 revision actually marks a retreat from the larger philosophy of academic freedom (what most 21st century academics think

academic freedom is) to the mere definition of rules faculty need to live by. Donoghue argues that the 1940 revision was less about academic freedom and holding up the professoriate as beyond reproach, and more about formulating "rules" that defined what professionalism should look like in the academy:

> The ideal of academic freedom expressed in the 1915 "Declaration of Principles" was not defined in practical terms until 1940, when the much more well-known "Statement of Principles on Academic Freedom and Tenure" was drafted. This document formalizes both the demotion of professors as figures of social importance and the contraction of academic freedom. (605)

The 1940 Statement attempts to take the ideal of academic freedom in 1915 and "put it in practice". Donoghue notes the free-flowing ideal of academic freedom seems hamstrung by parts of the 1940 Statement such as "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". The 1940 revision provides unqualified support for academic freedom, but also attempts to fit it into the other responsibilities expected of a professor. Donahue see this as a philosophical retreat in its breadth but a stronger defense of faculty publications and research within their fields.

The 1940 Statement also provides academic freedom for the professor in a classroom, but also understands the "professionalism" of being a professor, as well as the understanding that academic freedom is a right that is assumed. However, this right is not assumed if it is stated otherwise *before* the professor is employed. The 1940 Statement strongly defended a professor's very narrow work in the classroom, but indeed, that is a very narrow definition:

> 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".

It seems odd to see "limitations of academic freedom" in a document that spells out academic freedom and tenure rights, but if equating competence with academic freedom is the goal, the 1940 Statement "spelled it out".

In fact, the 1940 Statement is all about teachers who stick to their areas of expertise, not their right to think about publishing expansively. The nature of the 1940 Statement makes clear that true academic freedom is to be earned by being awarded tenure, which takes several years to attain: "Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years". Academic freedom is earned with competence. However, even after proving their competence over the probationary tenure period, professors still don't have the right to do or say whatever they want.

Donoghue emphasizes that academic freedom is enumerated through a series of rules that attempt to define competence:

> By stipulating that a professor's appointment as a tenured figure, analogous to that of appointees to the federal bench, begins only after seven years as a regular employee, and by stating as well that, even once tenured, a professor's freedom of thought and utterance is protected absolutely only so long as the professor sticks to his or her subject, the 1940 "Statement on Academic Freedom and Tenure"

> severs the tie that binds academic freedom to tenure. In doing so, the 1940 "[S]tatement" ushers the concept of academic freedom into the legal system. (611)

The debate about academic freedom is no longer about general freedom to pursue ideas; it's about whether faculty "stay in their lanes" as academics. As long as they do so, *then* they have academic freedom.

The 1940 Statement is not a religious text, and the U.S Supreme Court does not treat it as such. In fact, as will be demonstrated throughout my dissertation, academic freedom has generally been treated in very narrow terms in the 20th century. The 1915 Declaration established the rhetoric of academic freedom and defined it as a goal to be strived for, but, as the 1940 Statement demonstrates, academic freedom is always a work-in-progress. In the chapters that follow, it is explained that jurists have been wrestling with the tension between the more philosophical 1915 Declaration, which will be demonstrated in cases such as *Keyishian*, *Tinker*, *Healy*, and *CLS*, and the more narrow 1940 Statement, which will be demonstrated in cases such as *Adler, Garcetti, Perry, Roth,* and *Holder*.

CHAPTER 1: A PRECARIOUS BALANCE: ACADEMIC SPEECH BETWEEN *KEYISHIAN* AND *GARCETTI*

Chapter Abstract

In this chapter I examine two Supreme Court rulings pertaining to university-level academic freedom that occurred in 1967 and 2006, and which taken together, have put academic freedom in an ambiguous place. The 1967 case, *Keyishian v. Board of Regents*, written during the height of faith in the American university system, famously established academic speech as "a special concern" of the First Amendment and it gave a passionate defense of the modern university as a sacred laboratory for the examination of all ideas, no matter how controversial. However, 40 years later, in *Garcetti v. Ceballos*, the court inaugurated a new discourse restricting the scope of workers' speech -- speech as being part of one's work contract: "work-for-hire" -- subject to employer discipline. Although the judges in *Garcetti* specified that academic speech was a slightly different question that the one they were ruling on (which concerned the speech of a government prosecutor), *Garcetti* chilled the spirit of free inquiry that *Keyishian* apparently had established.

In this chapter, I review commentary of the cases and show that while both rulings seem to defend elements of academic freedom at the university level, the definition of the term academic freedom itself is rarely pursued by the courts. Also, the courts seem to have come to think of elementary and secondary school teachers as simple workers rather than intellectuals granted the right of free inquiry. In addition, it is unclear how long university academics will hold a special status.

***Keyishian* -- "A Special Concern"**

In addressing academic freedom, I will discuss how the highest American court system, the U.S. Supreme Court, defines and analyzes academic freedom. I first turn to a 1967 case, *Keyishian v. Board of Regents*, which established the idea that freedom of speech within the academy was important to preserve because schools represent the leading edge of human thought. I will then discuss a later important court ruling in 2006, *Garcetti v. Ceballos*, which established restrictions on "workplace" speech. I will argue that taken together the two rulings demonstrate the decreased importance of academic freedom in the U.S. Supreme Court. On the one hand, the court believes that the academy is one of the places where speech needs not to be restricted because of its close association with learning in its most explorational sense. Schools are our "laboratories" for thought, and they need to be able to experiment freely. But on the other hand, in 2006 *Garcetti* suggested that schools, like any other workplace, might also distinguish between speech as "work for hire" and speech as "free inquiry." As a result, some speech made by faculty might be thought "inappropriate" by school administration or even state legislatures and subject to censure. In one case, the university might be thought of as a science laboratory where faculty test the bounds of truth; in the other, the university is merely a job where workers may do only what they are told. But the key question that both rulings don't define properly is the exact notion of what "academic freedom" is.

The term academic freedom, especially within legal rhetoric, theorizes *intellectual* freedom. There have been cases that have addressed the speech rights of teachers, but not having the *gravitas* of an academic pursuit of knowledge. Only a handful of cases have

elaborated on the term "academic freedom" in the Supreme Court, and admittedly, not in great detail. This dissertation is an analysis of the U.S. Supreme Court's interpretation of a core function of a college, not a guidebook on what we can do in our classrooms and colleges to support academic freedom.

Background -- before *Keyishian*

The phrase "academic freedom" and the accompanying rationale for the term did not enter the Supreme Court's lexicon until a 1952 case, *Adler v. Board of Education Of The City Of New York* (Heins 121). In this case (which will be discussed in great detail in Chapter 2 of my dissertation), the majority found loyalty oaths constitutional without discussing the concept of academic freedom. Generally, *Adler* revolved around a public-school educator who refused to swear an oath of loyalty to the United States, which was a requirement for New York State educators called the Feinberg Rule. In practice these oaths were used to weed suspected Communists or suspected Communist sympathizers out of the primary and secondary school system in New York City. The dissenting opinion by Justice William Douglas, which is not binding but can be instructive in noticing the debates around the issue, expounded on the term academic freedom and stressed its importance in a school system (509), defining the term as free intellect among scholars (510).

In the following years, although the United States continued to live with the fear of an attack by the Soviet Union, Americans continued to live their lives. Although academic freedom was not clearly defended by the high court, the fear that undermined academic freedom became less pervasive.

In one such case in which intellectual inquiry won out over fear, *Sweezy v. New Hampshire, 354 U.S. 234 (1957)*, the U.S. Supreme Court found (in regard to the academic freedom aspect of the decision) that Paul Sweezy, a professor at the University of New Hampshire who was held in contempt for refusing to answer the New Hampshire Attorney General's questions about a lecture he gave at the university, had a constitutional right to refuse to answer those questions. The questions involved the contents of the lecture, specifically his advocacy of Marxism, his non-critical comments on Socialism in the United States and his support for the theory of dialectical materialism.

Chief Justice Earl Warren noted in his opinion that freedom in the university is a *must* (his opinion is not considered "precedent" since a majority of the court did not sign on to Warren's opinion – a majority of the court only signed on to the judgment):

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. (250)

Warren provided a rhetorical blueprint to be brought to constitutional fruition in *Keyishian* a decade later. In taking the mantle from Douglas' dissent in *Adler*, limits on academic freedom are equated with limits on civilization. The *United States* would wither and dissolve if robust inquiry in the university withers and dissolves. For Warren, absolutes must be continuously queried without the assumption that new queries are subversive or malevolent in some way.

A concurring opinion by Felix Frankfurter buttressed Warren's argument, in which Frankfurter focused on unfettered research in a university as an engine of progress:

> Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good -- if understanding be an essential need of society -- inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling. (261)

Important here is the "groping in the dark" element of intellectual inquiry -- ideas that may seem far-fetched and troubling have currency in the university since free inquiry is

the only way for society to progress. Key is his statement that *unbounded intellectual inquiry* is an essential need of society. Universities are one of the spaces where ideas need to be logically contemplated, comprehended, and tested. This concept goes for the most controversial ideas as well as the ideas that no one questions.

Frankfurter provides the succinctness in his argument in supporting academic freedom by unequivocally stating the four essential freedoms of a university. As he notes, he quotes from a statement of a conference of senior scholars in South Africa from the University of Cape Town and the University of the Witwatersrand:

> Freedom to reason and freedom for disputation on the basis of observation and experiment are the necessary conditions for the advancement of scientific knowledge. A sense of freedom is also necessary for creative work in the arts which, equally with scientific research, is the concern of the university…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. (*qtd. from The Open Universities in South Africa* 10-12) (263)

This declaration of academic independence provides the impetus for the high-minded sense of intellectual agency that will be displayed in *Keyishian*. This is a "hands off" approach to academic inquiry – a university (and the university community) knows what's best for the university without interference from outside inquisitors who can inflict fear and criminal sanctions. The university is an essential proponent of freedom

and every aspect of the university enhances intellectual inquiry and societal growth. The *atmosphere* is important, and the university is to be trusted with how to "incubate and grow" new theories and understandings that provide civilization with continued intellectual (and hopefully practical) growth. Noteworthy is Frankfurter's marriage of the sciences with the arts, which provides a powerful narrative that universities are in the business of intellectual inquiry irrespective of content or discipline. If it's a part of the university, academic freedom is the only way to go. Although *Sweezy* provided the impetus for academic freedom, there were still bumps in the road. A constitutional seal of academic freedom was not immediately forthcoming.

In a common occurrence demonstrated whenever there is a national security fear, there is a tendency to clamp down. The loyalty oaths in the 1950's and 1960's as a response to Communist infiltration ended up being an instrument to clamp down on dissent; they were the means by which school systems could limit the scope of scholarship and classroom teaching, at all levels. There were court challenges to loyalty oaths in the following years, with some actually overturned. But the reasoning had less to do with support for educators' intellectual pursuits and more about if the proper rules were followed in implementing and adjudicating those rules (Heins). By 1967, the time was ripe to not only challenge loyalty oaths in education, but to affirm that educators' research and expertise is a worthwhile endeavor to pursue in a college, even if that knowledge goes against dogma.

The next time the term academic freedom was discussed in detail it achieved prominence in a 1967 case, *Keyishian v. Board of Regents*. Although the tenor of the country had changed over the past 15 years since *Adler* (and even over the past 10 years

since *Sweezy*), loyalty oaths were still constitutional. In fact, as demonstrated in *Keyishian*, it became more or less a matter of course -- a reflex of the bureaucracy, if you will -- to simply include signing the oath as part of the checklist requirement to secure employment. While some scholars then (and now) would have no problem signing an oath that states they are not a Communist or never were a part of a Communist organization (the term Communist can be replaced throughout any time period with a value-laden phrase, action, or ideology that results in a negative reaction), signing an oath fails to address the long view. If the educational institution officially endorses one ideology over another (even if confined to its formulaic documents), it is not a stretch to surmise that this endorsement reflects the values of the college -- what is understood by those who participate in this intellectual endeavor, even without it being clearly stated. In effect, the idea or germ of truth springing from this idea is not welcome in the university. By clamping down on that initial idea, it squelches debate and progress in ways that cannot be imagined.

The actions of the professors in *Keyishian*, irrespective of their own political affiliations, speak to the reason why a court would hinge its reasoning on the term academic freedom. The court, by its nature, utilizes a case method for looking at the long view, settling a dispute to provide guidance for some time to come. The court gives reasons that result in a satisfactory outcome not only for the participants, but theoretically for the society at large if this issue should occur again. The reasoning keeps society moving (hopefully forward), much in the same way academic freedom keeps society moving forward.

Keyishian's **Origins**

Keyishian was the first noteworthy case that provided an impetus to move forward

in the academy. *Keyishian's* origins began in 1962, when the privately owned and operated University of Buffalo was merged into the State University of New York -- all of the employees of the private university became public employees. The result of this appears cursory: educators were still teaching and professing the same way they previously were, only with a new employer signing their paychecks. However, one condition of maintaining their employment was to sign the Feinberg Certificate which swore they were not a Communist, and that if they had ever been a Communist, they had communicated that fact to the President of the State University of New York. The requirement of placing this statement in an educator's terms of employment document was codified as the Feinberg Rule, which was upheld in the 1952 *Adler* decision. (592).

The Feinberg Rule allowed for the firing of educators considered members of a subversive organization, such as the Communist Party. New York had gotten rid of the Feinberg Rule by the time the case reached the U.S. Supreme Court, but the larger specter of guilt by association remained. Four educators refused to sign the certificate; one resigned, an instructor's one-year appointment was not renewed, and two other professors whose contract had not ended were allowed to teach pending the outcome of the case. In response, the educators brought a suit against the university, challenging the law that public educators were required to sign a loyalty oath to secure employment. It is not a stretch to assume that an English Literature professor such as Harry Keyishian would assign tracts that, even if considered within the mainstream of the discipline, could be taken out of context by others to draw unfounded assumptions about the professor. The oath could shape the content of what the professor teaches, which could be to the

student's detriment. Essentially, the content of the professor's teaching could be more static and formulaic out of fear. The student may not even be aware of alternative theories to apply to problems that could benefit society.

In 1967, educators in New York still had to abide by statutes that gave the government license to remove educators for treasonous and subversive activities. However, what could be defined as treasonous and subversive, even short of calling for violence or the direct overthrow of the government, was not clear. The Supreme Court addressed what is considered treasonous and subversive, and in the process gave credence to a distinct type of freedom within the college.

Educating as Treasonous and Subversive

The court first addressed the statutes that forbid treasonous and subversive activities. In essence, the court was wary of the government using the words "treasonous" and "subversive" in removing educators, since the words themselves have no clear boundary (589). The court provided the impetus for the idea that, when in an educational institution, in which the purpose of the endeavor is not simply uttering phrases to the general public, but appreciating the *space* in which those words are uttered, there is a difference. These statutes, in which a rational American in fear of a Communist attack would be on the look-out for treasonous or subversive activity in a public place, have a different meaning and effect when placed within the realm of academia. Schools and colleges, although not immune by the outside world's trials and tribulations, are not by their nature the same freely opened public spaces in which havoc could reign unabated without reason or logic. Students are required to be admitted or enrolled for the distinct purpose of educating -- expounding on reason and logic.

The court looked at a school as a different space than the public sphere. With regard to these education statutes, the court placed the onus on the government to spell out the terms treasonous and subversive by placing education as a place that is allowed leeway. In effect, the court's frame of reference was on the open-ended purpose and manner of educating, not on the reflex of the general public "in the streets" to squelch treason and subversion. Education spaces are *safe spaces* without the same reflexive reactions that would normally be taken in the chaotically less logical and less open-to-debate "real world".

An open-ended purpose and manner of educating was definitely taking the "long view" of the purpose of the academy. One could fathom revolutionaries debating and theorizing about new governments, and then literally going from the educational space to the public space to effect those changes through legal or violent means. Also, one could easily see the court come to a different outcome in the early 21st century by replacing the words "subversive" and "treasonous" in the education statute with "terrorist", which has an association with actual violence, but can also be defined as not the *literal* violent act but something *less than* that (apparently the court has upheld this use of the term in the realm of teaching, which will be discussed in Chapter 4).

The court in *Keyishian* made clear that the teacher who carries a controversial book on a public street, such as the Communist Manifesto, does not necessarily advocate criminal anarchy in the classroom (599). The court basically "schooled" the government on this point -- the government's argument was a logical fallacy. Causation can be a tricky rhetoric for freshman composition students and, apparently, lawmakers. As an educator, the Communist Manifesto goes beyond a manifesto of changing our

government to one we are antithetically opposed to. It is held up as a text within the sphere of History, Sociology, Political Science, and even English, to be used to further different means -- even if the end result is unpredictable.

Teachers can't really predict how their teaching will be understood and internalized. The court noted:

> The teacher cannot know the extent, if any, to which a "seditious" utterance must transcend mere statement about abstract doctrine, the extent to which it must be intended to and tend to indoctrinate or incite to action in furtherance of the defined doctrine. The crucial consideration is that no teacher can know just where the line is drawn between "seditious" and non-seditious utterances and acts (600).

If educators must frame their content through a cause and effect prism, it can follow that *every* statement made by a professor could *conceivably* result in harm. The court defended faculty from the various potential uses to which education might be put. In fact, the court found the theories that faculty teach do not necessarily advocate the practice of those theories.

Academic Theory in the Academy

The court returned to the concept of academic theory within the academy throughout its opinion. In querying the law, the court noted if it "bars employment of any person who "by word of mouth or writing willfully and deliberately advocates, advises or teaches the doctrine" of forceful overthrow of government" (599), which means that the court was having issues with attempts to limit the inquisitiveness of the professor and students. The act of choosing which content to discuss should not be inferred to reflect

the opinions of the professor. It is not a stretch to hypothesize that the legislature had images of anti-American professors lecturing to their students on the glories of Communism and hatching plans how to overthrow the government. The court noted "This provision is plainly susceptible of sweeping and improper application. It may well prohibit the employment of one who merely advocates the doctrine in the abstract without any attempt to indoctrinate others, or incite others to action in furtherance of unlawful aims" (600). The court's critique of this law calls into question a narrative regarding post-secondary education that the legislature in all likelihood relied on, and one that is still within mainstream parlance today. The narrative relies on a common perception of education instead of the actual delivery of education. The educator is seen as the be-all and end-all in its entirety of every aspect of the educational endeavor, in a similar frame as to Paolo Friere's critique of the "banking" of the educational process. In Friere's model, the professor opens her or his mouth, the students "open their heads", write down notes, and regurgitate the information back to said professor on an exam. The banking model creates a disconnect of what the populace thinks an educator is and what is occurring in the classroom. The problem is there is no clear definition of what educators *do* (especially in the humanities), which is why when they attempt to claim academic freedom, it is academic freedom for what, exactly?

The court, in criticizing the scope of the law, appreciates this dilemma, in that education involves theoretical propositions, not necessarily advocacy. *Keyishian* noted "...this language may reasonably be construed to cover mere expression of belief. For example, does the university librarian who recommends the reading of such materials thereby "advocate . . . the . . . propriety of adopting the doctrine contained therein"?"

(601). Academic freedom is the odd confluence of the university as theory and practice rolled into one; with one of the educators' functions to note a concept in the public sphere, such as a librarian who facilities the harvesting of information in her or his space (the library). Underlying motives of the educator are not at issue, since the educator, as a part of this larger endeavor, is facilitating pathways to knowledge that the student chooses to follow or not. *Keyishian* looks at the educator as not the indoctrinator but something more valuable -- an interpreter, granting that there may be more than one interpretation.

The educator as an interpreter is a novel way of looking at the academy in 1967. In effect, *Keyishian* implies that students are a part of this endeavor since they can choose to adopt the doctrine or not -- the educator's purpose exposes students to ideas for critical evaluation by discussing their strengths and weaknesses, not necessarily advocating such theories. Granted, by placing academic freedom within this line of reasoning, it makes the purpose of an educator less tangible and prescriptive, which is great for academics but not for the larger society which operates on a more concrete sphere (and provides educators the funds to continue their endeavors). Essentially, if the soapbox lecturer on the street begins quoting from a treatise deemed heretical in some way, it can be interpreted by the government that that individual must espouse or at least acknowledge the belief system within the treatise, which could result in further inquiry by the government (probable cause). Consider it a common-sense interpretation -- if there's a puff of smoke, there must be more smoke and a fire. However, *Keyishian* is saying that in the academy, educators must be afforded the freedom to take the treatise and let it be manipulated by students to further academic growth. This can lead to new "a-ha!"

moments for the doctrine if it leads students to query and research the treatise. People within the academy can't assume thoughtcrime, as those outside of the academy have a bit more leeway to do.

The court acknowledged that the academy is a learning lab, a place where growth can be accomplished based on the interplay of ideas and their application. In referring to earlier court cases, *Keyishian* stated "The uncertainty as to the utterances and acts proscribed increases that caution in "those who believe the written law means what it says."...The result must be to stifle "that free play of the spirit which all teachers ought especially to cultivate and practice. . ."" (601) These non-proscribed ideas may be outlandish, controversial, risqué, or jarring to the senses, but that leeway should be afforded a special space for the betterment of students and society. Words and ideas to motivate are imperative in the educational endeavor, and *Keyishian* appreciates that an interpretation of the law in the public sphere can have a different (and deleterious) result in the educational sphere and should be treated with caution when applied within the academy. The court's embrace of the spirit of the academic endeavor acknowledges that the purpose of the academy cannot be pinned down to simple indoctrination. If the purpose of the academy is solely about skill building, then a valid argument could be made that the negative sanction is valid since there are institutional constraints as to what the purpose of the academy is -- skills are needed for a society to function properly in a literal, less meta-cognitive fashion. The law is not to look the other way but appreciate this dichotomy.

Academic Freedom as a Special Concern of the First Amendment

This appreciation of theoretical evaluation that is the foundation of the academy is cemented in the court's statement:

> *Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom* (emphasis added) (603).

The use of the word “transcendent” is instructive. The court, in the boldest terms possible, acknowledges the importance of higher education in society. By providing a basis for academic freedom, the statement implies that academic freedom is the guiding principle of what freedom is in a society. Without it, there is no education. By placing it outside of the realm of a civil action brought by a teacher against his employer, it is explicating the fundamental importance of defining the purpose of the academy as something that is in actuality "un-definable", at least when attempting to utilize a legal application. The importance of maintaining the independence of the academy is similar to providing air for people to live. The court is embracing this academic theory in that there is no clear answer as to what the purpose of the academy is. In embracing academic theory, it is a double-edged sword. The court acknowledged that academic freedom is an important societal expectation. However, by not defining it, it creates a potential misunderstanding since people in their own space -- the non-academic world -- including the public and legislators -- apply reasoning to systems and use the law as a means of defining the limits of a system. If educators do not clearly define the academy as "this

system with this *specific* purpose" (which educators cannot, for once they do that, it defeats the essence of the college, that free play and interchange of ideas) it can create problems when the two spaces come into conflict. They are operating on different planes.

The court fully embraced the mantra of education as the lifeblood of civilization, affording it the highest priority in the continuation of our society as a democracy. The importance of the academy was fully embraced by *Keyishian*:

> In *Sweezy v. New Hampshire* we said : ... To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die (603).

Education is an essential aspect of civilization, affording it more prominence than by defining it as an organ of the state. The court acknowledges that our large systems are far from perfect, and the educational realm is essential in providing valued inquiry to make the whole of civilization function better. There is no inference that our systems we abide by are perfect, and the academy is not infallible. However, the fact that the court gives deference to educators as "intellectual leaders" speaks volumes of the wide latitude of academic freedom in this groundbreaking decision.

In fact, in a direct nod to one of the core functions of a university, *scholarship*, the court recognizes that one of the primary tools that educators use in furthering the conversation could be stifled without an appreciation of the importance of the academy's

purpose. For example, hysteria may result when an individual shouts "fire" in a crowded theatre -- there are no presuppositions about the utterance, unlike in an academic setting, in which the speech may have capital and motivate debate on an issue being discussed. The value of the non-academic speech as a benefit to civilization is different than how educators function when speaking as representatives of the academy.

The court, in the boldest of terms, appreciated this academic latitude, which was an important moment in educational jurisprudence. Especially telling is the court acknowledging disciplinary nuance. By singling out the social-sciences the court appreciates the value of abstraction as a fundamental academic tenet. It can be assumed that even though *Keyishian* referenced an earlier case (discussed previously) -- *Sweezy* -- where the professor was a social-scientist who gave a lecture to humanities students, and *Keyishian* involves the humanities, the fact that the court places this text in the body of its opinion gives credence to the humanities having this same latitude.

The court concluded its primary analysis related to academic freedom by warning that the government must tread lightly when attempting to regulate in the educational realm:

> We emphasize once again that "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms (as cited in *N. A. A. C. P. v. Button* 371 U.S. 415, 438); for standards of permissible statutory vagueness are strict in the area of free expression. . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." (as cited in *N. A. A. C. P. v. Button* at 432-433). New York's complicated and intricate scheme plainly violated that standard. When one must

> guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone . . . " (as cited in *Speiser v. Randall*, 357 U.S. 513, 526). For "the threat of sanctions may deter . . . almost as potently as the actual application of sanctions." (as cited in *N. A. A. C. P. v. Button* at 433). The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed (604).

Keyishian clearly notes that although sometimes regulation of speech may be necessary, the regulation must be so precise and exacting as not to even lead to a *supposition* that the speech can be interpreted to be in violation of the statute. Once again, the court's definition of the academy places great value on the abstraction of the university endeavor -- wide latitude in discussing, analyzing, and interpreting ideas is necessary, and a law that could chill swaths of inquiry that eventually lead to knowledge is antithetical to the university mission. The *Keyishian* ruling showed that education on a university level is not a scripted endeavor, in which ideas deemed "dangerous" can be censored without collapsing the whole of the academic purpose. The give-and-take, imperfect as it is, must flourish. By defining academic speech as a *vital* First Amendment right, the implication is that the essence of the first amendment can be usurped if the academy is not allowed to query and explore.

Queries posited by *Keyishian* -- Nebulousness and Limitations

Although *Keyishian* was a watershed moment in the jurisprudence of modern academic freedom, questions remain as to the decision's import in the larger academic and non-academic settings. Cary Nelson notes that *Keyishian's* notation of academic

freedom as a fundamental tenet of living in a democracy lends credence to his observation that "academic freedom helps preserve our other freedoms, however imperfectly they may be realized" (5). The strength of *Keyishian* is its expounding on the idea that without freedom in the academy, the ripple effect would have a deleterious effect on the essence of what Americans deem as of major value -- free will, as the knowledge afforded by the academy results in the pursuit of the American ideal. The college is the incubator, in effect, in which truths borne from this laboratory allow Americans to function and prosper, as these truths are put into practice in the outside world.

We apply our knowledge to inform us how to approach (and re-visit our approach) and how we navigate other aspects of life in America. With this understanding, Nelson may ask: How do we practice our faith? How do we build relationships with others? Why do we approach our careers, our families, and our day-to-day survival in a certain fashion? The knowledge, constantly upended in the university by allowing for a re-positioning and re-framing by successive generations, allows for the continued forward progress of our society. Nothing is fixed, and for a society to change and adapt is key to our survival, especially in a society which prides itself on individual freedom.

However, a question posed by Nelson relates to the lack of clarity in *Keyishian* -- the court failed to provide a clear definition of what academic freedom is (5). Of course, as previously noted, if one appreciates the fact that the strength of the academy is in its abstraction, not beholden to one point of view, the court's omission of a clearly defined definition of academic freedom can cause problems in future disputes. When has a

professor or student "crossed the line"? Can a professor or student "cross the line" if the academic endeavor is one of abstractions and not hard-and-fast rules?

Nelson's query goes to the essence of what a university's role is in our society: "Did the Court mean to elevate academic freedom to a fundamental constitutional principle or merely to assign it to a sub-category to be limited by the character of college and university employment?" (5). In *Keyishian*, the court provided a structural rationale for academic freedom -- as one of the intellectual bedrocks of our society, going beyond a classification system in which a checklist is to be adhered to by employers. The fact that the court's discussion heavily relied on academic freedom as a societal imperative, and not as an individual reflex (the court dedicated a large part of its analysis to how the fabric of America is influenced by universities role in querying ideas, and not merely to if a professor should not be sanctioned for a specific utterance) demonstrates the weightiness of the university. Educators are part of this larger collective. The whole of the university mission is to push the boundaries and look at places where others do not have the ability or courage to explore. The university mission is greater than the sum of the individual professor's parts. To harp on the individual's idea can be problematic, in which critics fail to see why educators do what they do. The "how" should not hold as much import, and the court does not spend an inordinate amount of time on the how. This lack of a discussion of the "how" is instructive, since decisions that limit or section off the broad societal interpretation of academic freedom will discuss more of the “how”, and the reflexive action that results from the “how”.

Nelson rightly posits *Keyishian* in the larger sphere of academic freedom cases that came after it: has the institutional view of "why" held sway over the individual

"how"? *Garcetti*, which will be discussed shortly, provides an inkling of how "academic freedom", and the status of those in this endeavor, are perceived. Either the professor can be seen as demanding protection on a case-by-case basis, or the framework of the conversation needs to be re-positioned to allow for the academy to be viewed as less of a place to go to for a "job" and more of an "endeavor".

Nelson is upset that academic freedom is being defined as something that resides in individuals, rather than a right or expectation conferred by the entire schooling process. Times change, and national dilemmas or emergencies can lead to a clamping down of acceptable speech that the university is not immune to. Allowances for speech fluctuate based on what is occurring in the outside world. The import and value of the university in our society may hold more sway based upon the time period. An educator's value and measure of respect may change over time, with allowances for institutional protections based on their role in the progress of a society fluctuating.

Today, professorial speech and scholarship often ends up being analyzed in a vacuum when the speech and scholarship become void of context and legal/institutional support. Speech and scholarship can lead to actions that can be described more as whimsical and based on taking the temperature of the moment and less on reflection, analysis, and debate -- the very hallmarks that are the lifeblood of the academy. Faculty speech needs to be understood in the context of the educational process, not just as an expression torn out of context.

Keyishian **in Historical Context**

Elliott Friedman also notes the limitations of *Keyishian* in his analysis, stating that the decision was more about the pushback regarding a Cold War claim rather than a

sweeping vindication of academic speech. He states "the doctrine of academic freedom was responding to a common Cold War claim about the vulnerable schoolroom rather than attempting to create a uniquely expansive First Amendment right" (218). Friedman thinks *Keyishian* was less a ringing endorsement of academic freedom than a curb on Cold War paranoia. Since Friedman couches the issue as one involving public employees, he argues that although educators were the beneficiary of this decision, non-academic public employees are the ultimate beneficiaries of *Keyishian.* The court, as it usually does, provides a measured response to infractions, rather than broad edicts. It is easier for people to grasp the concept of a loyalty oath as antithetical to employees of government functions and services. The court critiqued an un-wieldy concept such as the reach of Communist infiltration into government employees providing services, without providing much in the way of hard evidence. It is even more nebulous to carve out a special niche for a population (academics) whose job function is less clear cut once outside of teaching. The Court's role was to blunt hysteria, not create a new right based on hysteria. It is safe to assume that the public believes that educators already have freedom to educate without the government clamping down on their speech -- as enshrined in the First Amendment. The school and university are part of the community in which they are housed. This first amendment right is applied less concretely. What exactly does "a special concern of the First Amendment" mean, anyway? It assumes an obvious -- freedom of speech -- and attempts to make it an absolute -- freedom of academic speech. Of course, this reasoning cannot stand, especially for other public employees.

A major question regarding Friedman’s analysis is if a university is a part of the community it resides in, or does it signify its own hallowed space with "the locals"

looking on, merely satisfied of the economic benefits of having the university in their area. In commenting on the controversy regarding the five professors' refusal to sign the loyalty oath, Friedman's analysis lies at the crux of the matter: "Buffalo's largely working-class, conservative population had little sympathy for abstract rights such as academic freedom. They certainly did not want such rights to override measures taken in the name of combating communism. The case became a classic example of the 'town and gown' conflict, with liberal professors fighting for causes that the local public could not support" (202). It is not a stretch to surmise that if there is no stake in the community endeavor of academic freedom -- how it provides tangible benefits to those who live (but are not part of) the university -- it follows that the court in *Keyishian* will have a hard time justifying the concept of academic freedom without some legal gymnastics and a smattering of platitudes: Academic freedom is of "transcendent value" (603).

Supporters of academic freedom have to keep in mind transcendence queries when the local community has questions about the more controversial content being taught. *Whose* transcendent value is being represented? The members of the community who live their lives day by day, surviving, attempting to make ends meet in supporting themselves and others? What hardships are placed on the community members' lives by the plaintiffs in *Keyishian* being forced to sign a loyalty oath -- how does this act transcend their daily existence? The court noted that laws such as the loyalty oaths "cast a pall of orthodoxy over the classroom" (603). For the truck driver, fish vendor, farmer, homemaker, police, fire or trash worker, or small business owner, how do loyalty oaths in a classroom cast a pall over their lives? They still have to negotiate back-breaking and demanding labor, navigating superiors, who they have to always be prescient of,

attempting to threaten their economic well-being, or constantly being cautious in crime infested areas, fearing for their safety. On its face, even though the edge of the University of Buffalo may be only a stone's throw from residential housing, it is in a completely different universe than students and educators in a comfortable and structured setting such as a classroom, contemplating theories that the outside world may not have the time to spend contemplating.

Although the court is deferential to academic intellect, the court does not elaborate how limitations to this intellect would be harmful to America. The court notes: "To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation" (603). For non-academics, it is hard to see how loyalty oaths have a direct correlation to the destruction of the United States. The court does not make the connection; an educator might take out her or his proverbial red pen and query the writer how or why this is so, and drop their grade a notch for a lack of a logical discussion. The educator would not be alone -- the Buffalo community wouldn't get the urgency of this either, and Friedman's critique points to the difficulty of placing a circle such as the abstract concept of academic freedom into a square such as a tangible benefit to all Americans.

Keyishian -- Academic Freedom in Practice

In fact, Marjorie Heins noted that in the years after *Keyishian*, the scope of what entails "academic freedom" was to be debated when placed into practice (239). The court more easily applied the term when dealing with school reading lists and classroom speech. By banning a text or squelching a professor's classroom utterance, it looks bad in the nebulous universe constructed in *Keyishian* regarding a pall of classroom orthodoxy.

Heins points out an issue that relates back to the purpose of the academy: what do the students who benefit from academic freedom "look like" in practice? She notes the lack of clarity regarding the term "academic mind" the court uses in highlighting which school environment would be most affected by a lack of academic freedom based upon a loyalty oath (216). *Keyishian* notes the oath provision "applicable primarily to activities of teachers, who have captive audiences of young minds, are subject to these limitations in favor of freedom of expression and association; the stifling effect on the academic mind from curtailing freedom of association in such manner is manifest" (607). The *Keyishian* court applied the reasoning emanating from a primary and secondary school case (*Adler vs. New York City Board of Education*) to a case involving the effects on college students.

Also, there is a question of elementary school vs. college “freedom”. The abstraction of what academic freedom can also be is noted as a result of a lack of knowledge of *who* the benefactor is in such an endeavor. The court created a trope in "academic freedom"; this term means different things in different environments. Knowledge does not serve the same purpose in a primary and secondary school setting as it does in a university setting. Skill building and societal acculturation are key in teaching children; higher order disciplinary acculturation into a community of scholars is key at the university level.

By conflating the two environments and by not distinguishing the ultimate recipient of the academic freedom, and what is to be done with this freedom, it is easy to predict that later court decisions may give more attention to the effect of the specific population, more so than how academic freedom may be affected in a general sense.

Without a clear delineation of the recipients of this freedom ("students" is a very broad term) it is a stretch to apply the premise of academic freedom in a very broad sense -- the right to challenge within the scope of one's discipline -- to limit that freedom in a different environment -- perhaps a non-education workplace. From this result, it would allow this limitation to be *applied back to* an education environment. *Keyishian* could be turned on its head.

The Limits of *Keyishian*

In his analysis of the early line of modern Supreme Court cases addressing academic freedom, E.M. Barendt criticizes *Keyishian* as going against the grain of earlier cases that interpreted academic freedom as professorial open inquiry and the examination of traditional ideas (177). In particular, Barendt notes that "much of this [*Keyishian*] was overblown rhetoric...it is nonsense to equate university teaching and classroom discussion with the "marketplace of ideas" that characterizes free political discourse; standards of relevance, coherence and civility, which do not constrain such discourse, can and should be applied to academic teaching" (177). Barendt's wording is a bit harsh, but the larger point he makes has relevance; as a rhetorical document, *Keyishian* is polished in its ringing endorsement of academic freedom by broad statements about the place it holds in the concept of a free and democratic society. Barendt implies the term marketplace of ideas is too unwieldy. Essentially, it is the concept that *all* ideas should be given a fair hearing, with the best ideas embraced by the populace. The public (and courts) would be more amenable to a ruling that: 1) clearly explains and interprets a legal analysis of academic freedom within more clear concepts such as disciplinary relevance 2) addresses a coherent argument that moves the discipline in some way, and 3) addresses a civil

atmosphere which is conducive for all positions being aired. This is far less abstract than what the court did, which is noting academic freedom is of "transcendent value" and a "special concern" of the first amendment.

Academic freedom takes on a more abstract connotation by embracing the *concept* of academic freedom without laying the groundwork for an academic marketplace of ideas, which can be visualized in a political sphere such as a legislative space. Barendt notes "[*Keyishian*] safeguards the academic freedom, or freedom of academic speech, of individual professors, for they had mounted the challenge to the New York statute" (177). Perhaps it is outside the scope of the court's findings to paint a bit more of a clearer picture how the marketplace of ideas may play out within the academy, since the court's primary role is to address the aggrieved party, namely college professors. In this sense, the court provided a practical outcome. It was a limited response to a problem that we can "see". A professor speaks, and she or he is wrongfully sanctioned by the government for what is said. These other issues would have to be unpacked by courts as later disputes arose.

Garcetti -- Pursuant to Official Duties: Limiting the Employees Speech Rights

Even as decided in the early 20th century, academic freedom may be limited when educators are viewed as employees performing job responsibilities – and recently, this perspective has complicated *Keyishian's* broad defense of academic freedom. The concept of work-for-hire can further exacerbate the problem, when educator's ideas become quantified. Education is viewed as task-oriented.

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the guiding early 21st century U.S. Supreme Court case regarding academic freedom, the reasoning of *Keyishian* was turned

on its head. The court ruled a non-academic employer can limit an employee's workplace speech. This results in a lessening of academic freedom when mistakenly applied to the classroom since the employer/employee dynamic takes on a different meaning in academia.

In *Garcetti*, an associate district attorney, Richard Ceballos, alleged he was retaliated against for challenging the veracity of statements made by a deputy sheriff. In addition to supervising other attorneys, it was common for him to investigate aspects of pending cases when defense attorneys requested him to do so, as in this instance. He reviewed the statements the deputy sheriff made and determined there were serious misrepresentations in his sworn statement. After speaking with him and not being satisfied with his explanation, he notified his supervisors and wrote a memo expressing his concerns, recommending dismissal of the case. Eventually this memo led to a meeting which included Ceballos, his supervisors, the deputy sheriff, and other employees of the sheriff's department. It became heated, with one lieutenant sharply criticizing Ceballos handling of the case. Ceballos' supervisor decided to proceed with the prosecution; Ceballos was called by the defense regarding his critique of the deputy sheriff's statements (which in all likelihood challenged the veracity of the sheriff's version of events). In the aftermath, Ceballos claimed he was subjected to retaliatory employment actions, including a denial of a promotion. His employer noted that the actions were all for legitimate reasons, such as staffing needs (413). Ceballos sued, and one of his claims related to a denial of free speech. The Supreme Court eventually heard the case, ruling against Ceballos in claiming that an employer can limit decisions made by the employee in the course of her or his employment.

At the outset, it is instructive that the usual tropes associated with academic freedom -- forwarding of the discipline, allowing unpopular ideas to be tested out, a greater benefit to the community -- were not directly at play here. At its most basic, this was an employment dispute in which the employee suggested one course of action (not pursuing criminal charges in a case) but did not have the final say in the decision. The ultimate decision was made by a superior (another attorney) who also has expertise and simply chose a different course of action. Even if the stance taken by Ceballos was unpopular, he was not engaging in intellectual pursuits incubated in a safe space. He was given an order to perform a limited task.

This non-academic environment was the context in which the court applied the law. An employer-employee relationship does not have the same inherent intellectual pursuits as a student-teacher relationship, and the court framed the discussion in terms of the employer-employee relationship. Before delving into their analysis of the current case, the court provided backdrop by acknowledging the right of government employees to have discussions for matters of public concern -- as long as the employee is not interfering with the employer's operations (420). By "drawing lines" around the employee's societal speech, the court served notice that the functions of government were given more credence than ideas that can indirectly challenge those functions -- even for the betterment of society -- which can cause disruption. By noting that "underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance'" (420), the court was tailoring its discussion to an employer-employee analysis which frames debate and action in a pragmatic context, void of a special nature

related to the betterment of society. Employees are not bearing the weight of their discipline on their shoulders to advance knowledge. It is more of a task driven formula. Interestingly, this is the general view the court has taken regarding academic freedom in primary and secondary education; teachers are paid for skill building, including socialization. Larger theoretical considerations are not as instructive of a theme as associated with the under-18 student.

In analyzing *Garcetti*, the court made the distinction that the first amendment protects some expressions related to the speaker's job, not limited to educators. The analysis by E.M. Barendt provides an excellent grounding for the subtle legal underpinnings of this case, pointing out that the court was following the train of thought of an earlier U.S. Supreme Court case, *Pickering v. Board of Education* (1968). *Pickering* upheld the right of a schoolteacher to speak freely about matters of educational policy and management, provided that the educator was speaking as a *citizen* on a matter of public concern, thereby providing First Amendment protection as opposed to speech that was a matter of purely personal interest (Barendt 187). As long as the educator's speech was able to transcend the boundaries of typical workplace disputes -- the speech is of such general importance as to provide value to citizens outside of the workplace -- as well as the speech not providing too much of a disruption to the overall functioning of the workplace, it received first amendment protection.

However, the court distinguished *Garcetti*, noting that Ceballos was a prosecutor performing his expected duties -- writing a memo related to a prosecution, as ordered to by his boss. There was no expectation to protections based upon a work product, in a sense framing the activity as an automaton given a command, flensed of larger societal

motivations. The communication is insular, written at the request of the supervisor, but without an obligation to act on it (which in fact was not acted upon).

This reasoning provides the import of the court's holding, which views the relationship between an employer and employee as transactional and not substantial. *Garcetti* stated, "*We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline*" (emphasis added) (421). The phrase "pursuant to official duties" does not conjure the same type of imagery as in *Keyishian*. There is no sense of a larger mission inherent in the government employee's actions, even when the government employee is tasked with being a steward of upholding societal laws (and, as in this case, providing a foil to prevent a misuse of resources in proceeding with a governmental action). A statement uttered as a requirement does not have theoretical implications. There is an expectation that the statement will be made, within the proscribed boundaries directed by the employer, and channeled within those boundaries for a limited action. Of course, there are larger implications that come into play once this scenario extends to the real world -- an attorney who, based on his expertise and experience, believes his client (the government, in the guise of the deputy sheriff) is misrepresenting the facts, and someone accused of a crime could, as a result, unjustly lose his freedom and be stigmatized. But the type of situations that one in academia would look at regarding the import of the speech are somewhat irrelevant when framed in an employer-employee context. The long view tends to be reserved for the academy.

Pursuant to Official Duties and Work-For-Hire

The phrase "pursuant to official duties", taken in a larger context, relates to the concept of work-for-hire, which is a key part of forcing workers to do only what supervisors "want" at the moment. It is an anathema to academic freedom. Scholarship regarding work-for-hire primarily discusses intellectual property copyright claims. The Supreme Court addressed this issue substantively in *Cmty. for Creative Non-Violence v. Reid,* 490 U.S. 730 (1989), generally holding that the level of control the employer holds over the employee's work product is the determinative factor. In *Reid*, a non-profit organization commissioned sculptor James Earl Reid to create a structure highlighting the plight of the homeless in Washington, DC during Christmas by using the nativity as a template. African-American homeless people represented Mary, Joseph, and Jesus, under the banner Third World America. Imprinted on the base of the structure was the phrase "…and still there is no room at the inn". The parties disputed who owned the work after a disagreement over how it should be displayed. Many factors were applied to determine who controlled the work.

Although *Reid* did not mention educators as one of the professions affected by the work-for-hire doctrine, some scholarship has analyzed the import of this decision into the academic realm. Joy Blanchard elaborated on an unwritten "teacher exception" to the work-for-hire doctrine, and the concern that if *Reid* was strictly applied to educators, they would be deemed employees hired to do teaching and research, not independent contractors (67). Thus, their research, their lesson plans -- their *ideas* -- could be the sole property of their university employer, to be locked away forever if they were to teach somewhere else. She suggested all parties should be mindful of the symbiotic relationship beneficial to both the university that provides the resources to the academic and the

academics corresponding bounty of knowledge created by their scholarship that can be highlighted by the university (66). In this spirit, academics should not abuse the "teacher exception" to appear as academic mercenaries, selling their wares to the highest bidder (such as for-profit distance-learning institutions) (68). The business of learning should be framed as the pursuit of knowledge as the ideal; anything that either side could crassly use to make money would cheapen the sanctity of the academic enterprise, the essence of academic freedom, and be detrimental to the traditional not-for-profit university.

Nathaniel Strauss suggested a two-part test that courts could apply when addressing the issue of a "teacher exception" to the work-for-hire doctrine (36). Strauss wrote the "exception should apply to scholarly works, but not to course materials or administrative works" (40), and that it should apply to "all academic creators whose positions grant them a traditional expectation of ownership in the scholarly works they create" (43). Straus's test highlights the pondering and inquisitive purpose of the academy, viewing the academy as an ideal that traverses colleges and universities, not to be hemmed in by the traditional employer-employee dichotomy (although he also believes that educators shouldn't own the syllabi they create). The furtherance of the discipline should be paramount.

An interesting take on this by Paul Hellyer, sans the teacher exception, is the scholarship-ownership rights of university librarians. Essentially, Hellyer comes to a similar conclusion as Blanchard and Strauss, favoring the right of librarians to have an ownership stake in their scholarship, primarily through a contractual arrangement (54).

All told, commentary suggests the importance of framing a teacher exception in the work-for-hire debate in terms of scholarship and research as integral parts of the

academy. Even though there is no “teacher exception” explicitly stated by the Supreme Court, by placing the academy in a sanctified space, it may be a workable alternative to the extreme iteration of the work-for-hire doctrine which could place college academics within the sphere of primary and secondary school teachers, who are seen more as employees tasked with primarily skill building in a traditional relationship. The majority in *Garcetti* did not provide extensive elaboration on work-for-hire specifically regarding academics, but the issue is not settled.

Garcetti and Quantifying Speech

Indeed, in *Garcetti* the communications within this sphere are deemed a work product; nothing more, nothing less. The smooth operation of governmental administration is the goal, unlike in *Keyshian* in which the speech was deemed of going beyond the administration of government and to the foundation of government. In *Garcetti*, the court noted "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created" (421). This hearkens back to the notion of work-for-hire. By framing the speech right as that of a private citizen (and not more of a public citizen, as in *Pickering*, speaking to concerns of society at large), it loses the gravitas of larger theoretical concerns -- taking more of a world view related to the speech. This public/private citizen dichotomy also goes to a fundamental point that educators must be cognizant of. By defining themselves as public citizens, especially in terms of a clear set of responsibilities, the framework is shifted for the educator from a widget-maker to a societal facilitator.

In expounding on *Garcetti*, the professional responsibilities of an educator viewed as a public citizen allows for the hallmark of the educator as a pursuer of ideas. With a more restrictive view of an educator's function inside and outside of the classroom as professionals, they deserve those protections that would befit a citizen-scholar. The citizen should not be parsed from the scholar, wearing different hats that clearly define educators as scholars. Professional responsibilities should allow educators to enumerate the paths they can travel in the course of their intellectual pursuits. The danger of attempting to give definition through a legal system to the inherently un-definable specific professional responsibilities of an educator is that someone else will provide that definition to the detriment of the entire group. One size does not fit all.

Garcetti characterizes the speech as a subset of a job responsibility, with maintaining order taking precedence over speech, even if that speech is related to job functions of the employee. *Garcetti* defined speech in this context as insubordination:

> Refusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse. This prospect of protection, however, does not invest them with a right to perform their jobs however they see fit. (422)

The concept of speech was not addressed in more substantive terms that would be friendlier to academic freedom. Civic discourse emanates from the independence of a knowledgeable and trained employee whose mission extends beyond a goal driven task to a civic responsibility based upon discussion and contemplation. The court interprets the speech act as isolated within the context of employment, even in furtherance of one's job

responsibilities. Speech, according to *Garcetti*, is first interpreted as task oriented, which is similar to educators of children whose curriculum is skills-based as legislated by the government. Every other consideration after that is framed as outside the scope. The tenor of the court's analysis noting that the employee does not have a right to perform a job as one sees fit lends itself to a characterization of an employee as a troublemaker diverging from order. This interpretation is antithetical to academic freedom.

Garcetti begins to narrow employee freedom. Predictably, by framing the discussion in an employer-employee context, the court was then able to rationalize the concept of speech outside the scope of the orderly operation of business, noting "employers have heightened interests in controlling speech made by an employee in his or her professional capacity" (422). If interpreted within a professor/university context, controlling speech makes the concept of debate in furtherance of new disciplinary truths moot, especially by qualifying a limitation on speech as a heightened interest. Expertise, which is an inherent part of the employee's job, can remain untapped if the employer chooses to ignore it. By the court stating "official communications have official consequences, creating a need for substantive consistency and clarity" (422), one could easily see that if this is applied within a college, the professor who strays from a direct analysis of her or his discipline into more ethereal matters could be sanctioned for "going off topic" -- when in reality the professor may be enriching the disciplinary debate.

Garcetti provides a narrow definition of the purpose of communication: "Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission" (422). If this were to be employed in academia, a professor's speech could be challenged if appearing, even at

first blush, to be in direct contrast to the mission of the university. Especially if the speech is deemed outside the bounds of civility or considered non-harmonious, the mission statement could be held up as a weapon against the speech. The university could respond that the professorial speech does not subscribe to the values or mission statement of the university. What this actually is could be nebulous, as the speech (especially if it is inflammatory) could be cordoned off and dissected without providing an open-minded approach of the university's mission. Educators tend to analyze and interpret “between the lines”, but the court's interpretation of an employer's mission statement does not provide that nuance.

Garcetti importantly noted that it is not taking a position related to the traditional university-professor relationship: "[T]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence" (425). This is a good thing, because if *Garcetti* was applied to college educators, the rationale would probably go against the professor since the university would be able to limit the scope of the professor's speech since it relates to the course of her or his employment.

Garcetti frames the concept of academic freedom as "some argument" open to debate. “Some argument” provides notice to educators that the sacrosanct view of an educator and their fundamental role in democracy as ascribed to in *Keyishian* may not hold as much value in the 21st century, at least according to the Supreme Court.

Garcetti's Dissent: Official Duties and Academic Freedom

In his dissenting opinion on *Garcetti*, Justice David Souter reminds us of the sacrosanct view of educators and their fundamental role in democracy in his dissent. Souter is afraid "official duties" will restrict free inquiry: "[The scope of the control given to employers in *Garcetti* by restricting employee speech that relates to her or his professional responsibilities is an] ostensible domain beyond the pale of the First Amendment [which] is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to . . . official duties" (438). By interpreting professional responsibilities in a cut and dry manner without the gradations afforded by different environments and contexts such as the relationship between a professor and her or his community, everything the educator does -- in teaching, scholarship, and utilizing outlets such as social media -- can be a fire-able offense since the educator is usually expected to impart her or his knowledge in the community at the behest of the employer: the university.

Queries posited by *Garcetti*: Defining the Academic's Role through Official Duties

The opening caused by the *Garcetti* court refusing to distinguish employer-employee speech from professor-university speech was not lost on scholars, who provided much commentary in the years after the decision. Robert O'Neil noted "the crucial determination of an employee's "official duties" involves a judgment that is anathema to the academic setting" (*Academic* 19). One of the greatest attributes of a university is the freedom of its educators to fashion and shape their scholarship and

teaching based upon the needs of the student population, their discipline, and the community they are addressing. The content of the scholarship and teaching changes, sometimes from semester to semester. Proscribing an "official duties" doctrine goes against the essence of a scholar growing and taking her or his discipline in new directions, which could provide a great benefit to her or his employer, the university. The term "official duties" conjures up notions of a checklist and inhibits the spirit of free play and inquiry commented on in *Keyishian* that is essential to the lifeblood of a university.

O'Neil also states the bizarre result that would follow from an "official duties doctrine", in which professorial speech that has little or no relation to their scholarship would be the only form of speech that would garner constitutional protection (20). A university and the larger community benefits from the expertise of the resident scholar. Scholars need to experiment, or else the knowledge may not be brought to the public's attention. A classic example of a university retaliating against a professor was in 1900 (Eule). An economics professor at Stanford University, Edward Ross, was fired at the behest of Jane Stanford, the president. Stanford was irked by Ross' advocating for political and economic causes that went against the interests of Stanford, a railroad magnate, as well as his narrow-minded and racist view of Asian immigrants. His firing led to several resignations.

E.M. Barendt notes that one effect of *Garcetti* is that it is not guaranteed that courts would uphold individual academic freedom claims under the First Amendment regarding criticism of educational policy and university administration (known as intramural expression) (191). The concept of academic freedom lends itself to support that a professor, as part of the university community and the larger society, would be valued for her or his critique of the university because of her or his stake in it (and the

larger results for society based upon a critique of the policy). However, Barendt notes that placing an "official duties" label on professorial speech can result in a situation in which "the wider the responsibilities assumed by professors on matters of university administration" (191) can result in less protection for the speech. The incentive for educators, as members of the academy, to *care* about what is occurring within her or his university, and how those actions could affect the larger community, especially by assisting in the administration of university functions, becomes lessened since they cannot wear both hats simultaneously. The professor who wants to serve on a university-wide committee is expected to function at the university's behest, since the professor's academic expertise is not given the same allowances. In this instance, *Garcetti* would be critical of the educator who wants to effect change by taking an interest in the doings of the university. The court attempted to clearly delineate the roles of the academic and the administrator, defining the university in a partitioned and nuanced fashion.

Oren Griffin echoes this sentiment on *Garcetti's* practical inquiry into what are "official job duties", noting the nature of academic speech makes this inquiry complex (21). Even if the professor's job requirements are spelled out in an employment contract, issues arise as to when the academic stops being an academic. Outside of traditional classroom teaching, the boundaries as to "official job duties" are less about duties that are official and more about providing disciplinary knowledge in *some* fashion. This goes back to an idea that reverberates when discussing academic freedom -- academic speech is a special case.

Griffin notes an important distinction in the way lower courts have interpreted *Garcetti* when claims are made by professors regarding retaliation based upon an aspect

of speech; "(U)nveil[ing] a distinction as to speech that centers on core academic matters, such as teaching and scholarship, verses speech that involves administrative and managerial concerns" (Griffin 54). The lower courts in the immediate aftermath of *Garcetti* generally used a common-sense approach in determining what speech by academics was constitutionally protected. If it relates to concepts that are generally agreed upon things academics do -- teach about what they know and write about concepts that are related to what they know -- it is more than likely to be protected. Ideas and concepts that encourage students to always consider the "how" and "why", and encourage academics to learn more about the "how" and "why", have been generally agreed upon as having a benefit for society. This line of thinking, in a way, hearkens back to the spirit of the language in *Keyishian*, which gave deference to academic freedom as essential for the well-being of society. Actions performed by academics that adhere more to a *Garcetti* trope -- performing traditional office work in a traditional space with a specific, well-defined purpose -- tend to be viewed as "official job duties" without constitutional protection. It appears that lower courts, in the immediate years after *Garcetti* was decided, somewhat understand the concept that *thought* is difficult to quantify.

Garcetti and Generalizing the Speech of an Academic

In a more positive outlook on the effect of *Garcetti*, Matthew Jay Hertzog noted that despite the ruling, educators still had First Amendment protection (214). He suggests that university administrators should not read too much into painting the "official duties doctrine" with a broad brush. He notes that administrators working in higher education should not be quick to assume that every utterance by a professor is reasonably believed to be a reflex of an employment responsibility, in effect using *Garcetti* as a blunt

instrument to limit academic speech (224). However, Hertzog's reading of *Garcetti* does not allow for an appreciation of the nuances afforded by legal reasoning -- the law partitions actions into specific legal elements, interpreting and affording weight to those specific elements to come up with a result. Judges note a conflict, and interpret what society believes as a reasonable outcome, with a result not too "extreme". The *Garcetti* court was guided by this framework, or societal understanding. The court looked at Ceballos' speech and partitioned it within how society views employee's rights and responsibilities -- what should be tolerated as a society in terms of employees appearing, to the naked eye, to be disruptive and speaking out of turn. *Garcetti* provides for allowances, stating that as a society we will tolerate someone who speaks on an issue beneficial to the public, but not when it is speech produced in the "box" of usual employment responsibilities. Agree with it or not, this is the framework in which the court applied the facts. It is not, however, the sole frame of reference that would be afforded to an educator. Of course, the law is not limited to an application based upon the specific circumstances of a case -- *Brown vs. Board of Education* dealt with segregation in schools, but the legal reasoning has been applied to segregation in other environments. However, there was not a sense of the special speech of an academic in play in *Garcetti*.

Challenges to a professor's speech should go beyond using the reasoning of *Garcetti*, which apostrophes the speech action in general, without the context and gravitas provided when uttered by an academic. This context and gravitas is provided by *Keyshian*, which is still good law.

Hertzog drives this point home, noting that although administrators may use this reasoning as a pragmatic response when faced with a lawsuit from a professor claiming a

violation of academic speech rights, a better reading of *Garcetti* includes the caveat by the majority that applying the reasoning from *Garcetti's* employment dispute to a university setting may not be applicable. In fact, it provides a clearer definition of the first amendment protections for academics (224). What is overlooked by those who view *Garcetti* as a limitation of academic freedom is the majority in *Garcetti* noting that this case may not apply to issues of academic freedom -- once again validating the importance of an academic's speech. It is ambiguous. The "line of legal reasoning" would encompass a different legal discussion, which would be different in context and scope than an application by a non-academic's speech. The societal snapshot of an academic incorporates a different frame of reference. The image of a professor speaking and writing about issues of importance to society is seen as a common trope, whereas a non-academic doing that in the course of their employment would need a bit more convincing that it is expected. The majority says as much by telling those who want to limit an academic's speech, the academic is afforded a different dynamic based upon what speech actually is. Academics, by their words, deeds, and import in the American framework, transcend the boundaries of traditional jurisprudential lines of inquiry.

Conclusion

In this chapter I have shown the analytical fabric that goes from *Keyishian* to *Garcetti* initially gives credence to the ideal of an academic by indirectly allowing for latitude in her or his teaching and research (as per *Keyishian*), but later qualifies that ideal with the import of the ideas borne out of that ideal by permitting employee speech limitations (as per *Garcetti*). In looking at the broad brush painted by *Keyishian* and *Garcetti*, it is clear that the U.S. Supreme Court, at a minimum, appreciates that

university educators have *some* role in society. The court has a difficult time negotiating that place in exacting terms, which can be a benefit for educators who want to push the boundaries of their disciplines in ways that in the general public would be frowned upon. The Achilles heel for educators when navigating the legal reasoning around academic freedom is how they define themselves within the university, and if educators can transpose that understanding *beyond* the university when they speak on issues outside of the workplace related to their job function. If society (as represented by the courts) expects some tangible results, a give and take that results in growth, it behooves educators not to assume the safe space of the classroom -- a 21st century society wants some bang for their buck. If educators are able to remind society that the best of society directly results from academics and the freedom they have, it will have a good result for all.

CHAPTER 2: FROM A CENTURY OF DEFEATS: THE SLOW EMERGENCE OF ACADEMIC FREEDOM FROM THE COURTS

Chapter Abstract

In this chapter I trace the slow evolution of the contemporary idea of "academic freedom" through three court cases of the 20th century. Unfortunately for academics, this history does not end with a ringing endorsement of the right of academics to speak freely without being afraid of losing their teaching jobs. Rather, the courts have tended to agree that while faculty do have freedom of speech under the first amendment, they do not necessarily have the right to keep their jobs no matter what they say. It was only in the 1950's, in the dissenting opinion of Justice Douglas, where "academic freedom" gets linked to the preservation of democratic free thought, and this idea, of course, did not prevail with the rest of the Supreme Court's ruling. This chapter illustrates the court's early validation of punishing the "free speech" of employees if it promotes a "bad tendency" in *Patterson v Colorado* in 1907; Oliver Wendell Holmes' ruling in 1919 that introduces the concept of the "marketplace of ideas" to evaluate speech even though the defendants were convicted of espionage as they exercised their "freedom of speech"; and concludes with the Cold War case, *Adler v Board of Education* in 1952, where the court again validated the right to fire faculty for unpatriotic speech. However, it was in Douglas's dissent from the *Adler* ruling that our contemporary idea of "academic freedom" emerged. Although the American Association of University Professors (AAUP) has promoted the importance of academic freedom since the 1940's, the courts have yet to validate its practice.

Powerful forces outside the academy -- from the desire of businesses to fire workers at will, to the McCarthy-ite paranoia of the Cold War to prosecute subversives -- successfully dominated many important ruling of the courts, and as a result, the history is rather depressing. William Van Alstyne, a leading scholar on jurisprudence regarding issues of academic freedom, notes "at the turn of the twentieth century, the first amendment was virtually in a state of pre-history so far as academic freedom was concerned" because the courts gave great leeway to the government to sanction speech (82). The word "academic freedom" does not have a detailed formulation until the mid-20th century, and even when it does, it is applied in a dissenting supreme court opinion, not in the majority one. However, Justice William Douglas's dissenting opinion in *Adler* is shared among academics today as a benchmark in support of the foundations of an academic-based freedom, highlighting the importance of this concept. But the dissent does not necessarily hold the sway of judges, who view academic freedom through a narrower scope. Rather, the emergence of the term "academic freedom" comes from two war-era cases (World Wars 1 and 2) where academic speech struggled to be defined in the context of First Amendment free speech issues, first through a broad non-academic marketplace concept, and then through a more stark argument to support a marketplace implementation in the academy. For most of the 20th century, courts ruled that academic speech that did not correspond with the general national welfare (what jurists called a "bad tendency") was sanction-able: faculty had a freedom to speak but could be dismissed, irrespective of the importance of the speech in the academy. It was Douglas's dissent in the 1950's that demonstrated a connection between academic speech and the laboratory of democracy, acknowledging the university as more than a solely

transactional institution in which the student who was competent in evaluations was worthy of a degree. Douglas's dissent has become a legal argument (albeit unsuccessful yet) for the value of open debate in the university.

Part of the slow growth of academic freedom is because few people saw college professors as having much power or control over their jobs going back to the 19th century. Van Alstyne states in part, "the first amendment's immediate use value is in large measure derived from the case law that has grown up around it" (80). The idea of educators using the concept of academic freedom to push their disciplines forward was considered unusual, if not radical, during the early 20th century, as it will be illustrated in the cases discussed.

Although the concept of "scientific" freedom has been part of western educational traditions since Aristotle, academic freedom has emerged slowly over the 20th century. There are educators who "push the envelope". They test out in public those disciplinary innovations outside of the mainstream. Some ideas gain currency; some fail. However, those ideas that fail are not without merit. They are part of the laboratory of thought, which is the essence of academic freedom -- allowing for the unimaginable to one day become imaginable. Although this concept of intellectual freedom as part of the practice of scientific inquiry is nearly an article of faith in the modern university, the courts of the 20th century have not tended to share this philosophy. This chapter tells that story.

Patterson vs. Colorado **(1907) -- A Bad Tendency and "Contrary to the Public Welfare"**

The first case I will discuss, *Patterson v. Colorado* (1907), shows that limitations on speech were permissible if the speech demonstrated a bad tendency or was "contrary

to the public welfare". Tom Patterson, a Democratic Senator from Colorado, owned a newspaper in the state. He published articles and a cartoon critical of five Republican judges on the Colorado Supreme Court, essentially stating the judges were involved in an unconstitutional scheme of election-rigging to remove Democratic party lawmakers and replace them with Republicans. The court held the publisher in contempt, stating the publications impugned the court and its motives, and were intended to embarrass the court. Patterson claimed the truth of his claims as a defense, and in his answer to the charges filed with the court, he noted the court's corruption in several other cases in which the court had not issued a final ruling. Patterson, as a public figure, was attempting to persuade the court to decide the cases in a way he agreed with. The Colorado Supreme Court found Patterson in contempt for attempting to influence the court (Gibson 284). The US Supreme Court upheld the contempt conviction in 1907.

Regarding the freedom of speech aspects of the case, *Patterson*, whose majority decision was written by legal wordsmith Oliver Wendell Holmes, generally states that a claim of truth does not protect the individual from punishment – the constitution only protects *preliminary* punishment of speech. The government cannot prevent the speech. However, punishment is acceptable after the speech – even if the speech is true (462). This narrow reading looks at the first amendment through a process lens. Content is secondary. If the principle were to be applied to an educator, who is in the business of ideas, it would likely suppress educators from broaching a lot of subjects. The fear factor for educators, whose scientific method since Aristotle has been "the pursuit of knowledge for its own sake", is that, in following *Patterson's* reasoning, the first amendment "right

to speak" without protection of educator's ideas leads them to not take chances. It would be safer to re-hash the same theories than reinterpret them in new, imaginative ways.

A term to squelch speech was introduced by the court: a *bad tendency*. In *Patterson*, a contempt charge is valid since the publications about the case in question could affect the juror's outcome in the case (462). Scholars have interpreted this to mean that speech could be sanctioned if it has a "bad tendency" (Curtis 238). If this bad tendency theory were applied to speech in academia by a professor who is speaking in her or his role as a professor, an argument could be made that the words were intended to result in a bad effect, even if that was not the case (and the bad effect did not occur). It sounds Kafkaesque and bad for scholars making their disciplines meaningful to the public.

If that wasn't disheartening enough, the court allowed for punishment of speech based on a bureaucratic term: "contrary to the public welfare". The public welfare is a very general term -- the government can punish speech that can cause disruption, and the public welfare is typically defined by those in power.

This relates to the classical tension between technology and science, in which technology is applied knowledge, and knowledge (or science) is the pursuit of knowledge for its own sake. As summarized, "science concerns itself with what *is*, technology with what *is to be*" (Skolimowski 375). The difference is that science is not applied technology; it is free. Academic freedom is like science; *Patterson* would think of academic freedom like a technology. The public welfare stops at a basic understanding of what *is*.

Disruption goes against the public welfare, but disruption in scientific treatises provide academic freedom's linchpin of moving the discipline forward if we think of the humanities, as well, as a kind of "science". "Contrary to the public welfare" can be interpreted in a classroom as scrutinizing every topic and discussion which could eventually cause a disruption. Played out to its illogical conclusion, almost any idea could be criticized, looking at the speech (aka knowledge) as nefarious.

***Patterson* Dissent: Speech without Content**

Once courts start dictating control over the outcome of speech, speech itself becomes endangered. Justice Harlan's 1908 dissent in *Patterson* says that only protecting the speech *action* but not the speech content stifles free speech if (as the majority noted) it is contrary to the public welfare (465). In applying Harlan's dissent to an academic environment, the *Patterson* ruling hollows out the concept of academic freedom -- the freedom is rarely expressed. Although the government cannot stop someone from placing an idea into the world, it can punish whatever idea is deemed injurious in a way that is not explained.

The majority's logic stays within a very narrow sense of the Constitution, stating that the government cannot detain an educator only out of concern what might be said in the future -- *not* the present. The majority's logic is comforting on a basic level in a non-authoritarian country where the expectation is that individuals will not be detained without a reason. However, the majority's reasoning is more beneficial for advocates of academic freedom to view the U.S. Constitution a proscriptive document which extends liberties – not a restrictive document.

Although Harlan was not specifically defending an educator's freedom, his interpretation of constitutional rights as an expectation of being "American" lends itself to educators involved in educating Americans. Harlan writes that the public welfare should not override constitutional privileges, and since the rights of free speech and of a free press are, in their essence, attributes of national citizenship, the government cannot impair or abridge these rights (465). The reflex to protect should not supersede a right to freely speak or write. This is a common theme that Americans have struggled with throughout their history -- liberty vs. security. If those in the academy had to forego liberty for greater security, disciplinary knowledge would suffer.

In stating that a free speech and free press are the essence of being American, Harlan is challenging the majority on two fronts. Harlan frames those rights as part of the *fabric* of what it means to be American by asserting a free speech and press as the essence of what it means to be an American -- they are inseparable with the American identity. This idea echoes the mantra of academic freedom. The essence of this endeavor is in its liberty to examine and explore a doctrine with no limitations.

Also, Harlan is taking a jab at the majority's textual reading of the 14th Amendment of the Constitution by noting these civil rights such as speech are attributes of citizenship. This is the statute Patterson based his claim on. Section 1 of the 14th Amendment clearly asserts the State shall not abridge the right to speak:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Because even the majority of the court interprets the citizenry as having a right to speak, Harlan sees the 14th Amendment as protective of proactive speech rights. In effect, the *appearance* that Patterson is being sanctioned for speech should be enough to override a process claim of contempt which the court is basing its decision on, since a speech right is fundamental to an American privilege.

Harlan is critical of the majority's finding that subsequent punishment for a speech act is constitutional, which allows a legislature to "impair or abridge" that right "whenever it thinks that the public welfare requires that to be done" (465). "Whenever it thinks" is instructive in Harlan's reasoning here. Limitations on speech should not be based on snap judgments with a local or national legislature taking the temperature on some sort of danger that needs to be addressed by the speech. Whether that relates to the administration of court activities or something less formal, sanctions on speech are serious matters that could have lasting consequences. Harlan's concern can easily be applied to academia. The educator or student who says or writes something, even with disciplinary boundaries, can be sanctioned by government representatives wherever it thinks it could be injurious to the public welfare. This reaction can make the educator or student think twice before broaching the subject again. Academic freedom, in its most effective sense, allows disciplinary ideas to roam where they need to in order to come to some sort of larger understanding for the discipline and the larger society. If there is too much restriction in a "what if" scenario, going too far down a causal chain easily takes "whenever it thinks" into the realm of "whatever someone feels".

Queries posed by *Patterson*

Bad Tendency as No Tendency for the Academic

The general view of *Patterson* is that it provides a narrow reading of free speech rights but academic freedom is not even in the purview of this logic. In other words, First Amendment speech is not a license for academics to say whatever they want without danger of prosecution. William Van Alstyne notes "at the turn of the twentieth century, the first amendment was virtually in a state of pre-history so far as academic freedom was concerned" because of providing great leeway to the government to sanction speech (82). The concept of applying academic freedom to the first amendment would have no bearing since speech – even true speech – could be sanctioned. Anything a professor stated in a classroom could be viewed in the least favorable light. Of course, the assumptions of higher education at the turn of the 20th century were to learn from the great books and classics. The American university hadn't developed enough to challenge commonly held beliefs. Although the university held a revered space in the conservation and protection of ideas, in the early 20th century, the space of the university was often *expected* to reflect a white Anglo-Saxon male tradition. As in American society in general, the expectation of Constitutional speech was not to upset agreed upon sensibilities, which mirrored those sensibilities in the classroom.

Patterson may assume that working at a college during this time was legally interpreted as more of a task-driven job of teaching facts, and not a philosophical career with an exploratory bent. Although during this time a genuine change was occurring in American education based on Darwinism and the German belief of academic freedom (Cole 3), the U.S. Supreme Court was slow to catch up. In fact, a landmark case several years later in 1920 (*Lochner v. New York*) which struck down a New York law limiting

bakers to 60 hours of work per week was upheld by the court, demonstrates the lack of support for employees in general. Employees with a higher purpose were not a legal prerogative.

Further than the apparent legal irrelevance of the academy in the late 19th century, Van Alstyne notes an additional source of discouragement for early proponents of academic freedom was an understanding that an employee did not have free speech rights, even if the employer was the government (83). This assumption about the role of employees was best crystallized in an 1892 dispute regarding a policeman who was terminated for public remarks critical of his department. Oliver Wendell Holmes was on the Massachusetts Supreme Court at the time, and he succinctly summed up the state of the law: “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman” (84). The assumption here is that the employer/employee relationship is one of a master/servant dynamic. With faculty defined as servants to an institution, the idea of academic freedom as an open sharing of ideas in a common endeavor unlikely to survive.

Thus, academic freedom in America was generally not on anyone's legal radar in 1900. As Van Alstyne states, well into the 20th century “any claim of mere academic freedom [is] stranded as a constitutional matter; indeed, they [these cases] left freedom of speech stranded at large” (84). “Mere” sums it up: educators (and all employees as well) were responsible for their restricted role within their employer’s business, even if the lifeblood of the business involves professors and students working out academic theories to facilitate intellectual growth.

The *bad tendency* doctrine the court relied on was framed as a battle between "good vs. evil." Stephen M. Feldman writes that the judiciary’s reliance on the bad

tendency doctrine during this time period is steeped in the principle of republican democratic governments (999). Under this principle, the overriding principle is the pursuit of the common good, as defined by social norms. Those intellectuals outside of the norm are "out of the loop" regarding participating in democratic processes. Feldman notes, "Expression with bad tendencies supposedly contravened the common good, so courts, remaining consistent with republican democratic principles, readily upheld numerous restrictions on expression" (1000). It would be feasible during this time period that courts would be skeptical of controversial classroom speech, especially if the speech contravenes acceptable ideas within the American fabric. If a professor were thought to cause a disruption in some (or any) sense, the courts would be more likely to deem the professor's ideas as promoting a bad tendency, irrespective of the potential long term value of the professor and her or his students working through the idea to eventually benefit society.

Although education may have been viewed as a force for change in the 19th century, the freedom for educators to challenge the status quo was not. Feldman writes "the primary purpose of education within the republican democratic regime was to inculcate children with the values necessary to become virtuous citizens who would pursue the common good" (1000). Although Feldman discusses children's education, the judiciary during this time might have narrowly defined academic freedom for college professors or students as a job of promoting the mainstream opinion. The university was not viewed as an engine of social change as it is today -- rather it was the bulwark of the status quo. So at the close of the 19th century, the status quo would primarily be for providing job related skills, staying close to tried and true theories that society *expects* the

university to put forth. A broad reading of the concept of academic freedom allows for professors and students "testing the waters" without a predictable defined path and result. Such freedom, however, was seen as too unstable, even if the ideas have a logical basis in their disciplinary pursuits. In the early 20th century, academic freedom looked more like academic fealty.

So the 20th century started poorly for those who believe in a liberal interpretation of academic freedom; in briefly commenting on *Patterson* and the "bad tendency" doctrine, Stewart Jay notes in "the judiciary's attitude, as well as that of society generally, toward the balance between conformity to community norms and individual autonomy [i]n nineteenth-century American rulings, when free expression was at stake, the balance was tipped heavily on the side of state controls" (816). The tendency not to rock the proverbial boat would leave little room for academic freedom to be embraced. If a teacher asserted a right to speak in class, even if the professor framed the speech from less of an individualistic endeavor and more about the community in focusing the speech on her or his discipline, the response generated from the professor's speech would play a greater role. If the response could result in something bad occurring, it is unlikely that speech would be protected.

The Privileging of Ideas in Ascribing a Bad Tendency

At the turn of the century, economic prosperity was a guiding philosophy of American life, even in the assessment of ideas. David Rabban astutely comments that during this time the courts privileged ideas filtered through an economic lens. Ideas undermining a business endeavor were viewed in a more prohibitory light. This economic bias allowed for a greater prejudice in interpreting the speech as a form of wrongdoing. He states:

> in striking contrast to their increased oversight of economic and social legislation that infringed 'liberty of contract' and property rights, judges gave great deference to the 'police power' of legislators and administrators to determine the tendency of speech. Judges also readily found that speech, even if not directly prohibited, had a tendency to produce an action proscribed by statute and therefore could be penalized as a violation of the more general law (132).

Applied to a university setting, ideas that increase wealth and economic prosperity were seen as more valuable than ideas that are purely put forth for other reasons. Corporate criticisms of the liberal arts university at the turn of the 20th century were prevalent. Frank Donoghue cited a critique by an engineer that had been hired by the president of the Massachusetts Institute of Technology to do an economic study of education: "For [Morris Llewellyn] Cooke, the businesslike operation of a university, with its goal of maximum productivity in teaching and learning, stands independent of and implicitly opposed to research culture and the prestige that research culture generates for individual professors and (by association) for the universities that employ them" (8). Non-monetary ideas for growth are not given the same chance to bear fruit without the cover of a "state supported" economic bent.

In fact, Rabban notes, regarding Supreme Court cases from this time period, "this historical record poses a substantial challenge to current constitutional theorists who identify an independent judiciary as the best protection for individual rights in a democracy" (131). For academics, to automatically rely on a bureaucratic system and assume it will always default in their favor to the promotion of ideas in pursuit of "science", they may be surprised, even in the 21st century.

In *Patterson*, the court had an expectation of "safe" speech so sensibilities would not be offended. The high court viewing speech as more expansive would have to wait several decades.

***Abrams v. U.S.* (1919) -- A Marketplace of Ideas**

The next case I will discuss, *Abrams v. U.S.* (1919), demonstrates that although the court dealt with wartime speech in the same functional way as in *Patterson*, the dissent introduced the concept of a "marketplace of ideas" into the legal lexicon with more liberal content than the economic assumption of previous decades. Speech has a larger purpose than functionality -- speech can benefit the population.

During World War I, five Russian nationals who were anarchists and anti-capitalists living in New York City printed and distributed leaflets in English and Yiddish protesting and calling for action against the U.S. in its invasion into Russia to stop the Germans. The leaflets stated, in part, that Americans should cease working in munitions factories to support the war effort, and also fight against the U.S. in Europe to keep the allies pre-occupied. A recurring trope of the leaflets was to unite the proletariat against the capitalists and support the recent Russian Revolution. The five Russians were convicted of espionage. The U.S. Supreme Court upheld the conviction.

The court gave short shrift to the defendant's freedom of speech claim: "On the record thus described it is argued, somewhat faintly, that the acts charged against the defendants were not unlawful because within the protection of that freedom of speech and of the press which is guaranteed by the First Amendment to the Constitution of the United States, and that the entire Espionage Act is unconstitutional because in conflict with that Amendment. This contention is sufficiently discussed and is definitely

negative[sp] in *Shenck v. United States* and *Baer v. United States*…and in *Frohwerk v. United States*." (618). The court assumed that since two recent cases discussed the free speech claims that were at issue here, there was no need to re-hash that analysis. The cases noted were sufficiently (but not lengthily) discussed.

The somewhat dismissive tone of the speech claim in *Abrams* probably would have given some professors of the era a slight pause in criticizing the war in a similar fashion in their classrooms. If speech could be contextualized on a leaflet within a framework of espionage, pro-war passions could cause Americans to find fault in a professor's classroom war critiques as a form of indoctrination on her or his "minions".

As an aside, in the *Shenck* & *Baer* cases (consolidated by the court), leaflets were published during WWI urging men not to enlist and not to fight for a corrupt regime. The court held that restrictions on the first amendment are allowed during times of war. In *Frohwerk*, a newspaper publisher was convicted of espionage for printing criticism of America's decision to send soldiers to France during World War I as well as a general criticism of the war. The court held that restrictions on the first amendment are allowed during war. The court also noted essentially that a conspiracy to prevent soldiers to enlist can be gleaned from words of persuasion – a spark could be lit with words.

Holmes Marketplace of Ideas

In introducing the concept of a "marketplace of ideas" into the legal lexicon, the dissent by Oliver Wendell Holmes heralded something larger: the beginning of modern academic freedom. After discussing how the leaflets did not intend to impede the war effort, thereby not meeting the elements of a crime, Holmes notes the essence of the first amendment is the ability to bring forth ideas deemed unpopular. Although providing no

mention of a "marketplace of ideas" within a classroom, it is not a stretch to assume that a classroom is a place where ideas are commonly discussed, tested, and either refuted or supported.

As a brief aside, John Stuart Mill is credited with introducing the concept of a marketplace of ideas into the lexicon in 1859, although he never used those exact words. Mill and the marketplace of ideas will be discussed in greater detail in Chapter 5, but in sum he notes: “only through diversity of opinion is there, in the existing state of human intellect, a chance of fair play to all sides of the truth” (45). For Mill, debate and discussion, the tools of the intellect, can lead to a greater understanding of "truth". To reach the best outcome in approaching life's problems is to leave no theoretical stone unturned, since the populace will determine which ideas are the most feasible. Even if an idea is outrageous, giving it a fair hearing should expose it for its flaws. William Van Alstyne points out that Mill’s writings eventually influenced the Supreme Court (86), and perhaps we can see the beginnings of this in Holmes's dissent.

Holmes begins his analysis of a marketplace of ideas by providing an interesting outlook on the majority’s premise:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises (630).

By providing a dogmatic explanation of an idea, Holmes implies the short-sightedness of an idea that is not challenged. In fact, if an idea is not challenged, one can say it is not an idea at all but just a wish. For those who codify an idea are even more dubious. Sanctioning challenges to the idea demonstrates insecurity in the validity of the idea, or even having an interest in a position espoused.

His common sense approach to when an idea becomes valued is his defining of a marketplace of ideas:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out (630).

Holmes, in stating the ideal of the ultimate good, believes those ideas viewed as valid can lead to “better” truths. As a result of "better" truths, a society can grow.

Through an economic model of embracing the concept of marketplace economics in a good way, with less government regulation, he extends that "free trade of ideas" concept into the humanistic sphere. Although imagery of individuals meeting in a town square conveys a marketplace, in the 21st century in the U.S. this meeting is on display more readily in a university classroom. To cast suspicion or criminalize ideas without vigorously questioning the ideas, even if it leads to uncomfortable conclusions, can cause the old ideas to be recycled continuously, not changing and adapting to the populace.

The classroom provides the place for ideas to be tested, theoretically judgment-free, and learning from this give-and-take about the idea in question and permutations of the idea. Of course, the debate tends to be more robust in advanced undergraduate and graduate courses where students begin to find their academic and professional voices, but for the brave undergraduate questioning in an introductory course why an idea or theory is assumed, the *process* begins anew as a crucial first step -- the educational enterprise. That process provides the marketplace with its impetus of questioning instead of memorizing.

Holmes closes his discussion of the marketplace of ideas on a thoughtful note, stepping back to remind us that to look for perfection is impossible: “That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge” (630). Holmes reminds us that allowing ideas to be uttered is one of the ideals in this experiment of American democracy. To privilege ideas and to deny discussion of them is to mirror countries that have an unwritten rule about what can be said -- a type of thought police. Holmes' marketplace of ideas does not expect canned responses to whatever issue comes up, even if those responses can excite the passions. Those responses are expected to be messy, such as when free thinking takes place. To criminalize thoughts is to take a result-oriented system, such as the legal system, and place ideas through a “lawful or unlawful” prism of “right” or “wrong”. The marketplace allows for variance without the threat of punishment. In fact, the ideas and ideals how we live our lives may not be based on perfect ideas, but imperfections we have deemed as the way to do things.

The "business of learning" is itself part of this American experiment every day, messy and convoluted. Not one student thinks alike, and not one educator approaches material in class in the same fashion. To criminalize an interpretation of an idea goes against this experiment. Every idea started as a theory untested, perhaps even at a university having some germ of truth. The danger is the academy assuming the end result, in essence 'forgetting where you came from", which can become dogmatic.

Holmes does qualify those ideas that are outside of the marketplace that damage the fabric of democracy: "While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country" (630). But those ideas have to be so extreme -- essentially outright threatening death or destruction -- that self -preservation must be the motivation. This of course is theoretical; in practice, outside or inside the academy, society allows for checks on expression that are not as extreme as described by Holmes.

Queries posed by *Abrams*: Holmes' Marketplace as the Seed of Academic Freedom

Academic freedom can only be cultivated in a tolerant environment that recognizes the *humanity* in allowing all to speak, believing that the individual has something worthwhile to say. Starting with this assumption provides the room needed to test out the ideas in a non-threatening manner, with the soundest idea being brought to the forefront. William Van Alstyne states that Holmes' dissent in *Abrams*, as well as his writing in similar cases, in significant ways will eventually lend strong support to

academic freedom (98). Holmes used “market logic” in the opposite way that previous business interests had tried to use it to suppress academic freedom two decades earlier.

By couching university speech within a marketplace framework, it provides a more clear-cut impetus for academic freedom. Holmes’ “free trade in ideas” frames the concept of university speech as providing some sort of capital. The most successful ideas win out, as in the most successful capitalistic ventures. Business ventures can fail after being tested in the marketplace; so too can ideas in this similar way. The “failed” ideas are allowed to be given a fair shake, despite initial disapproval. The ideas are analyzed. The buying public can help determine the ultimate validity of the business venture. The academic public, which includes professors and student colleagues, can help determine the ultimate validity of the idea. A free trade of ideas protects us from the most dangerous ideas taking root.

In a bold move Holmes coins a phrase "proxies of truth" which shows his belief that *all* ideas are subject to revision and improvement and *law* needs to protect that growth. Van Alstyne writes that Holmes’ coining of “proxies of truth” provides the wiggle room needed for ideas (98). Van Alstyne notes “Indeed, life can only provide proxies as truth, each in turn being perpetually subject to displacement by other ideas that become more compelling proxies of truth, each proxy simply being whatever seems most correct to each of us, tested in comparison with alternatives equally unrestricted in their availability to us-an availability it is one function of freedom of speech to assure” (98). Holmes resisted a belief that ideas were eternally true. Embracing the first idea that appears plausible may not be prudent. In a college, it is fine to blurt something out (theoretically; this will be discussed in detail in later chapters) since professors and

students gather anything they can find in order to come to an imperfect agreement: "OK – this sounds good for now, but who knows about later?" To acknowledge the gray within the black/white continuum prevents a university from becoming a type of deity with disciplinary knowledge. Of course, Holmes proxies of truth *literally* can cause discomfort in the university (especially if it is a discipline such as theology that receives its mandates from God) but, as far as Holmes would be concerned, it is fine to assume that there may be other truths out there. The marketplace will provide a truth that everyone can live with.

In providing a truth that everyone can live with, looking for a *bad tendency* to sanction in speech is not practical and actually counter-productive. In noting the shift by Holmes from *Patterson* to *Abrams*, Van Alstyne states that the *bad tendency* framework within the first amendment cannot survive the marketplace concept: "The notion of bad tendency as a justification to restrict the availability of an idea threatening the status of institutions, groups, established wisdom, or values through speech cannot survive this view of the first amendment" (98). In an academic application of Van Alstyne's idea, a reflex to squelch speech for the sake of protecting a larger structure is not sufficient. The impulse to stifle speech may be pragmatic, which may inevitably win out in the end, but if an institution such as a university is to truly consider itself to be within the pantheon of a "sacred space" where knowledge for some type of growth is the mission, ideas are the currency in which the university barters. Once the university strays from that, the university becomes more of a cardboard façade that may espouse the advancement of ideas, but in reality, just keeps the status quo for its own self-preservation. This stagnation can be hidden by stylish admissions guides but the university that doesn't

acknowledge the hard conversations that bring about imperfect truths is slumbering. No harm, no foul, but little thought.

The marketplace of ideas concept may not be even value-laden. Regarding the part of Holmes' dissent that dealt with the marketplace of ideas, David Rabban asserts that Holmes couched his discussion in terms of Social Darwinism, flensed of privileging free speech's value to the individual or society (349). Holmes' dissent *was* pragmatic in its matter-of-fact tone, looking at the speech and weighing its importance to the constitutional dimensions of the first amendment, and not following the logical path of the speech to larger humanistic pursuits (that idea begins to be worked through by other justices in *Adler*, discussed below). A question to be asked is if the *ideas* have a fair airing of their merits in due process.

In fact, an argument could be made that testing out ideas in the academic marketplace involves a sense of detachment. Passion for one's position is welcome, but professors can be facilitators of knowledge who are fair in their evaluations of their students applying ideas. This parallels Holmes' free trade in ideas: to take a step back and see where the idea goes, letting the student make the leap to larger humanistic pursuits. The academy values the *process* of the free trade in ideas to see what idea emerges as the most logically sound one. Anything beyond that, which can have great value, is not to be conflated with the process.

Criticisms of Holmes Marketplace Feasibility within the University

As Holmes' dissent did not explicitly link a marketplace of ideas to academic freedom (which remember, hadn't been "invented" in the way the academy has used it since the 1960's), some commentators criticize the value of the "marketplace of ideas"

defense of academic freedom in the university. Robert Post is critical of linking academic freedom with Holmes' marketplace mantra in *Abrams* because Post is afraid of perpetuating the idea that the commercial marketplace should be the final justifier of academic inquiry, which is by definition a "science" of the disinterested pursuit of ideas for their own sake. In commenting on John Dewey's *Declaration of Principles on Academic Freedom and Academic Tenure*, Post states that disciplinary authority as controlled by institutional structures is key. This is unlike Holmes marketplace mantra that would result in a free-for-all in the classroom. Everyone in the marketplace of education has a goal. Debating ideas in a classroom leads to a truth that students apply to their papers or exam so they can pass the course. Upon passing many courses and receiving a degree, the student may pursue monetary or humanistic endeavors. In the traditional marketplace, the end-game is not a degree; it is greater truths to benefit society. It is incompatible (126). The idea of a university is less about a marketplace and more about a *disciplinary* place. Students expect to study ideas that have been debated and perfected over the course of generations. Foundational knowledge is prized in this environment.

However, Post's argument fails to see the forest through the trees. It is true that a literal interpretation of a marketplace of ideas envisions shouting, arguing, and an eventual "winner". But Holmes dissent is very much structural in nature – it provides the leeway that *allows* for the concept of new ideas to have a place in the academy. The marketplace does not literally assume that every setting will operate as a marketplace, nor that the best "value" is always financial. But the free trade in ideas provides a structural rationale that allows for the concept of a free trade in ideas to link directly to the concept

of academic freedom (as it will be discussed in *Adler*) and thereafter being a special concern of the first amendment (as decided in *Keyshian*, discussed in Chapter 1).

Also, as Holmes notes that the competition of the market will result in the best ideas flourishing, the *university* can be viewed as a marketplace – it has a distinct mission that can benefit from the understanding that the *concept* of an idea is valid, for the betterment of a business venture or a university. Holmes does not go so far as to say that anything spewed from a person's mouth deserves no scrutiny – he did state that one cannot shout fire in a crowded theater and not expect a governmental sanction. Holmes simply understands that an idea cannot be dismissed immediately out of hand – even if the idea is discredited within a second. By disallowing the reflex to not speak *out of fear* is to no one's benefit.

As much as many academics like the idea of a free "marketplace" of ideas, the metaphor of the market has some negative consequences, too. Adam Sitze also queries that Holmes "marketplace of ideas" mantra, following the line in later cases on academic freedom (such as *Keyshian*), misinterprets the essence of a marketplace of ideas as demonstrated originally by John Stuart Mill. Sitze argues that "rather than ask what our responsibility for what academic discourse can or should be, we simply let the market decide instead. The truth of the doctrine of the marketplace of ideas is that it excludes any truth except the laws of the marketplace itself" (597). Essentially, Sitze argues that although Holmes' "free trade in ideas" has become solidified as the gold standard of academic freedom, the marketplace concept is a uniquely court manufactured mandate of an American ideal, while in reality Mill's original mantra on ideas was less clear cut -- ideas can hold different levels of value within the academy, based upon those that go

against disciplinary “truths”, especially those that inflame and cause tension. Sitze would probably not look at Holmes free trade in ideas as an academic freedom “test” beholden to the traditional strictures of a first amendment legal analysis. This is because of pragmatic constraints within the university model. It is also because of an understanding that it would be a fallacy to allow *all* ideas within the current understanding of how a university identifies itself. Indeed, we do not "allow" our economic markets to be completely "free". The "market" language may not be the best we have, but the underlying concept of an unfettered expression of ideas for the common good still holds theoretical currency. The application of the ideal, as well as constraints placed on it, is up to each university.

Sitze views the academic sphere as a base from which the marketplace of ideas discussion can begin without the "noise" of unrelated ideas that do not expand on knowledge (598). There is an expectation that the participants in the university -- students and professors -- have come to learn and seriously understand what is being taught. This is accomplished through questioning. The questions can lead to new discoveries.

Iterations of Defining Holmes' Marketplace within the Classroom Sphere

The professor has a major role in allowing ideas to flourish. Akeel Bilgrami, who also critiques Holmes' "marketplace of ideas" mantra (and John Stuart Mill's argument from which it is based), notes that the marketplace focus should be on the professor making a good faith effort in evidence gathering to result in a truth (432). It is fine to have a professor claim that a concept is truthful without worrying that it may not be true several years from now based on additional research -- Holmes noted the airing of all

ideas in the marketplace can be viewed as a guiding principle, and not a literal dogmatic classroom exercise.

Having an open mind in researching a concept, adhering to ethical doctrine in evidence gathering, and reporting the findings satisfies Holmes marketplace of ideas ideal. If the convictions of a professor's ideas are true, with evidence as the vehicle of those convictions, the truth can be borne out in the classroom.

Rodney Smolla defends Holmes dissent in a "big picture" way, agreeing with Holmes but admitting some colleges *don't* have a hands-off approach. He states that debates over free speech on campus are largely debates over whether the Holmes' marketplace of ideas position or order and morality position best captures the soul of what an American university should be (102). Smolla sees the marketplace of ideas concept as a core function, an implicit understanding of how the university creates and expands on knowledge. By privileging the marketplace concept as the soul of the university, it goes beyond a checklist. It is a fabric of the American experiment, as Holmes wrote.

All told, the marketplace is a workable concept. After quoting Holmes free trade in ideas, Jessica Lyons states, “the need for a viable marketplace of ideas is the underlying principle of most First Amendment protections, both within the university and the greater community” (1794). It is common sense -- if most Americans would think of freedom of speech as an inherent right, it should follow that the free trade in ideas Holmes wrote about should have its own inherent parallel within universities, unquestioned as part of this American experiment. Holmes’ defense of a free trade in ideas was a clever appropriation of market logic, despite its potential shortcomings.

Adler v. Board of Education (1952) – Academic Freedom

Holmes analysis of a marketplace of ideas set the stage over thirty years later for how this marketplace of ideas concept should play itself out in a classroom setting. By introducing the term academic freedom into the court lexicon, academic freedom provides some clarity in discussing the marketplace of ideas in a classroom setting. The modern concept of academic freedom began with the formation of universities in the twelfth century (Stone 1). *In Adler v. Board of Education*, Justice William Douglas elevated the concept of academic freedom in the United States, taking it from the classroom to the high court as a constitutional factor to be considered in disputes involving education free speech claims (Van Alstyne 106).

At the start of the Cold War in 1949, a New York statute called the Feinberg Law, bolstering previous anti-communist legislation somewhat already on the books, was instituted to protect students from being indoctrinated by public school educators who belonged to subversive organizations. A list of subversive organizations, maintained by the Board of Regents, numbered almost 200 organizations. If a teacher was named by a witness as a member of an organization on the list, the testimony of the witness was deemed unquestionable proof (called prima facie evidence) that the teacher was a member of the subversive organization and provided grounds for termination. The witness was not cross-examined by the teacher. Also, each school district appointed an official to query the loyalty of every teacher in that district, apparently even if they were not deemed a member of a subversive organization. A legitimate criticism of government could be interpreted as subversive speech. *Any* form of speech, even outside of school, if deemed subversive could be grounds for dismissal. Because the nature of subversive

activities could be clandestine, *a lack of evidence* of any subversion could be interpreted *as evidence* of stealthy subversive activities. (e.g. Heins 75). Four New York educators, Irving Adler, Martha Spencer, and George and Mark Friedlander, challenged the law in court (Heins 119).

The *Adler* court ruled against the educators. Regarding the free speech aspects of their claim, the court essentially paraphrased Oliver Wendell Holmes 1892 dicta that employees can impose reasonable limitations on employment. If the educators do not like those terms, they are free to leave with their speech rights intact (492). In the court's eyes, prohibiting faculty membership to a subversive organization was a reasonable condition of employment.

The court noted the sensitive area of the schoolroom, and the ability to shape young minds: "It [the school system] must preserve the integrity of the schools". (493). It seems that the protection of youth is the motivation, and the court found no problem with that. The court focused on integrity. However, this may not include the ideal of academic freedom, which cannot truly take hold. The majority failed to realize that if the youngest Americans are not allowed to be exposed to varied interpretations of an idea, they lose an opportunity to participate in the essence of the American ideal, exposure to as many viewpoints as possible without limitations caused by censorship. Integrity, in the court's purview, allowed for a narrow construct. One quote from the court best sums up the attitude of the time:

> One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the

> employment of officials and teachers of the school system, the state may very properly inquire into the company they keep (493).

Guilt by association was permissible; in fact, it was obligatory since reputation was part and parcel of educational competence. Given such concerns, any questions of academic freedom were not at the forefront of the state's educational mission. For educators reading this opinion, presentation and appearance in service of education – in effect, *playing the role* of a teacher – was sufficient at the outset of any educational query. In this setting, professorial conduct could be called academic fealty without the academic freedom. Doctrinal adherence at the beginning was mandatory. Any variations tolerated were in the presentation, not in the substance of the content being taught. Although the court was addressing a child population, one could easily surmise governmental interest in protecting untrained college students minds from anarchist professors.

One statement by the majority slightly tips their hand: "Certainly such limitation is [one the state may] make in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence" (493). By framing the beliefs and associations of an educator as within the realm of a police power, *Adler* provides the government with a buttress to academic freedom -- the freedom is defined by how the government legally legitimates academic worthiness within a public safety context. Also, in characterizing the educator's beliefs and associations as a potential form of pollution within the school environment, the court condoned the sanitization of ideas for student consumption. Those ideas that are palatable to the majority and will not cause any ripples or disturbances are cleansed as knowledge. Ideas that are outside the mainstream cloud the mission of education -- an ordered predictability of skill building.

As a testament to how the majority decision was viewed as repugnant, even during the conformity-in-thought era of the 1950's, three justices dissented (one justice essentially dissented on technical grounds, stating there was not a clear case or controversy).

Dissent: Academic Freedom in the Legal Lexicon

Justice William Douglas's dissent is noted for introducing "academic freedom" into the high court lexicon. The dissent emphasized the important and unique role of teachers in a free society, which he noted at the outset: "The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher" (508). By framing the urgency of an educator's purpose as one of free thought and expression, Douglas set the stage for melding a sacrosanct first amendment (the amendment many Americans associate with freedom) with the lifeblood of an educator.

Douglas states that the anti-subversive law got it all wrong – even if the purpose of the law was to weed out bad actors to protect the schoolhouse from anti-democratic impulses, censoring educator's thoughts results in an inherent undemocratic effect: "The public school is in most respects the cradle of our democracy" (508). Douglas actually begins his analysis with the "cradle of democracy" sentence, exclaiming that the hallmark of the American experiment begins in the classroom – the reflex of the student or the educator should not be to censor oneself, because that in itself is an un-democratic and an un-American ideal. To teach the youngest participants in the American experiment to err on the side of caution in thought mirrors the worst in totalitarian regimes where the

citizen has no peace, no inner freedoms. Every action in the larger society would become robotic.

Douglas criticizes the infirmity of the Feinberg Law, which assumed an educator's guilt by her or his association. Douglas notes that once the Board of Regents deems an organization subversive, its purpose cannot be questioned and a teacher's membership is automatic evidence of guilt: "The irrebuttable charge that the organization is 'subversive' therefore hangs as an ominous cloud over her own hearing" (509). With dystopian finality, the educator is fully granted the constitutional right of notice and a hearing but cannot substantively challenge the black mark. The idea of an educator having an ominous cloud over their head shows how the purpose of education in a democracy can in reality be turned on its head to provide a certain type of un-freedom. The educator can attempt to demonstrate their innocence, "but innocence in this case turns on knowledge; and when the witch hunt is on, one who must rely on ignorance leans on a feeble reed" (509). Writing in imagery that evokes *The Crucible* (published a year later), Douglas provides a visual drama of anti-intellectualism that ignorance is bliss, and, by extension, education is supposed to be predictable without the disturbances of a heightened freedom for academics.

Academic freedom, as Douglas sees it, places a special emphasis on the educators and their ability to participate in a political or intellectual discourse without fear of being brought before an educational tribunal, even if the discourse involves ideas that are far outside of the mainstream. Douglas asserts "The very threat of such a procedure is certain to raise havoc with academic freedom" (509). The procedure in and of itself is an anathema to the free flow of ideas, as the obligation to *answer for* one's beliefs,

irrespective if one is sanctioned or not, makes the educator do a type of ideas-based cost-benefit analysis, noting the belief system is not worth the procedural headache. This filters its way to the classroom where the non-mainstream ideas are reflexively not spoken, even if they can query disciplinary knowledge.

Douglas, a former academic, could appreciate how academic freedom is hampered if a professor is constantly on guard. In fact, the *American Association of University Professors 1940 Statement of Principles on Academic Freedom and Tenure* mirrors Douglas sentiments for an open interpretation of academic freedom: "The common good depends upon the free search for truth and its free exposition" (Van Alstyne 105).

In fact, for the academic to *not* question, to *not* inform on the best possible approaches to a problem to improve on our democracy in a constant searching for "the truth" takes the problem-solving ethos in education and creates more dogmatic knowledge: "Youthful indiscretions, mistaken causes, misguided enthusiasms -- all long forgotten -- become the ghosts of a harrowing present. Any organization committed to a liberal cause, any group organized to revolt against an[sp] hysterical trend, any committee launched to sponsor an unpopular program becomes suspect" (509). Actually, the symbol of an educator as a neutral arbiter in the realm of ideas is upended by the academic taking a pro-active ideological stance out of fear. A counterargument is that if the belief system is repulsive to the idea of democracy (such as Communism) it is academically counterproductive. However, to air the philosophies that are the least palatable can expose them for the benefit of a learning experience, which includes

thinking through those ideas failures. But to erase any notion of the offending idea completely from an academic vernacular gives them a special stature.

Douglas argued that under the Feinberg rule academic freedom becomes academic complacency, with even acceptable thought suffering under the weight of inferences: “The law inevitably turns the school system into a spying project… This is not the usual type of supervision which checks a teacher's competency; it is a system which searches for hidden meanings in a teacher's utterances” (509). If people look hard enough, they could take almost any lesson or assignment and infer the worst. An argument against taking something out of context will not suffice, as one searching for an offense could eventually find it -- and perhaps justify the sanctioning of the ideas (and the individuals behind the ideas) if brought before a tribunal, where regulations and laws can be open to interpretation. It may be a stretch, but if the ideas are deemed toxic, the not-quite logical ends can justify the means.

Academic freedom becomes an illusion: Douglas notes there can be no real academic freedom in this environment (510). His “real” qualifier is instructive. If an outsider peers into the classroom and sees the professor lecturing and answering student’s questions, it appears that there is freedom of thought or expression. But that is the dilemma of actually quantifying academic freedom. Some ideas may not be broached, some lines of inquiry not pursued. But this seamless form of self-censorship could easily go unnoticed, with student's believing at the end of the course that they fully “got what they paid for”; an understanding of the concepts, theories, and (especially if an upper-level course) the conversations being had in the discipline. However, once they begin their careers, it may be more beneficial to their employers that the new employees go

beyond *what to think* in their discipline but also *how to think through* some queries they may come across, which is something that academic freedom aims to do.

Douglas frames academic freedom to have a higher purpose within the lifeblood of the U.S.: "it was the pursuit of truth which the First Amendment was designed to protect" (511). Look at any university's mission statement, and some formulation of "the pursuit of truth" is present. Without it, the university (or even the primary school) becomes the pursuit of the status quo and standardization, in which students are defined by markers and skill sets, quantifying knowledge and intellect. But to quantify intellect by sterilizing thought, especially on the college level, is not putting the first amendment into practice. And if one believes that the First Amendment's playground includes institutions as the press and the academy where the pursuit of truth makes theory into practice, to deny real academic freedom is to allow the experiment of America to be tentative at best. In *Adler*, perfection is the expectation. However, if perfection is the goal, then academic freedom cannot exist, since the pursuit of perfection is a flaw in and of itself.

In a short dissent, Justice Hugo Black, in fully embracing Douglas academic freedom analysis, also notes the mantra of an academic marketplace of ideas as being constitutionally viable: "Quite a different governmental policy rests on the belief that government should leave the mind and spirit of man absolutely free. Such a governmental policy encourages varied intellectual outlooks in the belief that the best views will prevail" (497). In viewing the academy as a marketplace, characterizing ideas as subversive squelches the ability of the best ideas to be used in public for the betterment of all. Although ideas can be wildly different, they should be given a chance to "breathe"

without a preliminary injunction dictating acceptable thought. It is interesting to consider academic freedom as a by-product of the marketplace of ideas. Both have a similar end-result. An academic marketplace gives more support to the importance of academic knowledge operating within the free flow of the marketplace.

Queries Posited by *Adler*

Marjorie Heins notes that the *Adler* decision "did not beat around the bush…the opinion at least had the virtue of candor" (120) To the majority, academic freedom was not at issue here; it was simply protecting the U.S. from enemies that would do harm. It was on a war footing in which no one is above scrutiny, and the stark language to inquire into the company an educator keeps was to preserve the safety and mission of education -- learning basic skills. As Walter P. Metzger aptly notes: "One might say that the opinion provided an ambulatory definition of academic freedom: it ensured the dissident teacher the right to take a walk!" (1287)

Academic Freedom as a Constitutional Standard

But the legacy of *Adler* is the dissent. Marjorie Heins notes the sound reasoning of Douglas dissent: "[H]e had made the case for academic freedom as a critical part of the First Amendment" (122). By encapsulating the freedom of educators to hold their own views woven tightly within the fabric of the first amendment, it implies that academic freedom and freedom of speech are inseparable. Several times throughout his dissent Douglas references academic freedom as the type of speech protection that is the essence of the first amendment: "The Constitution guarantees freedom of thought and expression to everyone in our society…none needs it more than the teacher" (508); "…the impact of this kind of censorship on the public school system illustrates the high purpose of the

First Amendment in freeing speech and thought from censorship" (508); " It produces standardized thought, not the pursuit of truth [in schools]. Yet it was the pursuit of truth which the First Amendment was designed to protect" (511). Douglas creates a logical path from the concept of academic freedom and the perception of the first amendment -- the first amendment *was made for* the classroom. Without the first amendment being applied to education, there can be no true implementation of the amendment, as students take their learning and put into practice their speech rights -- how to think and be "versatile" in their thinking (as Douglas noted).

Indeed, William Van Alstyne writes that Douglas also provided a sound legal footing for a specific type of freedom by mentioning academic freedom three times within the confines of the first amendment (105). Beyond Douglas using platitudes to describe academic freedom, he methodically laid out the case that academic freedom is an element of a free speech claim, in that Douglas looked at the case through a first amendment lens. Douglas noted "the impact of this kind of censorship on the public school system illustrates the high purpose of the First Amendment in freeing speech and thought from censorship" (508). By describing *Adler* within the high purpose of the *First Amendment*, Douglas implies that a law of this nature is unconstitutional because, when placed in practice, it can affect the *First Amendment academic freedom* of teachers and students. Not merely an ideal of an ancient philosopher lecturing to her or his students who are huddled around, but a practical application. Although some may say that the constitution is not applicable to education worldwide, nor is it actually compatible with classroom practice in the U.S., it is an aspiration we might try to live up to in a

classroom. However, looking to the Constitution for definitions of academic freedom is not a perfect fit.

Van Alstyne points out "Douglas did not find fault with the *stated* object of the Feinberg Law. Rather, he argued, the fault … lay with the means" (106). In essence, Van Alstyne argues that causation must be sound. If the effect is a hindrance of academic freedom, then the law is untenable. Van Alstyne believes that Douglas elevated the concept of academic freedom (within the purview of the First Amendment) in a constitutional causal analysis. This is an expansive view of looking at the academy. If academic freedom must be considered when a law is passed targeting the academy, it may be hard pressed to find a restriction that does not limit academic freedom *in some way*.

Anne Gardner mirrors this reasoning in noting how a lack of academic freedom in *Adler* could negatively affect education: "Justice Douglas envisioned the potential effects of this destruction [of the educative process] as reaching the very essence of the teaching and learning process" (228). The government influence over higher education would be far reaching. If somewhere within the "chain" of teacher knowledge -- from the teacher as a thinking and feeling individual with her or his own beliefs that prod intellectual development, to a teacher preparing materials, to a teacher performing in the classroom, to a teacher evaluating student responses -- this free-flowing idea maturation is disrupted, it can logically lead to less academic freedom. Debate may center on only looking at the practical application of the law, which is more reflexive (especially in times of national emergencies), but there is an argument to be made that any hindrance results in a changed practical application. Even though there was no explicit constitutional claim, Douglas

introduces an "on-ramp" so the educator and her or his preparation in educating can be acknowledged and considered in a constitutional claim.

J. Peter Byrne offers an interesting take on Douglas use of academic freedom as a style referendum, not a constitutional one. He states that academic freedom was more of an appreciation of the craft of teaching than the implementation of constitutional protection: “Justice Douglas never argued that academic freedom itself was constitutionally protected; rather, he argued that the Court should have found that the statute violated the teacher's right of free expression because, in part, the law would inhibit academic freedom, understood as the actual process of free inquiry in the classroom. In other words, academic freedom denoted an attractive mode of teaching and scholarship” (290n47). Byrne is correct in noting the tone of Douglas’ dissent is one of practicality; the result of a bad law on an educator’s freedom of speech. Educators would have to find “work-arounds” once the law was implemented, intending to do their jobs and fulfill a mandate for students to learn. The idea of the classroom as a place to learn would still *in theory* be correct. There would be educators imparting an idea to be applied by the student in evaluations. But academic freedom provides a *better* means to implement the purpose of education by allowing for flexibility in methodology.

Expansiveness and Contraction in Douglas's Academic Freedom

For many educators, academic freedom is the cornerstone of democracy. Chris Demaske briefly comments on Douglas’s expansive view of academic freedom as moving beyond the realm of employee rights to something more profound, noting “Douglas tied the protection of academic freedom not to employee rights but to what he saw as the role of academe in protecting and promoting a healthy democratic society”

(36). If Douglas would have framed the issue in the *Adler* dissent as one involving employer/employee relations, it would have severely limited the import of the effect of the law on the academy. A constitutional dispute by government employees, even on first amendment grounds, can be narrowly construed to allow employers power in limiting teacher's speech rights to avoid disruptions to government functions. This idea is especially true if teachers are perceived as communists whose sole purpose in gaining employment within the school system is to disrupt the government function of teaching students' skills and values to become productive American citizens. In fact, an employer/employee dichotomy was the framework the court employed in *Garcetti* (discussed in Chapter 1) which critics fear could be applied back to educators. Douglas provides educators with a space that goes beyond a workplace, defining educators as constitutional actors who are part of a democratic goal to "take the democracy further", not simply being provided with a paycheck.

But this expansiveness could result in less academic freedom. Jennifer L.M. Jacobs describes this frame of academic freedom as an undefined space in the First Amendment, but pointed out that Douglas is perhaps too broad in his defense of academic freedom. Douglas's expansiveness could result in less than stellar outcomes: "Douglas referred to a broad, nebulous freedom--presaging continual difficulty in defining the freedom's bounds" (815). Douglas viewed academic freedom as sacrosanct, with few limitations to be placed on it because of the intended and unintended consequences of being limited in scope and purpose. But without a clear logical path of how the freedom is to be applied in the legal realm, its application can be only on a case-by-case basis. For example, a professor brings a free speech claim that she or he is

inhibited from pursuing lines of inquiry related to her or his discipline. The university argues that the proper frame of reference should be employer/employee relations, or, in the alternative, that the university has their own speech claim that trumps that professor's speech claim. Is Douglas' analysis instructive here, or is it too general to have a practical application? The gravity of academic freedom is, by its very nature, not to be hamstrung by defined boundaries since knowledge is not to be dogmatic. But this "lack of" can result in courts applying academic freedom in ways more pragmatic and less in Douglas' grand vision.

Richard Flacks briefly comments on an aspect of this "lack of" in academic freedom -- extramural activities: "Douglas's reasoning speaks particularly to the ways in which academic freedom is affected by punishing the extramural activity of professors" (279). A major thread running through Douglas dissent focuses on educators' activities outside the classroom, and Flacks is astute in using a term in today's academic freedom lexicon, "extramural activities", to characterize an aspect of Douglas' dissent. If in 1952 surveillance could "weed out" those educators who had relationships with organizations or individuals deemed off-limits, in the early 21st century surveillance could "weed out" -- in a much more effortless way -- educators who use technology to have virtual relationships with organizations or individuals deemed off-limits. Opportunities for connections with individuals and organizations are far vaster today, as well as opportunities for much greater ease in educators publishing their views through technological means. Repercussions are still severe today. This will be discussed in greater detail in Chapter 3, but it is interesting to note here the similarities in the reflex by the government in the 20th and 21st centuries in characterizing speech in a value-laden

context, and utilizing tools based upon that value-laden context to ferret out educators who have some connection, even tenuously, to this speech.

All told, Rebecca Gose Lynch best sums up Douglas' opus on academic freedom: "[He] penned an eloquent tribute to academic freedom…He cited no authority, tests, or standards, but rather referred to academic freedom as an established right" (1068). Douglas provided a plain-spoken comment on the value of educators and the academy without dry legal nuance. In a detailed analysis of academic freedom, Douglas let the court majority know that applying the law to a checklist of teacher expectations was an act of short-sightedness in failing to understand what educators should *really* be trying to do.

Conclusion

The historical struggles of how the U.S. Supreme Court interprets speech provides a valuable context how educators are to navigate this legal minefield in facilitating knowledge. Although educators in the early to mid 20th century were not afforded with legal protections in aspiring to bring a semblance of academic freedom to the classroom, the underpinnings of questioning how free speech decisions could affect society at large were present, even in the early days of *Patterson*. Through the bleakness of 20th century speech limitations in cases such as *Patterson*, *Abrams*, and *Adler* came responses via legal manifestations of a marketplace of ideas and academic freedom, concepts that play an inherent role today in how educators can instinctually "move the conversation forward", inevitably for society's betterment. Indeed, William Van Alstyne notes "in the decades since 1907-1908 and *Patterson*, constitutional doctrine has moved very far (farther than most Americans themselves understand) from the bad tendency test" (102).

For teachers and students, to know about this history can better inform us about future speech limitations which inevitably reach the classroom.

CHAPTER 3: ADJUNCT ACADEMIC FREEDOM AND THE CORPORATIZATION OF THE ACADEMY

Chapter Abstract

If full-timers' right to hold their job through "academic freedom" has been minimized during the 20th century court rulings (see Chapters 1 and 2), the situation for adjuncts is far worse for several reasons. First, the courts have tended to see adjunct faculty as "at-will" and disposable employees whose terms of departure are characterized as "non-reappointment" rather than being dismissed or fired. The grounds for these court rulings have been viewed as both *procedural* and *proprietary*; adjuncts are guaranteed neither procedural grounds for inquiring about why they were not re-hired, nor any kind of proprietary one based on potential further employment implicitly made by their employment history. Indeed, these rulings even put tenure-track faculty in a similar powerless position. The second, and equally threatening problem, is that the notion of academic freedom itself, once used as a philosophical concept for individual faculty to defend their right to teach free from crushing orthodoxy, has been recruited by the corporate university in some legal cases to defend the administration's right to shape academic hiring as they see fit -- the employer's academic freedom, not the faculty's. With adjuncts now composing nearly 70% of the teaching position across the country, their right to academic freedom is in name only -- the practical business of the university is clearly at odds with the free inquiry of faculty ideas. And this imbalance in faculty

teaching has already begun shaping our culture's expectations for full-time faculty as well.

In the first part of this chapter, I will sketch the growth of the adjunct teaching class in the context of what has become known as the "corporate university," drawing on the critical university studies developed by Jeff Williams, Chris Newfield, Marc Bousquet, and others. As Frank Donahue has shown, the ideal of disinterested inquiry, or the pursuit of knowledge for its own sake, has been under fire in American universities since 1900. Trustees, legislators, and college presidents want workers, not intellectuals, and as the U.S. government backed out of funding higher education after the Cold War, private business took on a larger part of the university life, especially funding "big" science. Adjuncts, particularly in the humanities, have been hired as handmaidens to this private corporate enterprise, where science programs are funded by businesses who maintain an interest in patents developed through their research, rather than by government grants. Practically, adjunct workers have little voice in the curriculum -- they merely teach the curriculum and work at-will. As mere workers in the corporate university, legally they also have very few rights.

I then turn to two legal cases from 1972 that illustrate this weakness, *Roth* and *Snidermann*, which show the precarious legal standing of non-tenured and adjunct labor. In *Board of Regents v. Roth*, an adjunct who criticized the administration in class was not given a reason why he was not being rehired. In *Perry v. Sindermann*, an adjunct was not rehired after he testified about the attributes of becoming a four year university in direct opposition to the school board's assessment. The court recognized an adjunct's right to

speak as any other person, and at the same time they do not have a right to formally challenge their non-reappointment.

I conclude the chapter by returning to the corporate university where the academic freedom of the employer is being invoked to curtail the voice of the very faculty who are supposed to be on the cutting edge of knowledge production. If the majority of university faculty have no right to continued employment despite the high level of training necessary to hold the job, academic freedom will have a short life indeed.

The Business of the Academy -- A Historical Overview

Generally speaking, the decline of full time professor positions began in the early 1970's (Magness 52). There are numerous reasons for this decline (and the subsequent rise in adjunct labor). Caroline Frederickson notes "Most schools didn't allow women as full professors, and thus adjunct positions were associated with female instructors from the start"; instruction funding has generally remained flat while administrative positions have increased from 1993-2009 (Frederickson). The rise of community colleges, which employ more part-time educators, played a part (Magness 52). Also playing a part was the erosion of tenure and other job benefits, as well as the rise of for-profit colleges (Magness 50).

The adjunct's lack of legal employment protection mirrors their place in the modern corporate university structure. If the university is structured as a corporation, the adjunct, with her or his lack of job protection, lower pay, and lack of benefits, is a good fit to keep costs down and not complain. In fact, as Frank Donoghue has noted, the

corporate university with its underlying mechanics has been prevalent since at least 1900 (3). In summarizing Thorstein Veblen, an early 20th century academic writing on the corporate university, Donoghue states

> [that] [t]his [system of accountancy] [through delineated semesters, credits per course, and grading standards] ... aggressively co-opts the entire university in pursuit of the more theoretical goal of measurable efficiency...[T]he university does operate like a business, but more radically, it serves as a comprehensive and uniform credentialing service for all business interests. (11)

This model lends itself to the adjunctification of the academy; if the goal of learning is efficiency, the pursuit of knowledge does not have the same institutional backing. The university becomes an academic triathlon with the goal to complete each course. If *knowing* in a course is not given the same sanction as *passing* a course an adjunct could just as handily fit the bill as a full-timer, who has more scholarship but the same pedagogical gravitas as the adjunct. In fact, the lack of academic freedom and due process protections the non-tenured adjunct has is more beneficial in this system since an attempt to push the boundaries of the discipline can result in controversy, which goes against the corporate ethos of everyone working together to prevent disruption. Therefore, the lack of academic freedom and due process protections is in service of supporting the corporation in making money.

Donoghue says just as much in referring to Evan Watkins example that the university registrar's office does not care what was taught in English Literature class or what specific knowledge was generated by the student (11). A student will receive the same notation on their transcript whether they take a course with a scholar in their field or

with a non-descript adjunct. Since a corporate maxim is efficiency, hiring a scholar of high repute for an exorbitant amount (with benefits and tenure) is not as "business logical" as hiring a much cheaper adjunct (who is highly competent and learned in her or his own right) who can easily be switched out the following semester for an equally powerless adjunct. Adjunctification may be the bane of the academy in the classical sense with the lack of emphasis on knowledge building, but in the modern university setting adjunctification is a necessary adjunct to keep the business flowing (not to keep the concepts of academic freedom or due process flowing).

In fact, the business of the academy can become the main feature of the academy. Joan Wallach Scott, in referencing Donoghue's discussion regarding the history of the corporate university, states:

> Businessmen and politicians, then as now, have had little patience with the ideal of learning for its own sake and even less respect for faculty who often espouse ideas at odds with their views of the purpose and value of higher education. Today the sums may be larger and their impact on university research operations greater, but the pressure to bring universities in line with corporate styles of accounting and management persists. (452)

The concept of learning for its own sake, which is a bedrock of academic freedom and how the university creates knowledge, is instructive here.

The best interpretation of academic freedom approaches information as a non-commodity. Learning is a natural process in which some information is useful, some information is not, and some information *is.* Information in and of itself is value-neutral;

interference by anyone (such as professors, administrators, corporate donors, or politicians) can present the information to suit one's agenda.

Ideally, the professor will present the information for the student to process and apply the information without favor, without a monetary agenda. In a less idealistic and more corporate environment, the information will have a pre-constructed purpose to further the philosophy of the business or political will. The information serves a logical purpose in furtherance of the corporate university. Learning for its own sake can be wasteful and time-consuming; the university mission can be more precise and pragmatic. The best aspect of academic freedom becomes academic comprehension.

Adjuncts working in this structure have to negotiate the flow and pace of information -- how it is presented, how it is processed, and how it is applied -- without leeway because of their precarious employment status. “Coming to an understanding” in the most ideal sense may not square with the corporate university ethos.

In reminding us of this historical corporate ethos with technocratic underpinnings, Richard Hofstadter and Walter P. Metzger note,

> [that around the turn of the 20th century] the change in the occupational background of [university] trustees measures the growing power of the business element in education. Whereas wealth and a talent for business had once been considered virtues in trustees, now they were thought to be prerequisites. The increase in income and endowment brought new problems of balances and budgets, of property investment and management, of the husbanding and parceling of resources, with which businessmen were thought to be familiar. As a

result, a trusteeship in a large university became, along with a listing in the Social Register, a token of business prominence and of pecuniary qualification. (415)

The default position of a university was to look to men of great economic stature to shepherd the affairs of the university in order. The expectation that wealth was a pre-requisite for success (irrespective of how it is defined in the university) signifies productivity in the university lexicon has been defined in a monetary sense for quite a while. The 21st century has brought this marriage into sharper focus, especially with the influx of adjunct labor.

The Neo-Liberal University Ethos

A panoply of forces has led to the rise of the neo-liberal university, whereby the corporate university takes shape. In writing about the university formulated as a business entity to the student's detriment, Jeffrey J. Williams notes

> Whereas over the past three decades, it [the university] has evolved into "the post-welfare state university," marked by the shifts to privatization, most obvious in research, now much more proprietary and more directly at the behest of and benefit to corporate "partnerships" rather than public or disciplinary goals; exponential increases in tuition, paid largely by students and their families rather than subvented by the tax-base; and the lateral move to casualization that institutes neoliberal labor policies of low-paid, short-term, contract jobs rather than salaried, permanent ones with standard benefits. These transitions have altered the terms of academic freedom, although our notions of academic freedom, I fear, have not caught up. (172)

This sobering account of the university is in stark contrast to the ideal of academic freedom popularized in 19th century Germany. Lehrfreiheit, as described by Richard Hofstadter and Walter P. Metzger, “was not simply the right of professors to speak without fear or favor, but the atmosphere of consent that surrounded the whole process of research and instruction” (387). If thought production is the ideal, and, as Williams notes, the university had the monetary support of the state in the mid-20th century (172), the ideal has shifted to production per se.

Capitalism, at its most exploitative, is how the corporate university functions. If there is a monetary view to learning in its various machinations – pedagogical based, research based, and student learning driven -- the university loses the free-thinking imprimatur which defines the university in the public sphere. Educators are replaceable widgets in service to the course being taught, irrespective of the educators’ intellectual agency within the university since she or he is an adjunct. Research in service *to* a corporate ethos instead of in service *of* knowledge for the betterment of society may not necessarily benefit the public that bears the brunt of the university endeavor through the use of public resources that facilitate the university. Students’ access to this endeavor is predicated on economic contributions, which can affect the course of their lives (Williams 174). Students who are taught by part-timers and have to pay their way through employment that eats into time for learning (sometimes significantly) leads to the tacit understanding that the credential requires "getting through", not learning to explore. There is neither the time nor money to be wasted on what the corporate university would deem aesthetic pleasures. Even if it is not stated, everyone who enters this arena understands that free thinking in its purest sense is not economically viable. Especially

the adjunct, who does not have the employment stability to "explore". Thus, academic freedom (for the educator and student) becomes a luxury and a nuisance. Stay on track, finish, and be gone without much other than the skill-set needed to excel in a specific discipline or sub-discipline.

The mantra of privatization has also taken hold in public universities. Christopher Newfield categorizes the five dimensions of privatization within the public university which include:

> The *cost* of higher education, which shifts from society as a whole to students and their families, that is, from tax-based state funds and grants to tuition payments and loans…outsourcing activities to external agents such that *revenues* go to for-profit vendors rather than to the university…shifting governing control of public higher education from public funders, particularly state legislators as representatives of the citizenry, to private funders of specific activities…the *mission* of public higher education…dismiss[ing] the public value of educational gains, and downplay[ing] or ignor[ing] the many ways universities develop individual *and* group capabilities with *non*market benefits for the individual and the wider society…[and] redefining the educated person. The student, teacher or researcher becomes less the self as traditionally seen by most of Western philosophy…as pursuing its own developmental ends for its own sake, and more an economic subject, sometimes called *Homoeconomicus*.

Privatization encompasses more of a monetary goal-oriented process. Ideally, the idea of a university is a mutually beneficial bargain between the state and their citizens for the

benefit of the society. The state is no longer willing to subsidize this academic growth as college becomes something of an economic bargain in which a skill increases wealth. The student pays for access to economic prosperity, as opposed to the state footing the bill to help its citizens grow and prosper without having to make employment choices based on the size of her or his debt. Amenities such as food services are outsourced so the university does not have a stake in the well being of their students regarding what is being sold since the outside corporations' chief concern is turning a profit. An outside food vendor can present unhealthy options for the student if the food will sell quicker and "on the cheap" in terms of quality, perhaps without many other healthy options and at a higher price. The government has less of a say in the needs of the citizenry regarding the fields of study that would be beneficial to the community. The public good cannot keep pace with a private benefit for donors that want the university to conduct research that may not have the same universal reach as, for example, careers focusing on social justice and public health. This public good in which students have a sense of their larger community, using their skills to lift up others in the community without the expectation of payment to create a better place where the student lives, is lost in the privatization model in which the purpose of education is individualistic. The student's purpose is that of a tool, narrower and less worldly. College graduates may have no conception of ideas or philosophies outside of their major, and knowledge becomes disconnected from the world in which she or he is living in. The understanding of the public space, a key concept in academic freedom in which the graduate interacts within a marketplace of ideas, is non-existent where privatization does not provide sufficient agency for a public discussion.

Homoeconomicus fits nicely into the corporate university's "just in time" mindset. Marc Bosquet notes:

> [adjuncts] serving as term workers figure as the ideal type of labor power "in the informatic mode"—they can be called up by the dean or program administrator even after the semester has begun, and they can be dismissed at will; they have few rights to due process…[This] is the core feature of educational informatics—a perfected system for recruiting, delivering, and ideologically reproducing an all but-self-funding cadre of low-cost but highly trained "just-in-time" labor power. Little wonder that every other transnational corporation wants to emulate the campus. (*How the University Works* 71)

The corporate university eschews waste, since it eats into profit. Utilizing a "just in time" ethos saves the university money since they do not have to hire tenure-track professors with their additional institutional protections (and costs). Adjuncts can be "penciled in" at the last minute to take over a class without the institutional weight of due process protections. Due process hearings can cost time and money. Adjuncts can be easily let go. The university knows that the non-descript adjunct will be available the following semester "just in time" when a class is ready to run again.

Interestingly, in viewing the business of the university, a unique analysis notes that even though the university may follow a corporate structure, if educators band together in a "corporate" way it can do a disservice to academic freedom. A 1973 article by John Grable cites that the university follows a "corporate organization complex" (quoting Walter Metzger); if faculty members unionize in the same way as factory

workers would in an automotive plant, it could result in less academic freedom for the faculty members (221). Different professions have different needs. Grable states that "industrial organizations operate within a different value framework from that of most academic institutions" and "the most obvious difference is the profit motive" (221). Since trading in ideas is far more abstract and it may take years for an idea to demonstrate tangible returns, the skill based trades lend themselves better to unionizing since tasks can be negotiated in a more piecemeal way.

Essentially, Grable states that university faculty will sacrifice their role in governance since they will be in an adversarial relationship with the university instead of engaging in shared governance with the administration. He writes the university "has a rather lengthy history of cooperative or participatory decision making whereby the university faculty plays a central role within its spheres of competency... the gains of collective bargaining in higher salaries and greater fringe benefits [can] be offset by a corresponding loss of freedom to participate in the decision-making process" (222). Grable assumes there is camaraderie between educators and administrators, and this is the best way for academic freedom to flower without the encumbrances of labor strife. However, shared governance may not produce the best ideas, but the most pragmatic solutions.

Board of Regents v. Roth **-- Adjunct Professor Due Process Rights -- The Nature of the Interest**

In analyzing *Board of Regents v. Roth* and the companion case that follows, *Perry v. Sindermann*, these cases turn on a technical aspect of the civil law, due process. Due

process encompasses a procedural right "to be heard" (which is discussed below) as well a substantive right based upon a "fundamental interest" such as a property right in employment, which is at issue in this case. As discussed in Chapters 1 and 2, faculty members have a right to speak, but perhaps not the right to keep their jobs because of the way they speak. Generally speaking, employees usually have a right to keep their job if their constitutional rights have been violated (such as freedom from sexism, prejudice, or coercion), but *not simply* because she or he criticized their employer. In a criminal case, the constitutional protection of the speech would usually apply if the employee were prosecuted by the government for something she or he said or published. In a civil context there is not necessarily blanket protection from being fired merely on a freedom of speech claim -- it helps if there is another constitutional "right" at stake.

However, in *Roth* and *Sindermann* several considerations are in play that distinguishes this from a typical constitutional employment claim in which a "hook" -- such as age, gender, religion, or race -- is usually required to maintain a cause of action. First, *public* employers have a constitutional right to speak freely *in certain circumstances* (*Garcetti* in Chapter 1 addresses this). Second, public employers have a right to be "heard" before they are terminated. Finally, the crux of the due process analysis as discussed below defines if part-time employees, including adjuncts, have a right to be heard *in the first place*, which mirrors their non-existence in the university system. In *Roth* and *Sindermann*, being "heard" is not necessarily the same as speaking.

Procedural due process is a concept that generally states a government employee cannot be fired without being given a reason for the termination, and having an ability to

be "heard" to state her or his case before some type of tribunal before being terminated. At first glance, it would appear that only adjuncts would not have this opportunity. However, adjuncts are not necessarily the only non-tenured faculty; what due process rights does a professor hired for a fixed one year term have? In *Board of Regents v. Roth* (408 US 564, 1972), the court decided those due process rights are not guaranteed, and so adjuncts can be terminated for any reason or no reason.

David Roth was hired for his first teaching job as an assistant professor of political science at Wisconsin State University-Oshkosh in 1968. It was a one year contract with no tenure-track rights. Tenure is granted after four one-year contracts. Roth completed his first year, receiving an excellent rating by the faculty regarding his teaching, but was notified he would not be re-hired, without a reason given for his dismissal or a hearing.

The devil however was in the details. Although the majority opinion did not delve into this, during the school year Roth brought attention unto himself, as the dissent by Justice William Douglas clarified:

> He had publicly criticized the administration for suspending an entire group of 94 black students without determining individual guilt. He also criticized the university's regime as being authoritarian and autocratic. He used his classroom to discuss what was being done about the black episode; and one day, instead of meeting his class, he went to the meeting of the Board of Regents. (579)

The court held that no “reasons” were necessary and Roth had no right to a hearing on the University's decision not to rehire him for another year (569).

Important in this discussion is the interest Roth had in continuing employment. As the court noted, liberty and property are fundamental interests of the 14th Amendment (also considered a *substantive* due process right), and the court acknowledged that Roth as an individual had an obvious interest in keeping his employment. However, the court said that although a person may have an intense interest in maintaining employment, the type of damage caused by a loss of employment is the proper place to look: "But, to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake" (570). By analyzing the nature of the employment interest the court simply viewed this as an employment contract, and the harm that would come by not providing due process, and did not frame this as an expectation of employment as an educator.

A theme running through U.S. Supreme Court cases on occasion that limit an educator's rights is that the majority usually foregoes an expansive concept of the educator as sacrosanct with a vital function in society and takes a narrower view in applying the law, isolating an element that does not hold up when compared to other professions. In essence, the educator is usually not afforded a special status. Such is the court's analysis of a fundamental liberty interest for Roth. The court stated that Roth’s liberty was not hindered by his dismissal, as the university did not accuse him of a charge that other employers would hold against him (the court's example was dishonesty or immorality). Also, he was not barred from other employment in the state. So, he did not

require a hearing to answer for potentially harmful charges. In *Keyshian* (discussed in Chapter 1), the court looked at academic freedom as something of a constitutional prerogative by stepping back and viewing the educational mission. In *Roth* the educator's value was one of a task-driven employer. Issues of due process to protect the sanctity of the educational mission were not deemed relevant by the court.

The court took a unique logical path in denying Roth's claim that he had a property right to a hearing. They first briefly discussed education cases in which the court ruled that notice and a hearing were required. These cases dealt with educators who had tenure, were dismissed during the contract time period, or had an implied understanding of continued employment. They then differentiated this from Roth, who had an *abstract* right to a hearing. But since his contract had ended, and there were no explicit or implied provisions for continued employment, he simply was not re-hired. On its face, common sense should prevail. As a newly minted PhD hired on a professorial line, should the academic who spent years attaining the credential to be used in the academy -- as well as the university benefiting from his academic prowess -- assume that he is a "gun for hire" drifting from institution to institution unless there is some explicit agreement? Those hired with adjunct titles could make a similar case as well. The concept of education as a higher calling with untold benefits for the society seemed to be lost on the *Roth* court.

It is interesting how this dispute was framed. Roth brought a free speech claim as well as a due process claim. The court skirted the free speech aspect of Roth's claim by stating there was no final decision from the lower court on his free speech claim. The free speech claim, based on the above criticisms Roth had towards the university, are more

damning for the university if it appears the university fired Roth because of criticism. It is a simpler concept to grasp that an individual is fired for his speech. It looks bad for a university that promises to sustain the free trade of ideas. But the more nebulous procedural claim of due process gives the university more cover since it is not content specific.

At the end of the decision, the majority attempted to limit the scope of its decision. This was done so that the ruling did not imply that due process rights are not valid for university professors: "Our analysis of the respondent's constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for non-retention would, or would not, be appropriate or wise in public colleges and universities. For it is a written Constitution that we apply. Our role is confined to interpretation of that Constitution" (578). But by framing the issue as a property right and not as an academic freedom issue, professors without clear due process rights should not expect the courts to step in to fill the void, especially as the court limits the breadth of *Keyshian*, that academic freedom is a special concern of the first amendment.

In dissent, Justice Douglas tone was similar to that in the *Keyshian* decision, focused on the breadth of an educator’s role in society. He used the phrase "academic freedom" (a term not used by the majority), and placed a teacher within the same sphere as others who are accorded an assumption of a due process right. Douglas noted cases where the court found an important interest in affording due process rights, such as related to a driver's license, unemployment compensation, public employment, tax exemption, and welfare benefits (584). He wanted to place a teacher's contract in that

same sphere "whether or not he has tenure, [since it] is an entitlement of the same importance and dignity" (584) Douglas viewed educators as an essential part of the American fabric, holding as much import as essential monetary compensation and the ability to travel. Educators deserve a dignified exit, more so than being treated as an afterthought.

In fact, Douglas went beyond the professional and looked at the profession, arguing that academic freedom is attacked when an educator is fired for what the university should be protecting (which is the essence of academic freedom): "No more direct assault on academic freedom can be imagined than for the school authorities to be allowed to discharge a teacher because of his or her philosophical, political, or ideological beliefs" (581). The essence of an educator is a belief system that instructs and enhances her or his research pursuits and pedagogical application of those pursuits. Philosophical, political, or ideological beliefs *are* the motivating factors for educators to, well, *educate*. To Douglas (and perhaps advocates of academic freedom) the actions of Professor Roth were justified as an expression of academic freedom. Granted, an educator critiquing her or his bosses as authoritarian and aristocratic may not result in many heartfelt pleasantries at the university holiday party, but the ideas behind the actions hold merit in the larger marketplace of ideas. If the ideas can enhance the educator's disciplinary pursuits and classroom discussions, they increase the knowledge producing mission of the university. There are numerous indirect assaults on academic freedom such as codes of conduct, disciplinary standardization, and the "adjunctification" of the academy (i.e., to muzzle dissent), but to not rehire Roth (as it appears here) based on his ideas and actions leaves no doubt of the university's position to contain free

thought, putting others who may want to explore those ideas on notice -- especially those educators who are adjuncts.

Douglas highlighted the importance of the educator's role in a community as a reason to provide safeguards regarding termination: "Nonrenewal of a teacher's contract is tantamount in effect to a dismissal and the consequences may be enormous. Nonrenewal can be a blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired as a teacher, at least in his State" (585). Granted, the "what if" factor can be applied to every profession, but his focus regarding educators signals their inherent value -- "non-renewal" is an educational employment action that other professions may not utilize as often. Douglas was taking the majority's process analysis and saying it was not applicable to educators. Educators are a community "institution", lifting up the community's participants to prosper in their chosen fields; it is a less clear-cut undertaking than other professions where the expectation of knowledge for a future employer is not necessarily expected. To terminate a "community member" may result in fewer opportunities, as the public understanding of the academy generalizes its importance. Essentially, if an employee is fired from a widgets factory, the employee can tell prospective future employers that the widget factory was no good, had unfair practices, and does not have a friendly environment. For the employee fired from a university, it is a bit more difficult to make those arguments (especially on the pedagogical side) since almost every university has a similar "set up" and mission statement.

Justice Thurgood Marshall also dissented, although his dissent was primarily on the negative effects of firing government employees without due process. One sentence in his dissent does relate to the nature of education employment: "When the government knows it may have to justify its decisions with sound reasons, its conduct is likely to be more cautious, careful, and correct" (592). If a university's main capital is trading in ideas (especially the logic of those reasons), failing to provide a sound reason to terminate an employee foregoes logic and leads to a dumbing-down of the educational mission. How *does* the university define itself?

Perry v. Sindermann **-- Free Speech Rights and a General Interest of Re-Employment**

For those professors who do not have formal job protection, due process rights are not guaranteed when disputes occur. However, *Perry v. Sindermann,* (408 U.S. 593, 1972) provides a little more protection for the non-tenured professor. If there is an *expectation* of continued employment, the educator should be afforded notice and a hearing before being terminated. Decided the same day as *Board of Regents v. Roth*, if there is a genuine interest of re-employment, that could suffice for terminated educators to be provided due process. Also, in any event, an educator does not sacrifice her or his free speech rights, regardless of their title or level of job security. However, without job protection there is not free speech for the educator.

Robert Sindermann was an educator in the Texas college system from 1959 to 1969, the last four years as a professor of Government and Social Science at Odessa

Junior College. For a time he was the co-chair of his department. At Odessa, he was hired on a series of four one year contracts; there was no formal tenure system.

He also served in an additional capacity as the president of the Texas Junior College Teachers Association, a position he was elected to. It was in this capacity that he ran into trouble. As in *Roth*, the educator who brings attention unto himself is not doing himself any favors. The court in *Perry* noted:

> During the 1968-1969 academic year...controversy arose between the respondent and the college administration. [As president of the Texas Junior College Teachers Association] he left his teaching duties on several occasions to testify before committees of the Texas Legislature, and he became involved in public disagreements with the policies of the college's Board of Regents. In particular, he aligned himself with a group advocating the elevation of the college to four-year status -- a change opposed by the Regents. And, on one occasion, a newspaper advertisement appeared over his name that was highly critical of the Regents. (594)

Sindermann was not re-hired. The Board of Regents claimed insubordination (i.e. politics), but provided neither reasons nor an opportunity for Sindermann to rebut the claim. The court found that despite his non-tenured status, he does not forfeit his free speech rights, and may have an expectation of procedural due process.

The court first addressed Sindermann's free speech claim, framing this issue as paramount. The court noted "for if the government could deny a benefit to a person

because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to ‘produce a result which [it] could not command directly" (597). In this case, the court was aware of the university having undue power over the educator. A college could easily take any statement made by the educator and simply terminate her or him. This could have the desired effect of termination being used as a threat without it actually being used. The educator could self-censor just based on the fear of retaliation.

Noteworthy in this free speech analysis is the matter of speaking regarding a public concern. This concept was explained in an earlier case, *Pickering v. Bd. of Educ.* (391 U.S. 563, 1968). In *Pickering*, a schoolteacher wrote a letter to a local newspaper critical of the board of education's handling of a bond issue and allocation of financial resources. Some of the statements were not factual. The educator was terminated. The court found that an educator can speak on matters of public concern: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" (568).

In *Sindermann*, the court reaffirmed the *Pickering* ideal that an educator's "public criticism of his superiors on matters of public concern" (599) is protected speech. For Sindermann, who testified before legislative committees and was critical of the Board or Regents, he was in an important position as an educator to comment on the goings on of his employer. The public, as taxpayers, have a right to know how money is being spent.

An educator should not be beholden to an individual, but to the public. This ideal is in line with the social spirit of academic freedom. Attempting to come to greater truths in the classroom to further one's discipline does not stop at the walls of the college. The knowledge should benefit the larger society. There is a public concern in the occurrences of the university. If the surrounding community does not derive *some* benefit from the university, the university can become an ideological island unto itself. The information Sindermann provided lets the surrounding community know the values of the university, and if there are issues occurring behind the university walls that could affect the community in a negative way.

Also, irrespective if he was a tenured professor or an adjunct, he does not give up his free speech rights. The court stated "the respondent's lack of a contractual or tenure "right" to re-employment for the 1969-1970 academic year is immaterial to his free speech claim" (597). At a minimum, the status of an educator is not tied to her or his legal status. If free speech is a basic aspect of academic freedom, the court notes that educators have ideas that may be useful, and they cannot be fired solely based on those ideas (generally however "free speech" as an isolated concept itself does not necessarily help an educator keep her or his job unless it is coupled with some type of prejudice). The fear factor in allowing speech "worthiness" based upon a title could create an unfortunate dilemma in which a full professor can address issues -- extramural or not -- and her or his adjunct colleague teaching the same course may not be of the same value to her or his students in furthering their academic prowess. Free speech is the "bare bones" right. As for an "enhanced" free speech right in a public university, the court in *Sindermann* did not go that additional step.

However, the court *did* in a slight way go that additional step in addressing the due process aspects of his claim. The court first referenced the *Roth* decision (decided the same day) in which the *Sindermann* court re-iterated that Roth failed to provide a liberty or property interest in continued employment. In contrast, the court stated that Sindermann may have a genuine issue as to a continuing employment interest (599). For the court, a genuine issue was that Odessa College failed to specify what tenure actually was.

The court interpreted continuing employment through a de facto tenure system, as stated in the college's Faculty Guide (600):

> Teacher Tenure: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work. (600)

The court claimed this as unusual. It is unusual in its open-endedness. In an ideal world, the teacher tenure statement can work nicely with the ideals of academic freedom if the university does not place a value on "satisfactory" ideas. The educator is assumed to be a professional, without mandates of what is required of her or him in terms of course content. In theory, a professor who wants to "push the envelope" to further their discipline along is allowed to do so as long as their teaching services are satisfactory and as long as she or he does not "make waves".

However, this is illogical since "pushing the envelope" usually *does* "makes waves" "Making waves" and "satisfactory" could be whatever content the university deems appropriate. A lack of a cooperative attitude is determined by the university. For Sindermann, who was advocating for his role in a professional organization, the university probably viewed that as non-cooperative. Perhaps this teacher tenure statement worked better during less turbulent times (as evidenced by the court noting that the statement had been in place for many years), but by the early 1970's traditional expectations of decorum and the idea of a university educator was beginning to change. The "ideal" of educators having a defined type of freedom was only beginning to be addressed in the court system.

Sindermann's claim was buffered by the state's description of tenure: "[G]uidelines promulgated by the Coordinating Board of the Texas College and University System that provided that a person, like himself, who had been employed as a teacher in the state college and university system for seven years or more has some form of job tenure" (600). The court was filling in the void left by the university. By analyzing the college and university documents, the court noted there was an *expectation* of continued employment. For an adjunct who does not have implied tenure provisions, an adjunct should not assume that she or he is entitled to continued employment simply because of her or his status as an educator. The court's argument here does not directly align with the arguments in *Adler's* dissent (discussed in Chapter 2) or *Keyshians'* majority that the academy and its participants deserve a sacred space, an extra level of protection. It merely provides a floor -- educators cannot lose their rights to notice and a hearing because they are educators.

Interestingly though, the court did acknowledge that educators may look to circumstances of their service because of the dictates of their profession (e.g. an expectation of re-employment):

> A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service -- and from other relevant facts -- that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement... so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice. (602)

The court understood that the special nature of education may take into account an understanding that non-tenured educators can "point to" good recommendations, good teacher evaluations, and being continuously re-hired as evidence of their worth to be afforded notice and a hearing before termination. Using their academic freedom to develop as critical thinkers, non-tenured educators have a stake in their university's educational mission to help move the disciplines forward in their classroom teaching, not to be viewed as temporary workers merely used to fill a gap...*in some circumstances*.

However, regarding being afforded more substantive rights, this case does not extend the academic freedom ideal of *Keyshian* to additional participants in increasing

knowledge. It merely instructs universities to spell out who can and who cannot receive tenure. If there is a formal writing, even going so far as to state adjuncts *are* viewed as temporary employees with no expectation of due process, apparently the *Sindermann* court would find no fault with that.

This is the half-victory for adjuncts in *Sindermann*. They have a right to exist (to constitutionally speak), but are not afforded more substantive rights by the nature of their position: "We disagree with the Court of Appeals insofar as it held that a mere subjective 'expectancy' is protected by procedural due process, but we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of 'the policies and practices of the institution.'" (603). Adjuncts are to be mindful that they are not fundamental members of their institution simply because they are educators, but the court will acknowledge a greater protection if it is not clearly spelled out. But the greater protection is for the sake of fairness. By looking at the adjunct not as a vital part of the educational mission but as a party in a contract, the court allows for adjuncts to '"fill a need" without acknowledging the academic capital they provide for the betterment of the university and their students.

The Adjunct's "Lesser" Amount of Protection Related to Their Speech

In denying distinctions between different titled faculty, the *Roth* court failed to appreciate an aspect of academic freedom -- time. William Van Alstyne writes that the failure of distinguishing fixed-termed contracts from tenure-track contracts leads to tenure-track positions being procedurally interpreted as short-term "adjunct-like" contracts, which does not afford due process protection (133). If taken to an extreme

conclusion, universities could fire tenure-track professors without providing a reason at any point of their probation period.

In fact, Van Alstyne criticizes the court's failure to understand the purpose of a university in its lack of distinguishing tenure-track from fixed contracts, referencing the AAUP's brief in support of Roth's due process claim: "[T]his kind of comparison elides an essential difference and falsifies a critical distinction in status and expectations" (133). A universities modus operandi is creating, interpreting, and dispensing knowledge. Tenure-track positions afford the ability for the new scholar to follow on this "track" engaging in pursuits that acknowledge her or his research as a major asset towards the growth of the university. Over the course of several years in attaining tenure, ideas can be allowed to be developed in scholarship and pedagogy, polished and come to fruition. By the time the tenure-track professor is awarded tenure, those new, different, and unusual ideas have additional currency -- educators have spent years honing their interests, and can theoretically "hit the ground running" in contributing to the discipline without fear of reprisals. Providing due-process protections for tenure-track professors at least allows a professor to know that she or he can begin to explore disciplinary pursuits without the university firing her or him on a whim -- very much in an un-academic mold. If there is no expectation of a professor staying around long enough to contribute to the university's knowledge bank, the university production of new knowledge threatens to run dry and it focuses more on the tried-and-true ideas. For the professors who are fortunate enough to get tenure in this paradoxical situation, they may be several years behind in truly exploring their disciplines, perhaps dulling their scholarly pursuits for fear of reprisals.

This professional self-sabotage inevitably results in a deterioration of academic freedom, as Van Alstyne points out: "[W]ithout doubt the effect is necessarily one of inhibiting any professional departure from uncontroversial methods and substance, lest one find oneself out on the street with only a problematic right to sue. *Roth*, in recognizing no distinction between such appointees and tenure track faculty, widened that crevice even more" (133). With *Roth*, the "adjunctification" of the academy extends to those of a higher title than adjuncts. Every professor not tenured can look at their work as a short term contract -- fixed. Of course, for the tenure track professors who still have to publish for tenure, they will attempt to get their ideas into the conversation. However, they may find that being "un-noticed" in their research is more beneficial to their employment goals, despite shortening their research. Ironically, the university who does not afford due process protection may actually be hindering its own growth.

Defining the Due Process Right

The murkiness of the court's analysis of due process was addressed by P. Allan Dioniosopoulos at the time of the *Roth* and *Sindermann* decisions. Dioniosopoulos argues that the issue of due process for educators would have been better understood if the court had actually said more. He states that the majority in *Sindermann* upheld an un-clear tenure standard in the "common law" without providing a clear due process remedy:

> "The court's failure to spell out the exact nature of the procedural requirements [due process requirements] leaves doubt as to the meaning, significance and applicability of this 'common law' definition. Based as it is on certain understandings and practices, where does it find the needed procedural

> safeguards? If they must also find their source in such ‘common law’ understandings, their availability and adequacy are at all times in doubt". (23)

For Dioniosopoulos, tenure and due process should go hand-in-hand. Allowing Sindermann to have an inferred tenure right in relation to other professions leaves the mechanism of securing that right in doubt. The university structure, in ascribing to the belief system of academic freedom, supports a "free flow" of ideas and allows wide latitude in professor’s intellectual pursuits in and out of the classroom. But to subject this free flow to a *legal* process that stunts the intellect, due process rights are not on solid ground in a university sphere.

Would the same due process right for academics as for other government employees actually work to the educator's detriment? Dioniosopoulos criticizes the backdoor approach favored in the dissents of Douglas and Marshall: " [T]his would also mean that all teachers are to be similarly situated and equally protected by the same procedural safeguard. In view of the commitment of academicians to maintain distinctions rather than eliminate them, the Marshall position must be rejected as a backdoor approach" (39). In a way Dioniosopoulos mirrors Van Alstyne's analysis that the court missed the nuance of academic distinctions, which may speak to the inability of the court to truly understand university culture. A due process right for tenure-track faculty is needed but perhaps it should be understood in the context of the position itself -- the faculty member's job goes beyond teaching and research and relates to the growth of the professor in becoming a scholar contributing to the universities intellectual life. However, *Roth* did not provide that distinction.

In critiquing the overly broad due process approach in Marshall's dissent (in providing the same type of due process rights to academics and government workers), Dioniosopoulos argues that a broad notice and a hearing right may inevitably result in fewer job opportunities for academics. Hearings may harm job security:

> Carried to its logical conclusion, any decision not to reappoint could produce such a blemish. No matter what reasons are given, whether they be serious for the faculty member...or whether they be quite different in tone as far as the teacher himself is concerned...the consequences of full notice and hearing would still be the same: the blemish would still exist...None of the jurists, who subscribed to the position that a non-reappointed teacher should be discharged only upon "adequate cause," proved that the blemish would be removed merely by having a hearing. (40)

Although Dioniosopoulos suggests a more informal procedure in expressing displeasure with an academic, his argument that a right to a hearing might result in a blemish on academic faculty is unclear. Perhaps his implication is that the university “is above” the adversarial processes that non-academics employ since the academy is something of a professional “club” which mirrors an old idea that teachers do not need unions because they are professionals. However, a due process protection is itself a way to protect everyone, including the un-tenured and adjunct faculty in having *some* agency.

Determining a due process right for non-tenured professors may simply be a case of looking around and seeing if the professor is "treated as" if she or he is tenured. Rodney Smolla discusses the issue of a due process right for academics based on the

conditions of employment. Smolla frames due process as a distinction between a constitutional right worthy of due process protection (such as a person charged with a crime) or a mere privilege not worthy of constitutional protection (such as a government employee working at the pleasure of her or his employer).

Smolla says the principle expressed in *Sindermann* has come to be known as the doctrine of unconstitutional conditions:

> [G]iven the enormous leverage that modern governments possess over the various forms of public benefits that we historically regard as "privileges", we must devise constitutional principles that deter the government from using that leverage in a manner that effectively squelches constitutional rights. (80)

Is higher education in public colleges a privilege or a right? The number of undergraduate students attending public colleges is significantly higher than those attending private non-profit and private for-profit colleges (“Total”). If the government is providing the bulk of the higher-education benefit, it could be classified as a "right" because of the extensive amount of government involvement in higher education. If public universities hold this much sway, they should not expect that educators are mere employees without speech and process rights. The government is substantially involving itself in the functioning of higher education. For higher education to "work", educators must have the ability to speak on their discipline without a fear of arbitrary termination. Without the protection of due process rights for tenured professors, those educators will not be able to fully pursue their academic pursuits for the benefit of their students. According to Smolla, *Sindermann* does not provide non-tenured professors this right.

Despite this bleakness, Smolla implies there is at least a modicum of agency in the university system for a non-tenured educator. Smolla cites Justice Stewart's belief that there may be a common law right of tenure at a particular university. Smolla comments "Justice Stewart explicitly rejected the simplistic notion that the government had unfettered power to place any conditions it pleased on its dispersal of largess, explaining that even when a person has no right to a government benefit, the Constitution still imposes restraints on the reasons the government may invoke in denying the person that benefit" (79). The non-tenured professor should at the very least "exist" with some university structure, more than a mere appendage to be expunged for no reason. Naked arbitrariness does not serve the university well for the most vulnerable educators, especially since for those 15 weeks she or he is performing a basic university function -- educating students.

In fact, Smolla posits that *Sindermann* at least leaves the door open for non-tenured professors to make an argument they have a due process right. As Smolla smartly states, "If it looks like tenure, and feels like tenure, perhaps it *is* tenure" (79). At many schools it is treated as such. Tenure is the gold standard. For those non-tenured professors, they may have a modicum of institutional acknowledgement based upon how they are perceived and treated by others, and the role they play in the university. At least they might be able to make the argument, which is a start.

Although Smolla states the doctrine of unconstitutional conditions has many limitations on the non-tenured, and in fact does not provide any additional rights for the adjunct, Smolla acknowledges the university dynamic is something special: "We might

think of entry into a college or university community as an entry into a special "social compact" of sorts, one more specialized than the broad social compact that defines our relationships to one another as citizens" (80). A non-tenured educator steps into this social compact without the protection of future employment, as a "temp" following the same mission statement as the full time tenured educators, giving their students the tools they need to move forward. A lack of notice and a hearing treats adjuncts with a level of invisibility in the university that is not borne out by their true worth.

Since adjuncts have such a high bar to demonstrate their tenure rights, it may not be worth the effort to challenge based on an assumption of implied-in-fact tenure, even if there is a "common law" right (based on a favorable decision from a state court). A Duke Law Journal Comment at the time *Sindermann* was decided notes:

> The implied-in-fact tenure approach may provide a route for circumventing the usual requirement of the entitlement doctrine that the plaintiff show a right to employment rooted in statute or contract, but given the high standard of proof laid down by the Court (the plaintiff must show a "common law" of tenure, not a mere "expectancy" of continued employment, *id.* at 602-03), it seems likely that relatively few plaintiffs will be able to demonstrate the factual situation necessary to take advantage of it... (Entitlement, Enjoyment, and Due Process of Law fn 42)

Sindermann's path to tenure was not traditional; it would be hard pressed to find a university to have a similar free-flowing approach to tenure. Even if there is precedent from a state court finding in the educators' favor regarding a tenure right, the aggrieved educator today would in most likelihood not have the same *assumption* of tenure.

Sindermann may stand for the proposition "as a part of the university family you have this modicum of job security based on your years of valued service to the student population and the university". However, for the adjunct hired year-after-year the university that spells out its tenure protocol brings insight to the term "off the tenure track". The implication is that the adjunct is not "there" to begin with.

Sometimes cases are limited in their usefulness. Paul Ground suggests that the court, in essentially using a fact-based analysis to distinguish *Roth* from *Sindermann*, spelled out their interpretation of the law through inferences and not a clear guiding principle. *Roth* and *Sindermann* may only be useful for those litigants and not future generations:

> The fact that these rules may be stated readily does not, however, mitigate the difficulty of applying them to a given set of facts. The Supreme Court believed *Roth* and *Sindermann* to be distinguishable on their facts; it did not plot the location of a boundary beyond which due process requires a hearing. Nor does the *Sindermann* opinion outline the procedures required when due process mandates a hearing upon termination of an employee's position. *Sindermann* holds only that a dismissed employee whose interest in his position meets the vague "property right" test may attempt to prove his free speech and due process claims. This is far from a guarantee of a hearing before dismissal. (289)

For the aggrieved educator, these cases do not provide much clarity *when* a non-tenured educator has a right to notice and a hearing. These cases also don't provide guidance on what the hearing should look like. Most adjunct contracts carefully lack a potential

“property right”. A stripped-down pro-forma procedure could suffice, leaving the adjunct with little opportunity to elaborate on why she or he was terminated, perhaps flensed of context. By giving short shrift to the "property right" of an adjunct, this vagueness symbolizes the lack of understanding (and perhaps embracing) the role of a part time or non-tenured educator.

Even if the educator is awarded a hearing, it may not provide the educator with the ability to teach again at that institution. In a footnote, Ground notes "Establishing the right to a hearing may represent a Pyrrhic victory for the employee. First, the hearing itself is likely to occur long after the employee's dismissal...Secondly, the substantive law may provide for termination at will..."(fn 33, p 289) If a university wants a non-tenured track educator to leave, the educator will leave (perhaps immediately) even if she or he has a due process right. The university could simply do a cost-benefit analysis and decide to deal with any ramifications far in the future. For those educators who want to push the intellectual boundaries, they may be hesitant to do so, especially if "vindication" in a favorable hearing could take months or years later.

Also, even if educators win in theory, they may not win in practice. Even if, months or years later, the university was found to violate the educator's rights in terminating or not re-hiring her or him, the remedy -- reinstatement -- may not exist if the court finds the educator disposable. This is an at-will employee with no guarantee of employment. So, the educator who wants to explore controversial topics or theories may not bother since, in the end, she or he may fall out of the university's good graces for any

reason or no reason, and the remedy will be of minor import at best. A hearing may be pointless and too late.

Although untenured educators should have the same process rights as others utilizing government services, this may not be the case. Written around the time of the *Roth* and *Sindermann* decisions, Ground notes that although garnishing wages, terminating welfare benefits, revoking parole and drivers licenses and repossessing goods requires a hearing (before the adverse outcome), "*Roth* and *Sindermann* indicate that the breadth of protected interests for untenured teachers, and perhaps for public employees generally, lags somewhat behind this general trend" (290). Although many would argue that freedom, access to money and property, and convenience of travel are of more immediate import than process rights for an untenured educator, the ability of an untenured educator to teach students without the fear of a sanction for her or his ideas (and an inability to formally challenge the sanction) may result in her or his students being less-informed when advocating for their own freedom, access to money and property, and convenience of travel.

Without a clear understanding of how far the university could go until they have violated the educator's rights, the educator is left in the dark as far as what actions are allowable by the university before a violation occurs. Ground notes "While it is clear that governmental discretion to terminate employment may not be exercised in violation of fundamental substantive rights, *Roth* and *Sindermann* fail to delineate the deprivation that must occur before a public employee is entitled to a hearing" (294). There is no bright line. Although an educator cannot be terminated based upon her or his freedom of speech,

a university may be able to terminate the educator for anything else -- even if it would be a cover for termination based on speech. The educator would be wary to teach "outside the lines".

The Due Process Right for the Marginalized

A brief but intriguing interpretation of process that cites *Roth* in a footnote addresses tenure and one's identity. In a discussion about the denial of tenure, Penelope Andrews, Sharon Hom and Ruthann Robson comment "such disagreements occur in a field populated by racial, gender, sexual, class, and other identities. Academic freedom and freedom of speech are often implicated and issues of process and fairness, apart from the merits of claims, can become paramount" (601). Although this comment addresses a tenure-track faculty member, the larger issue is worth discussing. The *process* of obtaining agency within the university is part and parcel of what a university is. A solid due process right is essential for all members of the profession, especially for those who may be marginalized in the academy in more ways than one. Adjunctification is one avenue of marginalization. Add to that those adjunct identities not on the hetero normative white European male spectrum, and a due process right is essential to confront race and gender prejudice. Academic freedom should aspire to bring inclusion into the academy and all members having access to notice and a hearing to address disputes gives all those who enter the marketplace of ideas from a different road than the assumed "majority" identity an acknowledgment of their ideas holding institutional value. Adam Harris, in reference to a Teachers Insurance and Annuity Association of America Institute faculty diversity report from 2016, says "From 1993 to 2013, the percentage of

underrepresented minorities in non-tenure-track part-time faculty positions in higher education grew by 230 percent. By contrast, the percentage of underrepresented minorities in full-time tenure-track positions grew by just 30 percent". A due process right for all members of the academy gives credence to all voices as a way for the university to address inequities. This is in contrast to placing those members of the academy already disenfranchised as the "other" in the university system *structurally* disenfranchised as well in a university system by not acknowledging a due process right. This keeps those members of the academy invisible in more ways than one.

This similar strain is also noticeable regarding female educators. An AAUP report from 2010 notes " More than half of all female faculty now hold part-time positions and more than 45 percent of full-time female faculty have non-tenure-track appointments" (Benjamin 6, *qtd. in* Roederer 76). As women are a majority of the undergraduates (National Center for Educational Statistics), there is a likelihood that more than one of their female educators are disempowered by being cognizant of their tenuous job security, which can result in certain lines of thinking not explored. Indeed, Christopher J. Roederer notes "Faculty with less security of tenure are more risk averse, and this may lead to avoiding these sensitive topics (76)... This is in addition to the reduction in free speech that occurs when less faculty are researching and writing, when scholarship is devalued, not required or not recognized as essential to the educational mission" (fn 218). A majority of undergraduate students (who are female) will probably be in contact with more than one adjunct or non-tenured female professor. However, the professor may be more apt to stick to the general curriculum instead of engaging in more daring or cutting-edge ideas that bear fruit from scholarship. If adjuncts are disempowered because of their

lack of institutional scholarship support, this will be reflected in the classroom. Female students may see more male faculty that are bolder in their ideas since they will have tenure and the scholarship support that flows from tenure.

The Legal Identity of Adjuncts

In commenting on the legal "identity" of adjuncts, John Duncan notes "courts do not generally view adjuncts as a collective whole" (515). A collective or class-like approach to adjuncts is imperative in asserting their identity in formulating a process right. To be acknowledged as worthy of the same protections as full-time tenured members of the university, their identity must be deemed worthy of a process analysis, instead of a piecemeal approach where they are not part of the university but apart from the university. Adjuncts have to cobble together proof that they have a process right, and the bar is high based on *Roth*. This searching for proof mirrors their place in the university -- fractured, unsure, having to prove their worth for continued employment. Although Duncan notes adjuncts may not be able to look to *Roth* and *Sindermann* for resolving their precarious position, he comments that "nevertheless, the potential for acquisition of this property interest does exist under the doctrine. The Constitution will protect the interest if it is acquired" (544). However adjuncts are not identified as part of the professoriate because of their place outside the university, so they do not have access to acquiring a property interest.

The rulings in *Roth* and *Sindermann* have lead to an unfortunately predictable result. Speaking fifteen years after the decisions, Walter P. Metzger comments on this in a footnote related to employer decisions and academic freedom:

> The demand that a high constitutional credit rating must be established before a teacher can take procedural appeals to the bank was not intended to and has not increased the flow of business from probationers, part-timers, riders of nontenure tracks, and all of the rest of the academic host who are removable sub silentio by the mere expedient of letting their employment contracts lapse. (fn 107)

Metzger's language speaks to the sad state of adjunct agency in the nation's highest court. An adjunct in 1972 could reasonably assume that *Roth* and *Sindermann* essentially cement their place as fringe members of the university structure without a voice through due process claims. Fifteen years later the "process" of a lack of process had manifested itself with adjuncts not bothering in large numbers to pursue court challenges based on due process. With that avenue of recourse closed, adjuncts become, as Metzger notes, a non-entity in the university. There is no protest, no formal legal procedure to challenge their removal from the university strictly on meritorious grounds, which should be afforded to fellow academics who move their discipline forward through their teaching. Adjuncts enter stage left as "the invisible" and exit stage right as "the invisible". Based on *Roth* and *Sindermann*, the court would have no problem with an adjunct (especially one that does not sign an employment contract) showing up to teach her or his class at any time during the semester (or worse, on the first day of a new semester) and be informed that their services are no longer needed. Most universities have some sense of decorum in notifying adjuncts that they will not be rehired for the following semester, but a lack of legal acknowledgment in this matter speaks to the court's lack of understanding the role of the educator in a university.

The *Roth* and *Sindermann* courts also fail to understand professional norms in academia. Metzger says "the Court's failure to recognize de facto tenure -- due process rights conveyed merely by so many turns of the working clock -- is a sign of its unfamiliarity with professional scripts" (fn 107). The educational "definition" of punishments and rewards goes beyond the "at-will" standard in non-educational forums. Most adjuncts that are re-hired semester after semester are professionally evaluated by a senior (tenured) member of the department. The professor evaluates the adjunct's classroom decorum, familiarity with the pedagogical methodology, understanding of the discipline, how to convey knowledge of the discipline, and if the knowledge conveyed can lead to new "sparks" for the student. An unsatisfactory rating can result in not being re-hired. For the adjunct who survives this pedagogical and intellectual obstacle course every semester, after several years it would appear logical that the adjunct should be afforded professional courtesy to notice and a hearing based on her or his disciplinary and teaching ability before no longer being employed by the university. After all, the adjunct was effectively subjected to this type of notice and a hearing every semester by being observed, so isn't it logical that the end result should follow a similar format?

Due Process and Tenure vs. Non-Tenure Distinctions

As a broad overview, there are two separate due process claims (as stated above), procedural and substantive. Erwin Chemerinsky frames the difference this way: “Substantive due process asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose. Procedural due process, by contrast, asks whether the government has followed the proper procedures

when it takes away life, liberty or property. Substantive due process looks to whether there is a sufficient substantive justification, a good enough reason for such a deprivation". For example, if a public institution wants to terminate a tenured professor based on a speech she or he gave at the college, the institution could attempt to terminate the professor if the institution believes the content of the speech was similar to someone shouting fire in a crowded Starbucks. That would be a substantive due process claim – was the reason (based on a protected fundamental right) good enough to terminate her or him? On the other hand, if the institution wanted to fire her or him for any reason, the institution would be required to provide procedural due process, a notice and a hearing.

In an excellent and thorough analysis of an educator's process rights, John D. Copeland and John W. Murry Jr. posit those educators without tenure do not have much recourse in the courts when related to process claims. Regarding a *substantive* due process claim (a claim related to an educator challenging her or his termination based on a failure to fulfill a requirement for tenure), John D. Copeland and John W. Murry Jr. write:

> The distinction made by the courts between the property rights of nontenured and tenured employees also directly affects the scope of judicial review as far as personnel decisions are concerned. Prior to the granting of tenure, courts are inclined to give great deference to what is basically an academic evaluation which may use primarily subjective standards. (255)

Essentially, courts will not second-guess each factor the university based their tenure decision on. The non-tenured educator that employs non-traditional means in her or his

teaching or research interests may not be rewarded. Posing confrontational questions in class? Supporting an abhorrent (but feasible) position in research? A faculty evaluation form could easily find fault with those tactics under the guise of "non-professionalism" or "failure to adhere to disciplinary standards". So, the academic will perform what is expected of her or him, not what the expectation could be for the benefit of the students or the university.

Copeland and Murry Jr. also paint the same bleak picture for the non-tenured who want to make a *procedural* due process claim (a right to notice and a hearing before termination). As with other scholars commenting on *Sindermann*, minus exceptional circumstances such as the "words and deeds of an institution's administration", non-tenured faculty do not have recourse (275). Great deference is given to the university in issues of substantive and procedural due process. As Copeland and Murry Jr. note, "the judiciary has tended to act as if colleges and universities could be trusted to act in good faith" (246). With that assumption, the non-tenured faculty member has to overcome a high obstacle when challenging their dismissal. If the university is characterized at first blush of acting in the best interest, sanctioning a faculty member for not acting in the best interest -- especially when issues of disciplinary competence arise -- the educator is put on "notice" that going outside expected boundaries is framed as going against the university. In a way, if universities could be trusted to act in good faith, the courts can use circular reasoning to view challenges to due process protections as an afterthought: they are valid because the university has instituted them. Claims of academic freedom being skirted by a lack of process have an uphill battle.

It is important to look at the slight distinctions between tenure-track and tenured employees, which are easily overlooked. Robert Tepper and Craig White note:

> The essence of tenure is a restriction on the discretion of the university employer in matters of reappointment. As a result, courts are reluctant to find a property interest based on the criteria and procedures leading to tenure or reappointment of probationary faculty; the procedures in place should not be confused with an actual restriction on the university's power to appoint a particular candidate. (174)

Tepper and White highlight an interesting dichotomy here. If an aspect of due process is having a property interest, the courts have something of a “hands off” approach for the educator who is working toward achieving that property interest. But this highlights the haphazardness in who is legally worthy of due process rights in the academy.

For the increasing percentage of adjuncts used by universities, a lack of due process rights mirrors the lack of academic freedom in the university as a whole. Tepper and White state "this trend [an increased amount of adjunct labor] portends consequences for the academic environment; although contingent faculty add a practical dimension to the academy and work for less than the tenured or tenure-track faculty, the arrangement rarely allows for participation in research or faculty development, let alone faculty governance" (176). The lack of due process for adjuncts mirrors the "lack of" core functions of the university to move the university forward -- research, faculty development, and faculty governance. If a large percentage of university educators are non-tenure track, then the university as a whole begins to mirror the "invisibility" of the adjuncts as an "at-will" work force. So, as Tepper and White clarify "Appointments from

semester-to-semester or year-to-year counsel against free expression, particularly expression concerning the appointing authority, by this sub-group of the academic workforce. Yet such free expression is essential to academic freedom" (176). As a result, this increasingly large percentage "sub-group" of the university is "invisible". They have no stake in the substantive functions of the university since they are not worthy of substantive job protection. So, although there are faculty members who do have due process protections, the overall faculty input in substantive university functions is overall quite limited since they are not actually representative of the *entire* faculty's viewpoints. ***The full-time faculty becomes subsumed by the "sub group".*** Meanwhile, the university, without the adjunct/full-time distinction, represents a more powerful and united front in their vision of how to shape the university. It is essentially the "strength in numbers" idea, but on an academic institutional scale.

Although the *Roth* and *Sindermann* cases provided slight clarity in relation to non-tenured educator's process rights, there is room for interpretation. In commenting on terminating the employment of tenured professors, Corinne D. Kruft notes "because these two employment cases [*Roth* and *Sindermann*] involved nonrenewal as opposed to termination, the Supreme Court did not identify what requirements are necessary to satisfy due process precisely" (615). If non-renewal is not seen as termination, it does not provide much guidance for college educators for whom the concept of non-renewal is more prevalent than outright termination, which can provide more headaches for the university. It is easier for the university to let the academic "drift away" via non-renewal despite that fact that the educator is doing *substantive* work. Substance should logically be addressed with substance on the part of the university who wants to end its

relationship with the professor, and a termination procedure can at least address the merits of the educator's work. But this is not the case.

In a footnote, Kruft cites Lawrence Tribe who states "The actual elaboration by the Supreme Court of protected interests and procedural safeguards has been an evolving process punctuated by vague generalizations and declarations of broad, overarching principles."(fn 39). Such is the case here. *Roth* noted "But, to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake" (570). In *Sindermann*, the professor stated that he may have a genuine issue as to a continuing employment interest related to his due process claim (599). Such key phrases as "nature of the interest" and a genuine issue as to a continuing employment interest in describing a due process interest seem heady and un-wielding. In speaking to the import of an academic's worth in terms of a right to be heard on matters related to their employment, it is not a simple assumption that educators should be afforded process rights *simply because they are educators*, which would imply a vital function an educator performs in our society. By parsing the language in the nation's highest court, it reflects the vague understanding of an adjunct's purpose (and inevitably her or his worth) in the university and society at-large.

Without due process protections for the un-tenured faculty, they are less likely to litigate issues involving academic freedom. In a discussion about the first amendment and academic tenure, Daniel Hall notes "The differences in procedure for tenured versus [non-tenured] faculty...are likely to affect a faculty member's willingness to litigate or otherwise enforce a legitimate First Amendment claim against a university" (101).

Adjuncts without the right to a pre-termination notice and a hearing are less willing to challenge, and perhaps even be *aware of*, limitations to their academic freedom. When the adjunct is not re-hired based on a line of inquiry she or he pursued, it may not be challenged in the legal sphere for pragmatic reasons. The adjunct's expense of time and money in going to court to address the violation may not be worth it. So, the violation of academic freedom is allowed to go unchecked, whereas a much less involved university hearing would allow the "idea" in question to be explored more fully. Providing institutional awareness of the validity of the idea may actually allow it to flourish in the academy.

Faculty Handbooks and Due Process of the Adjunct

Those educators who are part time (and perhaps full time as well) relying on a property interest in *Sindermann* to invoke due process protections may have to contend with a wrinkle in their employment status. Jim Jackson writes that "The at-will doctrine presents some difficulties for those arguing that an employer's policy or rule manuals or personnel handbooks may form part of a contract of employment" (474) For instance, if an adjunct professor in a public university is terminated without notice and a hearing after claiming her academic freedom rights were infringed upon, she may want to look to official university publications to bolster her case. Even if the university handbook -- or even the personnel handbook -- states the university supports the free flow of ideas for growth and social benefit (as may be seen in a mission statement), there is no guarantee the courts will infer that it is some sort of binding agreement. As stated previously, academia is a distinct creature with its own understanding of what is sacrosanct, but if a

court looks at the dispute through the lens of the employee having less rights because of an "at-will" view of employment, that educator may be out of luck.

Universities as well are more apt today to make sure anything published or agreed to do not confer rights on adjuncts. In commenting on *Sindermann*, Stephen J. Leacock notes "This decision may be a cautionary tale for educational institutions when drafting provisions in Faculty Guide documents" (138). It is unlikely that the open-ended faculty guide in *Sindermann* would be published in the 21st century. Assuming that faculty guides are reviewed by several departments before publication, including the legal department, any inference of de-facto tenure will be clearly disavowed.

Adjunct Due Process and Faculty Self-Governance

The due process ideal for adjuncts supports the concept of faculty self-governance. Risa Lieberwitz, in briefly commenting on an article by Jane Buck regarding contingent labor, notes "contingent faculty, who are hired into non-tenure-track positions, are excluded from the full protections of academic freedom afforded by tenure, as they remain vulnerable to discharge by the university employer and [some] are excluded from the university system of faculty self-governance" (795). If due process affords an opportunity for adjuncts to be open in their classroom pursuits and play an active role in the governance of the university by providing new and fresh ideas, then a lack of due process leaves the adjunct less likely to embrace their colleagues role in university governance for fear of being terminated for any reason or no reason. The adjunct's tenured colleagues have the agency to pursue endeavors as a disciplinary body without repercussions. A lack of due process protections for the adjunct leaves her or him without

institutional support. Academic freedom goes hand-in-hand with lending that disciplinary knowledge to advocate for greater freedoms in university governance. However, she or he is left on the outside looking in.

Criticisms of Due Process for Adjuncts

In commenting on *Sindermann* and *Roth*, Richard Pierce speaks of the concept of affording due process rights for academics, who have a special mission based on the constructs of their profession. First, Pierce discusses a non-academic government employee who can make a due process free speech claim:

> Savvy government employees have used the broad definition of liberty recognized in *Sindermann* and *Roth* as a source of job security ever since. The message of these cases is clear. If you have reason to believe that your level of job performance renders you vulnerable to potential discharge, you can increase dramatically the cost of your potential discharge simply by becoming a persistent public critic of your superiors (1978).

The type of loophole Pierce describes here would not have the same resonance for an academic; in fact, Pierce misses the factual basis for the courts' reasoning, which demonstrates the roadblocks in affording protection for quality academics that are vulnerable. In *Sindermann* and *Roth*, the government employees, educators, were given satisfactory ratings. In the academy, effective teaching evaluations assess the educators based on overall competence and intangibles that cannot easily be sectioned off. Their motivation was not to "start trouble"; they were responding to timely university crises

that affected the essence and structure of their university (a mass suspension of students of color and the change from a junior to senior college respectively). The environment Roth and Sindermann are acting in is different from employment that does not trade in a marketplace of ideas. The academy embraces intellectual tension as "lessons" for students.

Further in Pierce's analysis of a later lower court case (following the narrowing of due process rights into the 1990's), he writes "It is also conceivable that due process will continue to apply to two narrowly-defined forms of "new property" -- the jobs of academics and the jobs of government employees whose skills are not transferable to private sector jobs" (1996). Academics' rights have been limited when courts analyze their job responsibilities in the same broad brush strokes as non- academic employees. A due process protection for academics (especially for the most vulnerable, the non-tenured) acknowledges a constitutional speech right in the framework of academic freedom -- a concept that is not transferrable to non-academic settings.

An alternate but intriguing take on the relation between academic freedom and due process for educators is if the relation can be used as a weapon if the professor is accused of sexual harassment. Nancy Chi Cantalupo and William C. Kidder discuss the "due process aspects of academic freedom in a Title IX faculty misconduct setting...by situating the contours of 'what process is due' in university internal faculty sexual harassment discipline proceedings" (2396). A claim of academic freedom should be viewed as more than a common/"catch-all" defense strategy since the essence of academic freedom is for the benefit of all involved in the university endeavor, which

obviously includes the students who have been sexually harassed by their professors. In an odd way, by providing due process protections to faculty members, it provides more support for those students who have been victimized (2399). Educators who have abused their students are less likely to achieve a procedural victory on appeal if the process is structured to hear all sides in an unbiased manner; due process rights for adjuncts could actually benefit the university community and not just the faculty member as commonly thought. Of course, an educator can be vindicated in Human Resources and still not reappointed. Due process protections allow those educators who are truly challenging their students and the larger systems via intellectual pursuits to crystallize the mission of the university.

One critic says using the legal system to address questions of procedure in academia may not be feasible. At the very least, although the legal system is an imperfect place to analyze due process claims based on academic employment, the threat of using the judiciary may be the best way to protect the due process rights of educators. In a due process analysis of tenured professors written shortly after *Roth* and *Sindermann* were decided, Alan A. Matheson notes "the genuine disadvantages of an attempted legal solution to an academic controversy involving tenure", which includes the adequacy of process and its uncertainty (621). For an adjunct or prospective full-time professor who claims a violation of academic freedom, notice and a hearing may not fully address an abstract concept such as academic freedom. A procedural query regarding the content of the adjunct's speech should differ from a procedural query based on insubordination or incompetence, but unfortunately the procedure may follow the same checklist. Also,

adjuncts accused of insubordination or incompetence may use academic freedom as a defense, but it can be open-ended how the speech is classified by the decider.

Tenure is a subjective community decision, not an "outside" one. In quoting Victor Rosenblum, Matheson notes "because of the resulting uncertainties, it would be a "serious mistake to think of the legal dimensions of tenure as a series of specific codified rules or principles subject uniformly to enforcement in the courts'" (621). Due process for the academic is markedly different than due process for the non-academic. If intellectual growth is the desired result in a university, the contours of a hearing will be based on an academic understanding of disciplinary knowledge, especially if the educator is questioned based on her or his teaching or theories. Non-academic hearings can be more cut and dry, since objectiveness relates more to actions and less to the intellectual value of those actions, Academic hearings merit more thought provoking questions based on subjective criteria in which the intellectual value of the action can be given as much deference as the action itself.

In fact, the most effective use of the courts may be merely the concept of its existence. In quoting Clark Byse and Louis Joughin, Matheson notes, "the availability of judicial review of a dismissal might operate as a curb on the occasional ‘arbitrary’ administrator or governing board or strengthen the hand of their ‘conscientious’ counterparts ‘when inflamed public pressures unjustifiably seek the discharge of a teacher'" (621). A process hearing for an academic could be too open-ended -- the decision maker could interpret the educator's action as grounds for dismissal, or perhaps not even provide grounds for dismissal. Especially for the adjunct who states something

unpopular (but related to their discipline), it is easy for the administration to provide a shell of due process. The threat of litigation could at least force the administration to provide more than a cursory thought to the academic's claims and attempt to make a finding that weighs the competing factors. The end result may be the same, but at the very least some thinking may be applied.

The Privileging of the Corporate University's Academic Freedom

In *Roth* and *Sindermann,* the vast majority of educators are powerless. In fact, universities have recently turned the language upside down. The university is an employer and the educators are mere workers with no agency in any aspect of the university from academic freedom to governance. In fact, if the university is able to define itself as a corporation, it follows that the university can go one step further and argue to the courts that the concept of academic freedom is a *corporate* prerogative. William Van Alstyne notes:

> ...although academic freedom is usually treated (in the 1940 Statement [of Academic Freedom by the AAUP]) as a matter of individual freedom, usually that of individual teachers to address matters of professional interest without threat to their jobs, some Court decisions apply a first amendment notion of academic freedom much more corporately, that is, to the university or the college as an entity. The university, it is thought, may claim a certain corporate academic freedom to set its own institutional course—in curriculum, in admissions, in appointments—sheltered from government to some degree as a matter of constitutional (academic freedom) right. (81)

Academic freedom is viewed through the prism of a corporate freedom. The staff or faculty member does not have their own academic identity through their scholarship, service, or teaching style. They cannot contribute to the university ethos. The staff or faculty member *is subject to* the university ethos. If the academic freedom of the university and the educator is in dispute, the university takes precedence. The academic is an employee to the university mission. This fits nicely into the adjunct's role in a corporate university structure. She or he is non-defined without due process rights to serve a function in the larger system. The academic has a corporate freedom within the university structure to effectuate the business of the university. Nothing more.

As a brief aside, in 1978 the U.S. Supreme Court briefly addressed the concept of academic freedom for a university in an affirmative action case. In *Regents of Univ. of Cal. v. Bakke*, the court ruled that a white medical student applicant was un-constitutionally denied admission to a medical school. Allan Bakke had better entrance scores than several students who were admitted under a special program for indigenous populations with the goal of increasing diversity in the medical profession. In commenting on one of the universities arguments regarding the freedom to make decisions regarding its student body, the Court noted "(T)he freedom of a university to make its own judgments as to education includes the selection of its student body" (312). ***The Court took the concept of academic freedom and interpreted that right to belong to universities as well as individuals***. Of course, the two entities can come into conflict with each other thereby making academic freedom something less concrete, but the brief analysis did not address a rationale or workable test in combining the two entities.

A few different interpretations of *Bakke* highlight how a logical application of academic freedom could also be viewed as a punitive measure. William Van Alstyne noted:

> (t)o gain purchase through the first amendment, the decision in any academic freedom case, whether individual or institutional, must still rest...on *academic* and not on some other grounds. It is all the same, moreover, whether the decision pertains to 'who may be admitted to study' rather than to 'who may teach,' or 'what may be taught,' or 'how'(137).

In opposition to that viewpoint a decade and a half later, Philippa Strum, speaking generally about *Bakke* and other Supreme Court cases that looked at different interpretations of academic freedom that did not focus on the faculty member, noted academic freedom is defined in courts as institutional right -- one that presumably can be exercised *against* individual faculty members (151). So, an academic ethos must permeate the academic freedom analysis for a furtherance of knowledge, irrespective of the actor. But this ethos can be interpreted in a hierarchical fashion; this could be more daunting for an educator if a corporate mentality has taken hold of the university well into the 21st century, even more-so than when *Bakke* was decided. The university and the faculty member are on the same team, but this alliance can become frayed if the faculty member's pursuit is not as worthy as the universities pursuit. For adjuncts in this setting, they are afforded even less purchase without a due process right against the institutional interpretation.

As the university subsumes the individual educator's endeavors, academic freedom for everyone becomes more challenging since the ethos is less about the public

square and more about the private sphere. Henry Giroux notes "As universities adopt the ideology of the transnational corporation, they are less concerned with how they might educate students about the ideology and civic practices of democratic governance and the necessity of using knowledge to address the challenges of public life" (20). If the university begins to drift from the concept of a marketplace of ideas (with the classroom a space for the best ideas coming forth) and becomes a space for the use of knowledge in a more pragmatic fashion, the conceptualization of knowledge is not able to fully "bloom". For example, a theoretical concept can be learned and applied to fulfill the need of an employer. However, the theoretical concept can be used in a different way, outside of a traditional corporate construct. This can make a difference on a community based level. It is a benefit for more people; the use of the information is not solely based on the cash-nexus. An adjunct that, by their nature, is not "tethered" to the university may approach an idea through different aspects based on their experience, not only the economic aspect.

The Corporatization of Knowledge

The corporatization of knowledge begins to creep in as universities are dependent on funding. Beshara Doumani notes "[a]s the commercialization of knowledge expands, the space accorded to academic freedom contracts" (34). Knowledge is viewed as a commodity, where it appears to mirror skill-building or standardization. Knowledge is "in the service of", not for the larger collective. Knowledge becomes stratified as the more valued knowledge becomes the knowledge that *benefits* the university through funding or better job placement. The classical view of knowledge, in which academic freedom thrives, is less transactional. Of course, all knowledge can lead to growth, but when the

corporate structure privileges tangible knowledge with a clear return on investment (which is not immediately apparent in the humanities), academic freedom can implicitly become academic dogma. For the adjunct that does not have academic freedom or due process rights, she or he is more apt to “stay within the lines”.

The altruistic purpose of knowledge is undermined in a corporate environment. Doumani references the university mantra of the social good, which embraces academic freedom to benefit society, but in the 21st century "in an increasingly deregulated environment...politicians clamor for accountability and flexibility, corporations and special -interest groups for control of the product, and academic administrators for more autonomy and money. Can critical thought - the beating heart of academic freedom - survive in such a corporate environment?" (37). Doumani's depressing query elucidates the trouble some academics find themselves in when they push the envelope too far -- a stratified model of knowledge production does not lend itself to a "marketplace of ideas" trope in which all ideas are welcome since the *process* is the university imprimatur for sterling quality. The academic in the marketplace is assumed to have a good heart and good intentions, even if the product is discarded for its lack of logic or abhorrence. Unfortunately, in the corporate milieu, the end result *is* the process; the "working out" of the end result can mean less since the product is what is "sold" to prospective employers.

If education is a commodity, then ignorance is...a necessary evil in service of the commodity? Doumani asserts

> [t]he commercialization of education is producing a culture of conformity decidedly hostile to the university's traditional role as a haven for informed social criticism. In this larger context, academic freedom is becoming a luxury, not a

> condition of possibility for the pursuit of truth. Knowledge production driven by market forces that reflect the hierarchy of power slowly restructures institutions of higher learning by promoting certain lines of inquiry and quietly burying others (38).

The ideas and actions of the corporate university are filtered through the collective, not the individual. An employee of an institution chooses to "go along to get along" to prevent grief and ultimately termination. There may not even be a written rule about the boundaries not to be crossed; the individual just *knows*. This makes it all the more difficult for an educator. The influence of the corporate university is discreet and indirect. Academic freedom becomes theoretical in nature -- even if it is formally accepted at the university, it takes a different shape at the corporate university. Thought can begin to become standardized, even if promoted through such terms as "professionalism" and "decorum". Information can begin to be framed at the outset as *irrelevant* -- the antithesis of academic freedom which takes all knowledge and does *something* with it for the benefit of the students and the greater society. The "idea" of how the university should "look" becomes a self-fulfilling prophecy for the practitioners. The shape of tenure can even look different at the corporate university. Academics who believe academic freedom protects them in not following a superior's order based upon their own disciplinary sound beliefs are more likely to be terminated at the corporate university for insubordination. It is not hard to imagine that the smallest fish in the corporate university pond, the adjunct, takes its cues from what she or he sees and can't see and acts accordingly. This is especially true since the adjunct lacks a clear due process right in which adjuncts are not afforded a reason why they are not re-hired. It is easier for the adjunct to “play it safe”.

The traditional university safeguards in protecting academic freedom are not present in the corporate university. The corporate culture differs from the existentialist ideals of a university culture, which includes the "coming to" of ideas through a marketplace concept. It may not follow along the same path as a corporate mindset in decision making. Alan K. Chen, in an article primarily focusing on the law and academic freedom, notes

> Accordingly, in many university settings, it is not entirely true that decisions to restrict a professor's speech are necessarily being made by experts in her field. One example of the transformation of the contemporary American university is that it is increasingly common for universities to hire presidents from a non-academic background. Also, as [Matthew] Finkin observes, trustees or regents, the ultimate decision makers in the hierarchy of university governance, may not even be professional educators, much less in a position to objectively evaluate a professor's work. Trustees for public universities, moreover, are elected and may be subject to extreme political pressure when reviewing a professor's controversial teaching or scholarship. (972)

If it is understood that a scholar's views are within the purview of other scholars, allowances can be made for ideas or actions that result from those views. For example, an English professor may decide to teach her or his class outdoors if the lesson deals with theories of nature in literature. The class may walk around, explore the campus, and "soak in" the aesthetic while the class discusses the theory. However, if the university overseers are more corporate in their thinking, they will view the class as against the

common ethos; it may be forbidden because of liability concerns regarding the time and place classes are to meet. Also, woe be the professor who decides to challenge the ruling --- the university may take it completely out of the realm of academic freedom and determine it is insubordination, which can result in termination. Academics "get" other academics (sometimes). The eccentric actually has a logical basis for a larger point. If "rocking the boat" is not seen as a beneficial academic enterprise, the corporate university will quickly put out what they consider a fire.

A cascading effect results from the corporate university. As Richard Moser states, "[t]he search for truth, critical thinking, intellectual creativity, academic standards, scientific invention, and the ideals of citizenship have been discounted in favor of maximizing profits, vocational training, career success, applied research, and bottom-line considerations". "Searching" goes against the corporate ethos, which highlights the result as efficiently as possible. How one gets to the result may be less important; the journey *is* the endgame. *Questioning* is not part of the corporate university's fiber -- it leads to insubordination. Taking ideas at face value "in service of greater truths", which is how knowledge *really* happens, is supplanted in the corporate university by "in service to maximizing profits". Creativity in the intellectual university accounts for taking in other's viewpoints, which can include viewing an idea from the perspective of a different race, religion, ethnicity, or gender. Creativity in the corporate university is stilted since it motivates a consumer to take a monetary action. Career success, which is a positive attribute of the university, becomes a driving force that may not take into account a "human success" element to go along with it that brings out the best in the whole person, not only their employment achievements. Searching for greater truths may not have the

same immediacy as the corporate vision of task driven research which could be more immediately profitable.

The corporate university relies on the inevitability of its existence, ergo the market ideology, to prevent academics to question. Moser notes:

> Too many of us believe that these developments are the inevitable outcome of some juggernaut, usually the free market. Indeed, that is how corporatization is presented by its advocates. In this context, the free market is primarily a cultural and political artifact; it is a rationale, a managerial tool, and a means to blunt resistance. Rather than apply our professional standards, or understand our history, we are supposed to shrug because the new standards of the market reign supreme. Market ideology now functions to foreclose other alternatives. But history has its uses. History helps us to broaden our view with alternative understandings and suggests that our personal struggles have political meanings.

The "invisible hand" of the corporate university helps feed the narrative that the individual -- the faculty member, staff member, and student -- has no agency, and, although they *function*, the individual is not a true equal in the academic endeavor. This unfortunately even goes beyond the adjunct with her or his lack of employment protection. Money, or a lack thereof, is viewed as the prism through which intellect flourishes, so *all* actions -- in support services, in the classroom, in the department offices, in the administrative offices -- are monetary in scope. Institutional university memory, which includes generations of advocacy to make universities places of

intellectual and community growth, may not suffice as much in the “here and now” fluidity of the corporate university, where intellect is commodified.

The Corporatization of an Academic Identity

University culture movement towards corporatization is reflected in a corporate faculty identity. Risa L. Lieberwitz, in addressing the corporate university and its players (the faculty) notes:

> University expansion of private market activities in research creates tensions with its public mission, as expanded patenting and licensing activities restrict the public domain of academic research. These same tensions result in the teaching area, as for-profit distance learning corporations prioritize profit maximization over education. These market activities create closer university-industry relations through increased corporate financing of research and for-profit education ventures and through industry licensing of university patents (302).

The public mission is instructive here. In hearkening back to the "social good" of a university, the output of thought-provoking queries may not reach the public. Also, the public may not have easy access to the output. In some cases, faculty members become servants to the work of their students, as the spoils go to private corporations who can turn a profit off of the pedagogical labor, especially in the sciences. Profit maximization results in the university’s bottom line as a prime indicator of viability; intellectual pursuits not necessarily front-and-center on the university spectrum. Of course, universities need financing, but if functionality is viewed as a primary university function, actions that may be in opposition to the concept of academic freedom, such as

less interest in scholarship without a clear return on the university's investment, results in a university eliciting more business-logical actions. An adjunct working in this environment without employment protections will follow this ethos.

In fact, Lieberwitz begins this passage by noting "other developments have implemented traditional corporate employment models, including an increased use of contingent faculty and a corresponding decrease in tenure-track lines" (302). It is a numbers game; for the purposes of the corporate university, the academy promotes functionality over substantive academic pursuits that can be more readily addressed by full-time faculty instead of adjuncts who usually cannot devote scholarship pursuits to the university they are teaching at because of their tenuous status. In the bureaucratic sphere, the intellectual investment in the university means less than the labor investment. Academic freedom loses some of its pull since the profit of intellectual pursuits is given less "space" than the profit of functionality. With the increasing use of adjuncts directly propagated to increase the bottom line, their tenuous employment status results in less willingness to profess outside the intellectual lines.

The Corporate University and the Functionality of Adjunct Labor

Adjunctification is a permanent feature of the university's corporate mindset. Ellen Schrecker notes

> Universities are also emulating the business world by trying to cut costs... The most deleterious cutbacks...affect the faculty, as part-time and temporary instructors replace the traditional tenure-track professoriate. Though administrators rationalize this substitution by citing the need for "flexibility," so

> many of these men and (mostly) women teach the same courses year after year that, clearly, financial considerations drive the practice. (44)

The university mission of a free and open dialogue for greater truths is supplanted by a cost-benefit analysis. The university may counter it is for their survival. But if the university is "selling" a high quality education to its clients (students) more than a few students (and parents) may recognize that the adjunct or graduate student they see in front of the classroom constitutes false advertising. True, the adjunct is very much as pedagogically (and substantively) capable as the full-time, tenured professor. However, if the adjunct is underpaid, is given no health benefits, is unable to join the college's pension system, has no job security, or even a right to challenge their dismissal, she or he cannot afford to devote the time needed to devote to scholarship in their field or even spend time with their students. They have to run to another adjunct assignment.

By having adjuncts teach the same introductory courses every semester, it cheapens the substance of those courses. An introductory course can be competently taught by an adjunct. However, if the purpose of these courses goes beyond high-school and basic skills knowledge, giving adjuncts the financial and employment stability to research proper texts, methods, formulas and theories to be applied to basic courses and create time-consuming syllabi that reflect this knowledge will result in greater understanding for the students. The adjunct will be able to go beyond the formulaic syllabus and perhaps explore new avenues without the worry of not being re-hired for any reason or no reason. But the university sees a logical opening that is easily exploited by the need for having adjuncts at the ready to deal with last minute course changes. Although adjuncts may have been conceived as a stop-gap measure, their over-reliance

has brought the stop-gap mentality to the corporate university. Get the grade and move on. In the meantime, the adjunct repeats the same practice the following semester.

There is more than meets the eye regarding the common trope of the corporate university. This trope usually involves caricatures of a battle between good educators fighting for the university to maintain its individualist spirit versus bad administrators cutting costs by hiring adjuncts and closing programs (Ruth 84). Jennifer Ruth turns the spotlight inward by noting that chairpersons and full-time tenured professors have a significant role to play in the corporatization of the university by focusing on their own self-interest through the embracing of exploited adjuncts and the "woe is me" attitude of chairpersons and professors in their belief that they are increasingly exploited, overworked and underpaid. As Ruth, a former humanities department chairperson at a western state college, writes

> One major reason we've [Chairpersons and tenured Professors] been helpless to stanch the erosion of tenure is surely that we became attached to the idea of our own helplessness [i.e., no political avenues]. We became capable of picking up the phone and calling an adjunct the day before a term begins while simultaneously believing that *we* are the hapless victims of the corporate university (64).

Departments, especially in the humanities, have to compete for scarce resources; to keep their departments afloat and provide new courses as well as enough sections of required courses so those majors can graduate. The corporatization of the university, with its constant ethos of profit and saving money, becomes part of the mindset of those

educators with tenure, who, although with academic freedom, are themselves disenfranchised by relying on corporate actions (such as using disenfranchised adjuncts) to support their own academic endeavors. To focus on a tangible foil to represent the university, such as administrators, chairpersons and educators forget that they all are feeding from the same trough. The corporate university is a *mindset*, not solely an invasion from the outside. Times change, attitudes change, ideas change, and the reprehensible become pragmatic. As Ruth notes, "Of course, had the subpar working conditions been imposed in one fell swoop or been imposed on all of us, we would have understood what we were up against. But it happened over time and it happened to some of us while others of us remained comfortable" (61). The *theory* behind the corporatization of the university may not be readily apparent as most of the actors in this play are (or think they are) fighting for scraps.

In fact, the true essence of academic freedom has not been utilized by the tenured professors, which enables the continued corporatization of the university. Ruth notes the untapped agency the tenured have in utilizing a voice in how departments are run based on a fear of politics. She states:

> I believe we need to fight for our identities as *professionals* in order to retain (or regain) our autonomy and our empowered positions vis-à-vis administrators... The flip side of this empowerment is, of course, responsibility. If we have power in how things play out, then we are also accountable for how they play out. Again, *we* make the calls to hire adjuncts. We write and sign these contracts. We propose—or don't propose— motions in the Faculty Senate to reverse the

> proportion of on-track to off-track faculty. On our Undergraduate and Graduate committees, we approve—or don't approve—a curriculum that will run on contingent labor. (82)

If full-time, tenured faculty value academic freedom in writing and research, their academic freedom is contingent on the freedom to concern themselves with the other side of "academic" -- the causation in those external actions that directly factor into their ability to competently profess. Academic freedom has to move from the individualistic sphere to a community based sphere, where those with tenure safeguards can attempt to frame the role of the professoriate. However, thinking about the long arc of history is difficult when the professor, in utilizing their own academic freedom to run a new course, comes up against the fiscal reality that eventually the course may be staffed by those without academic freedom. This could then lead to new theories in the course being stilted because adjuncts may be hesitant about going beyond disciplinary traditions as a result of their lack of employment protection.

Also, for the chairperson who refuses to sign adjunct contracts and demands that nearly all lines are tenure tracked, the chairperson may not be long in that role, regardless of tenure. Again, this edict will tangibly come down from above (the dean, provost, etc.) but what Ruth is positing, and what makes sense in the larger sphere of the corporate-adjunct partnership, is that a piecemeal approach to counter the increasing lack of academic freedom in the university by the exponential use of adjuncts and simultaneous department limitations because of never-ending "budgetary constraints" fails to fully grasp a shift in *understanding* that is needed at a system-wide level. Unfortunately, this

will require a lot of work and some confrontations that would be unpleasant at best and highly disruptive to the professor at worst. There are no easy answers.

The adjunct is a part of this corporate university ethos. Alan K. Chen notes "some universities are hiring more faculty members on long-term contracts and more part-time faculty, instead of tenure-track faculty. This suggests that internal institutional processes that are relied upon to ensure freedom for traditional faculty may not always be helpful in protecting academic freedom" (972). The adjunct is a logical part of the corporate university model -- expending low cost and the same benefit as a full-time tenured professor. The ideal of academic freedom results in the corporate university not running as smoothly as it should. To have adjuncts free to explore research or follow theories in class that may now or in the future cause disruptions can result in less funding if the public or government officials highlight the adjunct's actions. Making sure to have as many adjunct and non-tenure track educators as possible can, in the corporate universities view, save money by paying them less while still doing as much labor as a full-time tenured professor. Perhaps adjuncts will produce even more labor since they will fear for their jobs. Also, it will keep them on an (invisible) leash so they know not to stray too far from the university thought processes.

As Chris DeMaske notes, the increase in adjunct use "make contingent faculty vulnerable to the increasing political pressures, but also it weakens the fabric of the university itself. Contingent faculty have to fear retribution much more than their tenured counterparts and they also lack the same respect and authority on campus in terms of the university as a whole" (39). It is institutionally unlikely that adjuncts can be fully

embraced into the university sphere of research since they lack standing and employment security. The corporate university begins to look like an intellectual factory with adjuncts who, with other commitments, "drop some knowledge" but usually can't stay around after class to help the students (or the university) foster an interest in helping the knowledge base grow. The students are off to another adjunct's "snapshot" in another discipline (or perhaps the same discipline, which is additionally sad), and the potential scholarship remains just that -- potential. The student takes what she or he needs to pass, and perhaps nothing more.

The corporatization of the academy is even more pronounced than the effects of corporatization in the private sector because of the deep thinking that is prized in universities. Cary Nelson notes:

> [e]mployment insecurity is, to be sure, a widespread feature of a globalized corporate economy. Neoliberal dogma insists that all forms of job security are passé, that market forces will reshape employment continually, and that people as a result can expect to change careers many times over the course of their lives. But the jobs available in these fragmented careers [adjunct and non-tenure track teaching] are often not of comparable quality (82).

The structural change that the corporatization of the university has brought about has led to the permanence of a feature that goes against the *idea* of the university. Non-academic positions, even temporary (and exploitative) are within the fiber of neo-liberal dogma; those systems (corporations) are set up to produce the best outcome for the employers. Ideas such as shared governance, tenure and freedom of disciplinary thought may not

"translate" in a hierarchical corporate structure. Knowledge is in service of profit to the employer, not necessarily the larger society. The corporate worker can improve their lot by finding employment somewhere else that improves their standing in an individualistic sense and provides *individual* growth. By transporting the corporate worker's transactional approach to academia, which by its nature is not wholly economic in its outcomes but is instead more communal in nature, the structure of academia is bound to be cheapened and eventually collapse. If the educator has no stake in the university (theoretically put forth in the university mission statement) because of a lack of job security, no academic freedom, and no opportunity to participate in shared governance (not to mention the lack of health insurance or pensions), she or he is a fragmented work-for-hire, a stop-gap measure that provides no worth to the overall mission of the university.

Unlike the individual growth of a corporate employee, the adjunct, after a while, will not even be granted that same individualistic growth of a non-academic employer. For example, the English adjunct will first be given a course that is new to them, such as Freshman Composition 1. After learning about the course, applying the knowledge, and growing in their pedagogical and disciplinary abilities, they will most probably teach...Freshman Composition 1 *again*. It may be alternated with Freshman Composition 2 or an Introduction to Literature course, but overall the adjunct's purpose as a stop-gap measure makes their role one of functionality as opposed to growth, even in an individualistic sense. This is a harsh assessment of adjuncts and non-tenured educators (and graduate instructors to a lesser extent, since theoretically their teaching is a part of their growth as graduate students, but unfortunately many universities use graduate

students first and foremost as cheap labor, thereby creating an even lower level of indentured servitude), but the large majority of those dipping their toes into the university pool without having the ability to be fully immersed will understand the disjointedness of their existence. And that is exactly what it is, an *existence*.

Even more exploited than the adjunct are the adjunct's students, as Nelson notes (85). The students are cheated out of an educator who has the full institutional support of the university to pursue research that could expand the students knowledge base, address unique theories in class that challenge disciplinary dogma, advocate for her or his students needs in governing bodies, and spend time with the students on campus after class to clarify in-class concepts. Unfortunately, the neo-liberal policies that exploit non-academic employees will have more far reaching effects in the corporate university. The graduating students will bear the brunt of the effects of the corporate university in what they *won't know* as they apply their knowledge to the public in the real world. This can be assumed if a good amount of their classes are taught by *the othered*.

The adjunct that speaks up may be viewed as disruptive in the corporate university. In a discussion about academic freedom for adjuncts, Eva Swindler writes

> Our speech is disruptive because we adjuncts raise issues that themselves are unwanted and disruptive. Do we need to challenge the definition of disruption or do we rather need to create a political situation in which the truths about the hierarchy and controlling values of academia are confronted and adjunct speech is valued because adjuncts are seen as central to reclaiming academia from the corporate agenda?

Adjuncts are a neat fit in the corporate university – low pay, willing to teach introductory courses, and not cause a stir about either their employment conditions or less-traditional disciplinary ideas. Once the adjunct begins to question their conditions and especially what the university deems as acceptable knowledge, they no longer fit neatly in the corporate university. Their corporate "worth" is their powerlessness; lacking academic freedom and meaningful due process protections, they will not complain. The adjunct speaking, especially in a corporate university, is similar to a bleating sheep -- with no "position" in the hierarchical university structure; she or he can be ignored (and not re-hired).

The corporate university benefits from anti-unionism and anti-intellectualism. Due process for adjuncts is viewed as an anathema to those ideas. Joel Westheimer argues:

> …the hiring of part-time and clinical faculty with no time for scholarly inquiry and little job security are…threats to both scholarly inquiry and university democracy. Anti-intellectualism [which Westheimer earlier defines as research that promotes the financial and hierarchical health of the administration] and anti-unionism are not opposites but rather reinforce each other. In fact, in the corporate university, due process protections afforded by faculty unions may be the best way to protect free and independent scholarly inquiry. (135)

The adjunct's worth is not in her or his intellectual growth or research attributes, but solely in her or his ability to fill a need (i.e., "at the last minute" teach a section that does not have a teacher). By not providing due process protections in which the adjunct's

worth is measured more in relation to their disciplinary competence, the corporate university benefits from the adjunct that does not over-think things or place too much stock in what they are actually teaching. Functionality is the corporate university's version of intellect.

The Corporate University and Adjunctification through Online Learning

An interesting outlook involves the use of adjuncts in online classes. In commenting on the corporate university, David Schultz notes

> Corporatization accelerated with the growth of online classes, and especially with the emergence of for-profit colleges and universities. In many online programs, a specialist designs the curriculum for courses and sells it to a college or university, which then hires adjuncts to deliver the canned class.

Shultz's use of the term "canned class" is instructive here. Online courses presumably have less over-head than a typical in-person course. The corporate university, by streamlining knowledge in a "more straightforward" manner with no-frills, supports the ethos of the corporate university. The adjunct fits nicely into this milieu since her or his worth is one of functionality – everything has been created for the adjunct to implement without the adjunct's innovations and interpretations of the curriculum necessary. Both the online course and the adjunct with no employment security are primarily viewed as cost-effective measures to keep the system running. Granted, this is not always the case; many adjuncts can contribute their own expertise when teaching online courses at for-profit and not-for profit colleges. However, overall the ethos of an online course and an

adjunct are similar. The "online course" and the "adjunct" are systems that deliver a product. Online courses do have tremendous worth with an endless array of information, communication, and convenience attributes. But for the corporate university, functionality may be the overriding reason, which is one of the reasons for adjunctification. In-person courses and the tenured professor are relics of a bygone era in which intellect has been re-defined, perhaps for pragmatic reasons.

The adjunct's lack of institutional ties is helpful in utilizing online courses. In a discussion about the functionality of outsourcing parts of instruction through digital means, Jenny S. Bossaller and Jenna Kammer note

> A university might outsource a variety of products and services. We can think of this as a continuum. On one end of the continuum, all educational materials are prepared and taught locally to students who reside in buildings maintained by university employees. On the other end of the continuum, students are scattered throughout the world, taught by adjuncts without physical ties to their institution, using materials prepared by contracted companies (5).

The "invisibility" of the adjunct and the "invisibility" of the online course align with the corporate university mindset. Adjuncts are used as a part of the streamlining of the institution -- by not having a space in their university, their identity (including their research pursuits and presence on a physical campus) is fluid. Online courses can have that same type of fluidity; the *presence* of the educator may not be apparent. It can become more mechanical, especially if the university plans to use adjuncts solely for online endeavors. Online courses are valuable provided there is institutional support – the

educator can be familiar because of her or his identity in the university. The adjunct is given the online course because of their competence and knowledge base. But if the corporate university conceives of online learning as a solely adjunct endeavor because of cost maintenance (i.e., adjuncts are given online courses solely because of the adjunct's economic usefulness in an online education paradigm and lack of employment protection) the adjunct even becomes further removed from the institution. Even if the adjunct employs video chats, the adjunct is not "there"; their worth is actually *limited* through the digital medium because of the lack of institutional identification, which includes the assumption of academic freedom.

The corporatization and digitization of the university is viewed by some as going hand in hand (McCluskey and Winter, *Idea*, *qtd* in McCluskey and Winter, *Academic Freedom*). Frank McCluskey and Melanie Winter note "The digital revolution has accelerated a decline in faculty power and necessitated a new class of professional managers that has been empowered by their digital and managerial expertise" (*Idea*, 104). As the university becomes digitized, bureaucrats become replaced by technocrats. The difference may seem negligible, but it is a paradigm shift in the functionality of the university. The professor loses control of their platform, the classroom. The space for the professor to perform becomes co-opted by a space completely out of her or his control. The responsibility for managing that space comes from an individual or department whose primary goal is functionality.

Adjuncts accelerate this loss of faculty power in the digitized corporate university. McCluskey and Winter state

> The application of digital technologies and the impact they have had on university culture is one reason why faculty power has declined. The rise in the percentage of online courses and the increased percentage of adjunct faculty teaching in universities may also be related to this power shift (Schrecker 2010) (*Idea* 36).

By "programming" adjuncts -- which are un-tethered -- to a learning tool that is in a sense un-tethered to the traditional university function, it is easier for the corporate university ethos to take hold. The programmer becomes the point-person for designing the interface, how the material is presented (and perhaps processed by the student) and the evaluations used. Experimenting with different modalities of learning can become hamstrung, especially if one instructional application is required. An adjunct fits nicely into this structure.

In turn the adjunct, which already has no academic freedom, can have even less than nothing in a digitized space. McCluskey and Winter argue "As opposed to the physical classroom, there is a physical record of every transaction that takes place in the classroom…This kind of data collection can present a challenge to academic freedom. A digital record that can be mapped, analyzed and compared with others has now replaced the individual performance of the craftsman" (*Idea* 114). For the hesitation the adjunct may have in presenting an idea in class, she or he is more mindful of the documentation of that idea which can be taken out of context, especially with no employment protection. Following the standard curriculum is the safer choice, which fits nicely into the idea of the corporate university.

Adjunctification in a Corporate Religious University

The adjunct's exploitation in the corporate university is not limited to secular universities. In a discussion of how the mission of catholic universities can contrast with the ethos of the corporate university, Rev. Wilson D. Miscamble notes:

> Let me offer two proposals. If these were implemented in concert by American Catholic colleges and universities, they would have a real impact and be a serious expression of the institutions' fidelity to their mission instead of to the market…Catholic schools, especially those with significant financial resources, should undertake to provide a "living wage" for their lowest paid employees. And as a matter of urgency, they should take the lead in American higher education in providing just compensation for adjunct faculty. The exploitation of such folk should end on Catholic campuses. (17)

If a religious university "sells itself" on the ideals of the religion, it should hold to those ideas for *all* the individuals who take part in that endeavor, from the students, to staff, to faculty (as an aside, religious universities may not actually be taking directives from the actual religious bureaucracy; religious universities can be run by secular boards of trustees whose members may ascribe to a different religion or no religion). If adjuncts are in service to the university, the ethos of the religion – which includes free inquiry and freedom from exploitation – should logically follow, without a fear of termination for any reason or no reason.

The ethos of a religious university can be found in its mission statement. For example, one university mission statement notes:

> As a university, we commit ourselves to academic excellence and the pursuit of wisdom, which flows from free inquiry, religious values, and human experience… We embrace the Judeo-Christian ideals of respect for the rights and dignity of every person and each individual's responsibility for the world in which we live. We commit ourselves to create a climate patterned on the life and teaching of Jesus Christ as embodied in the traditions and practices of the Roman Catholic Church. (*St. John's University*)

Adjuncts do not have the academic freedom to freely inquire; they are stilted by their lack of job security (which in turn deprives the students of free inquiry). The dignity of adjuncts includes just compensation -- they can believe in the religious ethos but live as secular members of their society. In the United States, the secular society follows a capitalist system. The religious university fully understands that by providing a low level of compensation in which the adjunct has to worry about food and shelter or work several jobs to survive, they are not respecting the dignity of their adjuncts. It is exploitation, rationalized in the corporate speak of budgetary limitations but in reality taking advantage of marketplace dynamics. If the religious university truly believed in the Judeo-Christian ethic, caring for *all* the members of the flock would be of paramount importance.

Conclusion

For generations, adjunct educators have not been afforded academic freedom. This is typified in two seminal U.S. Supreme Court cases, *Roth* and *Sindermann*, in which the adjunct's lack of academic freedom is demonstrated by a lack of due process protection in being *acknowledged* as valued educators. The corporate university, with its primary goal of profit over intellectual pursuits, reifies the idea of the "invisible" adjunct. In fact, these lack of legal protections in the corporate university which places functionality over intellectual worth, speaks to this precariousness among all educators in this endeavor.

CHAPTER 4: ACADEMIC FREEDOM AND THE WAR ON TERROR

Chapter Abstract

Since 9-11 and a rebirth of our nation's anxiety that virtually any constitutional freedom can be given up in the name of national security, our nation's faculty have felt a similar pressure on their freedom to pursue ideas in the classroom. Like the twentieth-century attacks on faculty teaching and conduct that occurred during the World Wars, the Cold War, and Vietnam, many faculty today have faced censure and firing because of controversial statements they make in class, in traditional media, and most recently on social media. In this chapter I study a 2010 Supreme Court decision, *Holder v. Humanitarian Law Project* (hereafter called *HLP*), that prohibits any sort of teaching to organizations deemed "terrorist," a ruling with potentially dire consequences for the evaluation of any sort of teaching that the public finds questionable. In this political context, I also examine the cases of two faculty removed from their tenured jobs on the basis of controversial statements they made in traditional and social media. In sum, this chapter argues that even though teaching may be controversial in all of these cases, our society is best served by continuing to allow faculty to speak freely and make verbal blunders without fearing for their jobs. However, because of the current paranoid political climate generated since 9-11, as well as our country's increasing impatience with the excesses of social media, faculty are increasingly being held accountable and our education system is being steadily undermined.

Specifically, I analyze academic freedom in the context of recent cases since the American War on Terror after 9-11, focusing on the dismissal of two faculty, Ward Churchill and Steven Salaida, whose essays and social media posts views lost them their

jobs at public universities. I argue that faculty speech rights should always be protected by the concept of a "marketplace of ideas" where faculty should not be fired for controversial speech, both within and outside of the classroom. Unfortunately, faculty who declare controversial ideas in public (such as social media or in popular publication platforms) are currently very vulnerable to censure, and perhaps our sense of academic freedom is mistakenly changing because we can no longer decide the difference between intramural and extramural expression. (i.e.: one's private thoughts are not so private on social media). As a result, we are witnessing new waves of institutional censure of faculty as well as a powerful "self-censure" of academic freedom by academics that fear for their jobs. I begin with an explanation of the 2010 court ruling on *HLP*, which found that any group "teaching" a federally-labeled "terrorist" group was materially supporting terrorism itself. This important ruling has powerful effects on the act of teaching anyone (such as criminals), as well as an interesting evasion of First Amendment freedom of speech because *HLP* finds speech can be used as a weapon. *HLP* underscores the vulnerability of "teaching" to be attacked as a malicious or nefarious act, which is also illustrated in the Churchill and Salaida cases.

It is essential that knowledge-making through debate and discussion is not completely quashed within the American academy. The War on Terror since 9/11 has witnessed the firing of two professors without much respect for academic freedom, and this chapter will focus on the larger issues involving these cases. The threat to faculty's professional security is demonstrated especially through new media that can increase participation in academic discussions, and the new truths borne of those fruits that benefit society. Recently, politics have been cramping academic freedom just like it did in

Vietnam, the Cold War and World War I. The consequences of a type of “exception” are a virulent strain of anti-intellectualism in which the free inquiry of ideas takes a back seat to security.

First, in my discussion of *HLP*, I will draw on Andrew Moshirnia's critique of the "material support" ruling where the court argued that faculty who teach people on the terrorism watch list are "aiding" terrorism, even if they are teaching them not to engage in terrorism. Particularly useful to my argument is Moshirnia's claim that a slippery slope can be created in which eventually a lack of research about groups who the government deems terrorist can result in the suppression of knowledge that could benefit the public. A lack of informed debate about the group deemed terroristic can result in an intellectual black hole in how to counter these groups. According to Moshirnia, the principal danger of the *HLP* ruling is that academic inquiry will be thwarted before it begins, and because all teaching will be judged according to its potential threat to society even before it is vocalized, the growth of human knowledge will stall.

Second, I analyze the firing of Churchill and Salaita, by looking at different kinds of documents other than court cases. Churchill and Salaita were terminated because of their incendiary comments (the former called 9/11 victims "little Eichmans", and the latter tweeted for Israeli children to be kidnapped). In both cases, they were not fired directly for the comments they made, but terminated for other reasons. Churchill was found guilty of poorly footnoted scholarship and self-plagiarism, and an offer of employment to Salaita was rescinded because of his lack of “civility”. I will draw on the critiques by Robert O'Neil, as well as Henry Reichman, Joan Wallach Scott, and Hans-Joerg Tiede, who argue that self-censorship can result from professors being questioned

about their academic speech, even if the speech is in pursuit of their discipline. Particularly useful to my argument is their claim that universities will tend to challenge a professor's speech indirectly through sanctioning other aspects of their scholarship and questioning their civility.

In both cases, there was not a direct challenge to the content of their speech. Rather, both universities attacked the faculty on other grounds: one on his previous scholarship; the other on his alleged lack of "civility" as a colleague. Increasingly, American universities are attacking the content of their faculty's speech and teaching by indirect means. I argue that by using procedural and indirect means to oust those deemed hateful while still claiming that academic freedom is not at issue creates a Cold-War type of self-censorship over the entire academy, in which there is no true academic freedom. The controversial ideas are not debated and discussed; the end result is an environment of repression. Although academic freedom is "political" and controversial, it still deserves the benefit of the doubt as the only means of nurturing a healthy future for a free and open society.

Education as "Material Support" for Terrorism in *Holder v. Humanitarian Law Project*

Teaching can be a crime in some contexts, depending on how teaching is defined. In *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) the U.S. Supreme Court ruled on the thorny issue of non-governmental organizations teaching U.S. designated terrorist organizations about how to engage in peaceful resolutions. The court held that a non-governmental organization's teaching and training of a U.S. designated terrorist group would constitute "*material support"* for terrorism and is not a violation of the First

Amendment's freedom of speech to prohibit such teaching. Although the setting was not a formal classroom, one wonders if lower courts could attempt to move the goalposts in re-defining the concept of academic freedom based on the characteristics of the audience, which would not bode well for an open interpretation of academic freedom.

The background of the case involved a fairly obscure player on the horizon of U.S. security who was nonetheless deemed as a supporter of terror because of U.S. diplomatic relations with Turkey. In 1997, the U.S. designated the Kurdistan Workers Party (the PKK) a terrorist organization (9). Under U.S. law it is a crime to provide material support to a terrorist organization (18 USCS § 2339B). The court essentially defined material support as training that actively involves teaching instead of providing general information (18 USCS § 2339A). The Humanitarian Law Project (HLP) was a non-governmental organization with a focus on human rights and associated with the United Nations (Tuley 588).

According to the court, the HLP wanted to "(1) 'train members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes'; (2) 'engag[e] in political advocacy on behalf of Kurds who live in Turkey'; and (3) 'teach PKK members how to petition various representative bodies such as the United Nations for relief'" (14). However, the HLP feared that their training and teaching the PKK would constitute a crime under the definition of providing material support to terrorists, and petitioned the legal system for clarity. As an aside, there were other individuals petitioning the legal system as well based on another organization designated as terrorists (the Liberation Tigers of Tamil Eelam or LTTE), but by the time of *HLP* their issue was

essentially moot since they were defeated militarily by Sri Lanka and thus had no role in the country.

With regard to the teaching and training aspect of providing “material support” to terrorism, the court noted that the statute defined training as "instruction of teaching designed to impart a specific skill" and expert advice or assistance, meaning "advice or assistance derived from scientific, technical or other specialized knowledge’” (21). The court stated those terms were not vague, and then determined that the activities of the HLP fell under these definitions. By placing teaching within this context, the court put the HLP on notice that the concept of teaching, even for non-violent means, would not be defined as teaching if the “students” are classified by the government as *bad actors*. Although the PKK are bad actors (in Turkey’s eyes), the court noted the act of teaching has limits, and in fact will not be viewed as teaching in a peaceful sense.

With regard to the freedom of speech aspect of the case, the court framed the HLP’s activities as support to terrorists, not a fundamental right of speech via teaching. Speech here was viewed as a weapon. The court questioned “whether the Government may prohibit what plaintiffs want to do--provide material support to the PKK and LTTE in the form of speech” (28). The court applied speech in a “functional” manner. The speech was not framed in the form of education or training for peaceful means, but as a tool to be used by groups designated as terrorist. The distinction is slight, but the court’s view of speech was not in an “educative” mode; the HLP had argued that the purpose of the speech was to assist the PKK in peaceful resolution strategies.

In fact, *HLP* viewed the issue of freedom of speech as more narrow than framed by the parties (28). The court defined the issue of speech via teaching as a narrow one.

The court does not explicitly state that the classroom is a special concern of the First Amendment (see *Keyshian*, which I discuss in Chapter 1). There is no mention of academic freedom in the decision, but a fundamental concept of academic freedom (teaching) is an aspect of *HLP*.

The court viewed teaching in a narrow context as nefarious, arguing that the HLP were aiding the terrorist organization to support their crimes. The court analyzed the first aspect of the HLP's argument that dealt with educating, "[to]train members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes" (36). In describing how the terrorist organization could use information to their advantage, the court stated that any instruction to a terrorist organization, even how to pursue legal behavior, would constitute terrorism:

> It is wholly foreseeable that the PKK could use the "specific skill[s]" that plaintiffs propose to impart…as part of a broader strategy to promote terrorism. The PKK could, for example, pursue peaceful negotiation as a means of buying time to recover from short-term setbacks, lulling opponents into complacency, and ultimately preparing for renewed attacks...A foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt. This possibility is real, not remote. (36)

By criticizing the teacher for how to know how the knowledge is *received*, the problem is that future courts can critique the messenger -- such as the educator in *HLP*.

Although here the "students" are terrorists, it is not a significant leap for an educator to be accused of wrongdoing when teaching students information that the

student can use for nefarious aims. The court's reasoning is twofold: first, students are receptors of knowledge and easily pliable, and therefore their professors can easily influence them. For example, if a professor gives a lesson using information outside of the mainstream of academic thought and the student commits an act using that knowledge, the professor can be told she or he should have known that information could be used in a bad way. The educator could plausibly be viewed as planting a bad seed. If this occurs in a population that has been demonized, it is plausible that stereotypes would unfortunately lead some to wrongly generalize that the professor should have known that teaching about certain information would lead to a bad result.

Second, the court parsed a term that the HLP used in describing the effect of teaching. The court analyzed the second aspect of the HLP's argument that dealt with educating, to "teach PKK members how to petition various representative bodies such as the United Nations for relief" (37). In describing how relief is a crime under the statute, the court wrote that any education or monetary aid provided to these groups could be used for nefarious purposes:

> The Government acts within First Amendment strictures in banning this proposed speech because it teaches the organization how to acquire "relief," which plaintiffs never define with any specificity, and which could readily include monetary aid. Indeed, earlier in this litigation, plaintiffs sought to teach the LTTE [The Liberation Tigers of Tamil Eelam; a Sri Lankan militant organization which used violence in a failed attempt to create an independent Tamil state called Tamil Eelam in the northeast section of the island] "to present claims for tsunami-related aid to mediators and international bodies," which naturally included monetary

> relief. Money is fungible…and Congress logically concluded that money a terrorist group such as the PKK obtains using the techniques plaintiffs propose to teach could be redirected to funding the group's violent activities. (37)

The court equated the benefits that flowed from teaching the organization how to advocate for them-selves with advocating for funds that could be used for violence. Note how the court generalizes an outcome of teaching: relief.

However, relief does not "tell the story" of what teachers do. Relief sounds transactional and boring; the term knowledge sounds more valuable and free flowing (and less nefarious). Teachers introduce the information into the public sphere. They cannot control where the information "goes". The court predicts the term "relief" will result in monetary support, which is a crime, without much in the way of a logical train of thought. The court uses another party to the case (the LTTE) to "make the case" that teaching naturally leads to monetary support. Many professors could be sanctioned if information they brought forth is assumed at the outset to have a hidden agenda "to read into" where information can lead. This would obviously cause educators to carefully limit what they teach. Of course, the expectation is that students in a classroom will not use their knowledge to acquire funds to commit a crime. However, if *HLP's* logic is applied to normal teaching, a professor of literary theory might be indicted for teaching semiotic theory used in terrorist activities.

At the very least, the court does not appear to relegate all future interpretations of the material-support statute regarding teaching to the same fate. The court states that this is not a freedom of speech issue, nor is it to be used domestically:

> All this is not to say that any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny. It is also not to say that any other statute relating to speech and terrorism would satisfy the First Amendment. In particular, we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations. We also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations. We simply hold that, in prohibiting the particular forms of support that plaintiffs seek to provide to foreign terrorist groups, § 2339B does not violate the freedom of speech. (39)

In these crucial restrictions about the scope of their ruling, the Court appears to recognize where *HLP's* logic could lead if taken a bit too far. If the government instituted a separate statute regarding some speech that can be classified as "terroristic" in some way, it would obviously have repercussions for all, especially for educators who deal in theories and hypothetical scenarios. It would not take long for professors, especially one who uses controversial materials, to find herself or himself under scrutiny. For instance, the English professor who wants to use works that depict real forms of violence, the History professor who wants to analyze successful tactics of guerilla or terrorist organizations in world history, or the Biology professor who wants to analyze theories related to bioterrorism.

Interestingly, the Court would have less of a problem with an individual educating a terrorist organization in the United States rather than an individual teaching a terrorist organization in using peaceful strategies outside of the United States because of the

problems this could directly cause for educators. Perhaps the Court views teaching as something that can be manipulated more so than advocacy, which involves working within set structures (such as governments). Also, interesting is the fact that the Court was not willing to suggest that the material support on teaching ban should extend to domestic organizations. In contrast to a foreign organization deemed as terroristic, placing sanctions on domestic organizations begins to inch closer to the problems facing a university -- giving lessons to a non-profit organization could more easily "look like" a lesson a professor could give to university students.

The dissent noted the general nature of the majority's argument. By placing the onus on the unpredictable, what the students may do with the knowledge is a bad precedent. The dissent noted the precariousness of the government in privileging content:

> [T]he risk that those who are taught will put otherwise innocent speech or knowledge to bad use is omnipresent, at least where that risk rests on little more than (even informed) speculation. Hence to accept this kind of argument without more and to apply it to the teaching of a subject such as international human rights law is to adopt a rule of law that, contrary to the Constitution's text and First Amendment precedent, *would automatically forbid the teaching of any subject in a case where national security interests conflict with the First Amendment* [emphasis added]. The Constitution does not allow all such conflicts to be decided in the Government's favor. (53)

If applied to academia, entire subjects deemed threatening would be off limit to teach, since any phrase or idea related to the subject could be viewed by another as fodder to commit a crime. "The fear" is lurking and easily stifles academic freedom if classroom

conversations are steered in less controversial directions or ideas that students produce are not given the same agency as less "head-turning" ideas. Educators in any discipline introducing controversial or non-mainstream ideas will tread carefully, especially if it is assumed that students are "the others" to be walled off and not to be fully trusted in the learning experiment. Picture a professor behind a lectern lecturing straight from a dry text without affording any nuance for an entire lesson and leaving immediately thereafter without taking questions, failing to assist her or his students in "making meaning" of ideas. If *HLP* reached the classroom, the above scenario could be a common outcome.

In an interesting way, the dissent states that all teaching involves "co-ordination" and hence the majority's main objection cannot be sorted from regular teaching:

> The majority…cannot limit the scope of its arguments through its claim that the plaintiffs remain free to engage in the protected activity as long as it is not "coordinated." That is because there is no practical way to organize classes for a group (say, wishing to learn about human rights law) without "coordination." Nor can the majority limit the scope of its argument by pointing to some special limiting circumstance present here. (53)

Here, the dissent demonstrates how the majority and dissent define the space the HLP were working in. The majority sees the space as a base of operations with the purpose of providing coordination for attacks, while the dissent sees the space as a classroom without the proposal of coordination as a catalyst for violence. The majority views almost any act of teaching here as part of a criminal enterprise, while the dissent views the act as a learning experience. Of course, this does not fit neatly fit in a classroom dynamic since the "students" are terrorists, but if *HLP's* legal reasoning was applied to a typical

professor/student dynamic that dealt with shocking subject matter the professor and her or his students could be woefully doomed. The classroom dynamic would be criminalized -- the concept of learning becomes irrelevant when the whole endeavor is viewed as having a hidden agenda.

Critique of *HLP's* Interpretation of Educational Agency: Putting on the Blinders

As Andrew Moshirnia argues, *HLP's* view of teaching dangerously limits the flow of ideas, harmless or otherwise. If the court can restrict speech under a threat of terrorism, the venues in which speech could be restricted are vast. In a discussion of terrorist-related speech and the new legal doctrine that came out of *HLP*, Moshirnia notes that not only will the speech stifle advocates of terrorism but "these positions will go much further, criminalizing otherwise protected speech and stemming the flow of ideas" (430). Untested theories need space to formulate and become something substantive. If an idea at the outset is criminalized, it becomes dogma framed by an outside entity without any meaningful discussion.

When the court equated the coordination of the speech activity with a nefarious effect, it has ramifications for actors beyond those working with terrorist groups. Moshirnia notes "If the Government may prosecute individuals who have interacted with terrorists and produced 'coordinated' speech, then the Government may threaten journalists, academics, and humanitarian workers" (430). Here, if a professor plans a lesson on an issue related to terrorism (in any manifestation) then the class itself is considered a criminal enterprise. In the government's eyes, the weapon becomes the classroom; not a safe space for thought and reason but a haven in a legal sense. The high ideal of the university as a place to benefit society looks like the opposite in this scenario.

In contrast to the HLP ruling, I argue the classroom is a safe place to test ideas, even bad ones. Moshirnia states "In effect, the Government has announced a new restrictive approach to speech related to terrorism in the name of security, while simultaneously ignoring the intelligence value of that speech" (430). Professors propose hypothetical ideas to an audience of students. The students may act on that information after discussion and elaboration which is what academia *does*.

A lack of scholarship during the Vietnam War illustrates Moshirnia's argument that the government can restrict free thought. A survey by the *New York Times* in 1970 noted that there was "no scholar in the United States who devotes a major portion of his time to studying current affairs in North Vietnam…and there is no scholar specializing in Vietnamese studies with a tenured professorship at any American university" ("Academic"). Although the reason given at the time was a lack of interest in researching Vietnam, East Asian Research Center Professor John K. Fairbank of Harvard University noted "It has meant misjudgment of the enemy, a very serious problem. If we had known about the Vietnamese the way we knew about Britain, we would have known that a few months of bombing would not make them give up" ("Academic").

Ellen Schecker also suggested the dangers of a lack of scholarship in relation to McCarthyism's effect on Vietnamese research:

> [I]t is often hard to separate the specifically *academic* effects of McCarthyism from its more general impact. Thus, for example, there is considerable speculation that the devastating effects of the IPR [Institute of Pacific Relations] hearings on the field of East Asian Studies made it hard for American policy-makers to get realistic advice about that part of the world. Naturally, greater access to better

> scholarship would not by itself have prevented the Vietnam War, but there is no doubt that the legacy of McCarthyism in the academy and elsewhere did make it difficult for the government to act wisely in Asia. (*No Ivory Tower* 338).

If the reasoning by the court in *HLP* led to a fear of academics researching terrorism, the end result could be similar to Fairbank's and Schecker's conclusion that the government's military conflicts shape civilian politics. Fortunately, there is a lot of scholarship and teaching on terrorism groups and their ideologies (Rada). As for direct methods being used in researching these groups, such as being embedded with one of them, being limited over a fear of prosecution may be more difficult to ascertain.

For the reasons Moshirnia gives, this dissertation argues that lively debate is the keystone of an informed populace. It is the crux of the concept a "marketplace of ideas" (as discussed in Chapter 3). But if the instinct is to shut down any discussion of a terrorist group the public is left with a vacuum in which the only information brought forth are general narratives from interested parties, leaving the populace with a high level of ignorance. The prospect of the citizenry being kept in the dark about even a terrorist organization does not improve their well-being. Moshirnia notes "[c]hilling the speech of journalists, aid workers, and academics does not merely impact a few select professionals; the American public suffers an intangible loss of intellectual freedom. The speech protections of the First Amendment allow for a flourishing marketplace of ideas…" (432). Intellectual freedom is key. To understand an ideology is to examine the ideology through discussion and debate, testing out theories and discarding those that are non-sensical. The discussion actually can demonstrate the "stupidity" of bad ideas.

In fact, restrictions on frank and open discussion can be an impediment to fighting these organizations. Moshirnia notes

> [t]hose who might have communicated to us views that are critical of our foreign policy, might out of an abundance of caution, keep them to themselves. We lose out on these ideas, and the republic suffers as a result. The Government should be wary of disrupting the flow of ideas, especially those ideas that relate to the global war on terror (432).

The public loses out on how the policies put into place may be ineffective, and that better policies may be more fruitful. A global war on terror may never end. This disruption can stifle open and honest discussion of the war of terror among academics. Honest discussions can be uncomfortable, even in an academic setting. However, these discussions help shine a light on the importance on the issue, especially since the dynamic will change over the course of decades.

Openness is a better alternative than having superficial discussions that can be used to rile up emotion to sway public sentiment. Ignorance may be a good tool to limit intelligent, lengthy (and logical) debate but one wonders what would happen if a good amount of the populace awaken to see that the emperor has no clothes. The best version of academic freedom keeps people engaged and constantly questioning the actions of others.

Research may benefit the war effort in a productive way more than hurt it. Moshirnia states:

> Academic papers comprising interviews with a terror organization would provide intelligence agencies with a better understanding of the organization's goals and

> grievances. Similarly, NGO reports, prepared with the cooperation of members of a terror organization, might yield valuable group demographics and thus, information on current fighting strength. Civilian communication that might indirectly reveal terrorist whereabouts or plans would be driven underground. Academics who have collected information on terrorist organizations are also likely to refrain from publishing their findings. (433)

Granted, the government has some agencies that perform some of these functions, but in having academics and other groups who are also familiar with these organizations produce research, this will provide additional insight that could be used (even partially or incidentally) by decision makers to support the war effort. The academy has traditionally played a role in making meaning with their institutional knowledge base and techniques (as well as with new generations of students bringing fresh perspectives). Although universities partner with government agencies to develop strategies related to the war on terror, cases such as *HLP* may prevent even more ideas "brought in" from the outside. It is not too naïve to believe the more knowledge, the better.

Academics typically "translate" between one society and another. If they are forbidden to talk to others, they cannot do their job. David Price, Robert Rubenstein, and Michael Price state:

> Ethnographic writing is in part an act of translation, in which an ethnographer renders understandable to one group of people the cultural logics that underlie the seemingly irrational or incomprehensible activities of another. In public speaking, anthropologists may present their research in such a way as to help their audience see why members of a designated terrorist organization are conducting the kinds

> of activities that they are. If anthropologists fear this act of publicly accounting for a group's actions might be considered 'material support', they may well either cease making such explanations, or find themselves prosecuted for doing so. Such fear could create a climate in which forthright conversation was discouraged, and public discussions of important contemporary issues truncated and forced into a single interpretive structure. (5)

An academic's job is to explain foreign concepts. Hence *HLP's* criminalization of education is too broad ranging. Nuances in arguments and a diversity of views are key in academia. Adding the *HLP* assertion of criminal liability to the teaching of controversial or extreme viewpoints will force most teachers to give up speculative thought. It is less of a headache for the educator to simplify their response, providing a superficial understanding of a complex issue. A superficial understanding of an issue is actually worse than having no understanding of an issue, since it is easier for outsiders to "fill in the blanks" and dupe the populace into a conclusion that can be more self-serving than accurate.

In contrast to the court's opinion in *HLP*, a better outcome results from less regulation of knowledge. In a discussion of state speech regulations over non-academic professions, Claudia Haupt tangentially addresses *HLP* and academic freedom. In acknowledging "the speech interests of professionals speaking to each other are similar to those underlying academic speech" (fn 51), she later notes "Knowledge communities have specialized expertise and are closest to those affected; they must have the freedom to work things out for themselves. The professions as knowledge communities have a fundamental interest in not having the state (or anyone else, for that matter) corrupt or

distort what amounts to the state of the art in their respective fields" (1252). In applying knowledge communities to an academic, the "art" is important here. An academic who researches and educates may have difficulty creating knowledge for their academic community if she or he fears the consequences of transmitting the knowledge. Coming to a new understanding can be messy and convoluted at the start, but the ideal is that eventually the idea is formed into something workable. *HLP*, if taken to its outermost conclusions, represses knowledge communities at the outset by searching for a terroristic thread that can lead to a bad outcome; the potential outcome of discussion is rejected because of its nefarious possibilities.

Problems with "Material Support"

To confuse material support with research about other societies is foolish. Dangers of the "material support" argument outweigh any perceived benefits. When the courts decide what the outcome of an academic conversation is in advance -- even before the discussion has occurred -- academics become suspects. Research by anthropologists may run afoul of the "material support" statute that *HLP* addressed. Michael Price, Robert A. Rubinstein and David H. Price note that the academic work of anthropologists involving contact with nefarious subjects can be interpreted as providing material support to terrorists:

> Ethnographers, for example, might wonder if some of their research activities, which include simple acts of reciprocity that develop in any fieldwork situation -- buying food or supplies, or helping informants in some non-tangible way -- could be construed as providing material support, and put them at risk of prosecution. As a result, they might well self-censor their fieldwork methods, avoiding

> opportunities to collect information of which they might otherwise have taken advantage, and producing a less complete ethnographic picture. (4)

Any aid becomes criminalized.

Similarly, such as when an educator simply follows the classroom conversation in order to "come to" a new understanding, a researcher can let events unfold to "come to" a new understanding. The fear of a bad outcome of a seemingly innocuous action can "poison" the researcher's entire viewpoint and color her or his findings.

In fact, the best subjects of research tend to be those which may not conform to the establishment line of thinking. As Price, Rubenstein, and Price note, anthropologists typically work with marginalized people:

> Despite the increasing interest among anthropologists during the last quarter century in studying elite individuals and groups who wield power in their societies, many, perhaps most, contemporary anthropologists still conduct research with people who are marginalized, or who are at the receiving end of actions of state power. Some of those groups include organizations and individuals resisting state action, or who advocate for radical change in their communities. And for a variety of reasons, including politics, some of them have been designated as 'foreign terrorist organizations' by the United States government. (4)

HLP's vantage point is that of the establishment -- non-violent teaching and research among marginalized people is likely not to "conform". The worst of the worst, denoted as terrorist organizations, are viewed by *HLP* as simply forbidden for the purpose of teaching and research intended to foster non-violence. The viewpoint of the educators

and researchers in teaching about and learning about these violent organizations -- so they can work within the system for change -- may at first blush seem as naïve (aka a tiger will never change his stripes). However, in reality marginalized groups that go against the establishment are not always embraced by academics. *HLP* relies on the U.S. Government's designation of a foreign terrorist organization, but if there is a high level of subjectivity with that designation, and the court's default position is the establishment viewpoint, academics may become unwittingly part of the establishment train of thought by disavowing (or not even acknowledging) the alternative narratives. Even academics might become too suspicious themselves.

In fact, the "higher stature" attributed to the goals of teaching in such U.S. Supreme Court cases as *Keyishian v. Board of Regents of Univ. of State of N. Y.* (in which the court ruled that academic freedom was a special concern of the First Amendment) is nowhere to be found in the court's assessment of teaching in the *HLP* case. As David Cole noted in his article on the perils of First Amendment advocacy based on *HLP*:

> Much lawful advocacy could be linked, at least in the indirect way deemed sufficient in *Humanitarian Law Project*, to wrongdoing by another. Could the state prohibit the provision of job training to gang members on the theory that the skills might make them more effective criminals? Could training in nonviolent mediation be prohibited on the ground that it might "legitimate" the gang, thereby making it more attractive to new members who might commit future crimes? (157)

In Cole's scenarios, the potential for "teaching" gangs to adopt a better life is prohibited from the start. The faulty reasoning of the court in making a hypothetical leap from non-

violent teaching to acts of terrorism is similar to the educator whose teaching is viewed as dangerous in most instances. For the population not given the bureaucratic designation of a terrorist organization, the educator who acknowledges her or his student's flaws (as all humans have flaws), but chooses to work with them runs the risk of censure. However, if the students are predominately Islamic, African-American, or Latinx, with the racist and religion-phobic stereotypes associated with these populations (regarding an inclination to commit terrorist attacks or a higher propensity to commit crimes), law enforcement could initiate some activity based on how an educator's teaching might be perceived by these groups of students. Of course, the law does not formally allow for inquiries based solely on a student's race, religion, or ethnicity. However, if the populace is fearful of an increase in terrorism or an increase in crime, the educator who is teaching non-violent (but perhaps highly controversial) content to these populations might be scrutinized "just in case" to prevent potential criminal acts. First terrorists, then gangs, then the poor, then, who knows?

In these *HLP* scenarios, all teaching becomes suspect. For example, the local mosque in which several of the Islamic students in class attend is known to have an Imam who is a firebrand whose sermons are acutely critical of certain religions or governments. Or, there is a high incidence of gang activity or crime in a predominantly African-American or Latinx area, and several of the students in the educator's class are affiliated with the gang members or known criminal actors in an indirect way.

As in *HLP*, the educators are not teaching their students to commit crimes, but in a highly charged environment, the perception is that these threatening populations using new-found knowledge can result in crimes being committed. It sounds far-fetched, but

HLP allows for government action in any environment based on the "just in case" scenario which includes the classroom. *HLP* does not yet apply to domestic teaching in the U.S. but it could.

Succinctness can be the simplest way to get the gist of a case. In a panel discussion of recent U.S. Supreme Court free speech decisions and the implications of these cases for American society, Susan N. Herman states "Was it, in fact, a violation of the material support laws to teach terrorists how not to be terrorists? Well, the Supreme Court amazingly enough said, 'Yes'. It is a violation of the material support laws" (Morrison et al 804). Although Herman framed the issue by using the term "teach" in a positive light, *HLP* took the view that the teaching was not "teaching" in common parlance but an activity in support of nefarious activities. It is all in the framing of the issue.

In fact, the court could have easily "softened the blow" in implicating teaching as a nefarious activity by focusing more on the intent of the activity. Susan Herman refers to this as the Constitutional Avoidance Doctrine, in which the court will decide a case on a more narrow ground without implicating constitutional safeguards, which can be damaging to civil liberties (809). Herman notes:

> What the Humanitarian Law Project said, and what Justice Breyer thought in his dissent, was that you could use the constitutional avoidance doctrine to not get to the First Amendment doctrine, but what you would have to say is, we are implying a specific intent requirement in the statute. Because if you have a specific intent requirement, if you‘re only going after people giving material support to terrorism who actually intend to support the terrorist‘s activities—as

> opposed to, they‘re trying to teach terrorists not to kill people, or they‘re supporting the nursery school—then you don‘t have a problem. (810)

The court decided that the criminal statute is constitutional. Therefore, every activity listed in the statute -- including teaching -- survives constitutional scrutiny. The court inferred the *act of teaching* is a crime when intended to aid terrorists. The court could have changed the focus of their analysis based on the intent of the actor. Irrespective of the act of teaching, the individual's intent in performing an action to further terrorist activity would be at issue. However, if teaching falls under the intent purview, it opens up future educators to further scrutiny, even if the claim itself is far-fetched and defies common sense.

The context in which the action is viewed is key. Timothy Zick notes, "Expression and association have traditionally been treated as means of persuasion, rather than as potentially dangerous commodities some audience might use to violent ends. By treating words themselves as a form of material support, the Court further blurred the distinction between conduct and expression" (186). The tools of the rhetorician have usually not been viewed as weapons in the hands of the student. If the causal relation between teaching and violence in *HLP* is tenuous outside of a classroom setting, then applying the causal relation standard to a learning community, in which the practice has benefits for the student’s progress, should be even less relevant.

If speculation about the outcome of any teaching were encouraged, the entire academy could easily be placed under a microscope of suspicion. Marjorie Heins notes “six Justices were willing to defer to speculations by government officials about the ‘fungibility’ of non-monetary aid, and to approve the government‘s goal of suppressing

speech and association that might help legitimize groups identified, for foreign policy reasons, as terrorist" (612). Teaching and research are not nefarious activities (e.g., the purpose of becoming an educator is not to cause direct harm to individuals). The concept of "fungibility" assumes that a value neutral concept such as education can lead to a nefarious act occurring that is several steps removed from the original act of teaching. The court can justify placing limits on the activities that take place between the teacher and the student through speculation.

HLN provides a slide into preemptive censure and paranoia. Heins states "[i]n the last analysis, public opinion may play the decisive role. As more Americans begin to understand the ways in which the government exploits our understandably panicked reaction to the word 'terrorism', judges may begin to take a more measured and skeptical view of executive branch arguments that suppressing speech and association is necessary to maintain national security" (612). But currently, because the public does not question the government's interpretation of providing material support to terrorism, substantive debates about the harms to academia have been ignored. In fact, the tendency of academics to self-censor before they are criticized is not even apparent to the public, and perhaps not even apparent to the educator. The silence is woven into the fabric of the discussion.

The silence can creep into every aspect of students' and professors' lives. Although Anna Pinchuk, in a discussion of Countering Violent Extremism (CVE) programs that monitor students' activities in schools, states that *HLP's* holding is limited in scope -- "Holder [*HLP*] would not apply unless students are providing material support to a designated foreign terrorist organization. Activities, such as viewing online content

about terrorism, independent advocacy in support of various organizations' legitimate activities, and discussion of terrorism generally would not be considered as 'material support' under Holder [*HLP*]" (682) -- the breadth of the majority's rhetoric in *HLP* implies even the act of advocating for the groups' positive aspects in the framework of a classroom discussion could be looked at as attempting to "turn" her or his colleagues into supporters of the terrorist organization. There is an inherent failure in applying "material support" to the world of ideas.

The Rhetoric of Terror

The rhetoric of "terror" broadly encompasses any activity, and such activities as teaching can be viewed negatively under this rhetoric. In a discussion on the teaching of International Humanitarian Law (IHL) and International Criminal Law, Guido Acquaviva asks if the Red Cross would be prohibited from providing material support to our enemies:

> Does the Supreme Court ruling mean that the International Committee of the Red Cross (ICRC) would be materially supporting terrorism should it decide to provide information and training on IHL to insurgents and other organizations defined as 'terrorist' in domestic settings? And would that in turn allow the inference that providing funds to the ICRC or its affiliate societies should be construed as aiding and abetting this crime? Or, in case the ICRC is recognized to have a special 'privileged' role in IHL training, would the US Supreme Court-position allow or even require prosecution for any entity engaging in this type of teaching other than the ICRC, maybe because the provenance and quality of their training is not recognized at the international level?

Although hypothetical, the above query demonstrates the slippery slope of applying a fixed governmental (bureaucratic) response in a more free-thinking environment. Free thinking inquiries in academia ideally should not be pre-empted by vaguely defined laws. For those professors who push the envelope in their ideas, *HLP* seeks to prevent them from doing so even before they think.

For example, the world history professor discussing how actual revolutions can bring positive change, as well as teaching about effective tactics revolutionaries can use in overthrowing governments anywhere in the world, including the United States, would argue that this discussion is within the realm of ideas. The "law" could say the only allowed place to teach about revolutions would be within a military or law enforcement environment, and only by those who work for the government. The "law" could define teaching as a criminal act. The "law" could say that anyone that supports the world history professor's idea -- or supports the professor -- (the word support is general) is providing material support, which could be criminal. At first blush "material support" seems far-fetched, but the above example is steeped in a type of logic employed by *HLP* that could lead to a stifling of speech.

Speech and the Academy

An assumption of a professor's nefariousness is not limited to the physical classroom. If the worst effects of *HLP* on academia have not been completely applied to domestic teaching within the U.S., professors who speak both inside and outside of the classroom have faced a different array of attacks. Two cases from the early 21st century highlight these attacks. Both academics stated controversial opinions, and the ideals of academic freedom could not protect them.

The day after the September 11, 2001 attacks Ward Churchill, a tenured professor at the University of Colorado, published an article online titled "Some People Push Back: On the Justice of Roosting Chickens". In discussing the motivation of the 9/11 attackers, he was highly critical of the lives lost on 9/11. He criticized the World Trade Center workers and stated 9/11 was pushback against the U.S. military-industrial complex. He called the financial workers who died "little Eichmanns", which was a reference to Adolf Eichmann, a Nazi who enabled the "final solution" (*Colorado Conference of the AAUP Report on the Dismissal of Ward Churchill* 14).

Several years later the article was re-discovered and highlighted, leading to a firestorm. *The Colorado Conference of the AAUP Report on the Dismissal of Ward Churchill* discussed the controversy in detail; all the below information about the Churchill affair is taken from their report.

Churchill was scheduled to speak at Hamilton College in upstate New York in 2005. Three professors critical of Churchill's viewpoints submitted editorials about Churchill to the college newspaper, including web links from "Some People Push Back". On January 21st, the newspaper ran a story about Churchill, quoting certain parts of Churchill's essay. Five days later, a local Syracuse newspaper picked up the story, which was immediately posted on a prominent conservative website. In early February segments began to appear on Fox News The O'Reilly Factor, and continued over the next three months.

At the same time "Colorado governor Bill Owens…announced his intention to withhold funds from the University unless Churchill was immediately and summarily fired" (30). It did not end there; "On the evening of January 28, Governor Owens phoned

CU President Elizabeth Hoffman at her home, demanding Churchill's immediate firing and threatening to 'implement Plan B' if Hoffman refused to comply. While Plan B was never explained, Hoffman did refuse. A month later, she cautioned the CU [Colorado University] faculty that a 'New McCarthyism' was afoot and under pressure resigned three days later" (31).

The University of Colorado Board of Regents convened an emergency meeting on February 3rd regarding the Churchill affair. Churchill was not fired, but the Board of Regents was looking for a reason to fire him:

> In accordance with [interim chancellor of the Boulder campus Phil] DiStefano's proposed procedure, the content of Churchill's extensive published material and public lectures and speeches over an undefined period of time would be examined for the express purpose of determining whether any of his opinions might constitute legally defensible grounds to fire him. (33)

DiStefano forwarded the findings of his preliminary investigation to the University's Standing Committee on Research Misconduct. The Committee itself was flawed; in one glaring example, no experts in Churchill's field of American Indian Studies were on his Investigation Committee, which seems like a good idea if a tribunal is conducting an investigation into Churchill's scholarship. There were two recognized experts in his field who were initially appointed -- law professor Robert Williams and research professor Bruce Johansen -- but both resigned under false accusations of bias as well as dismay with the flawed procedure (43).

Churchill was questioned by the Investigation Committee. The investigative committee shifted its concerns from Churchills's alleged mistakes in the "Push Back"

essay to focus on the minutiae regarding his use of sources in other publications, which had no bearing on the original complaint. In the end, the Committee did not impugn Churchill's references (which was the ground for the initial inquiry), but rather turned its attention to judging his arguments:

> [an investigative committee member] asked Churchill why he had cited an article that he had written as one of his sources. Churchill claimed that he had done no such thing and went to considerable lengths to provide evidence that no citations of the article appeared in either edition of the book in question, the difficulty of proving a negative notwithstanding … after Churchill cited a source directly supporting an interpretation of events he had allegedly fabricated, [an investigative committee member] traced the chain of citation to an 1833 journal kept by Maximilian, Prince of Wied, in an effort to prove that both Churchill and his source were wrong. To its credit, P&T [the Privilege and Tenure committee] concluded that that this maneuver on the part of the IC "goes beyond the Investigative Committee's charge [and] strays into evaluating Professor Churchill's references, rather than seeing if he had a rational basis for his conclusions." According to Churchill, the [Investigative Committee] Report is riddled with less conspicuous examples of the same technique being employed. (50)

The outcome of these unrelated inquiries was that the Investigative Committee found "serious academic misconduct—deliberate plagiarism, fabrication, and falsification" (38). The Standing Committee on Research Misconduct, solely based on the Investigative Committee's report, voted for termination. He appealed his termination to the Privilege

and Tenure Committee, where the issue of Churchill's practice of citing an article that he himself had ghostwritten was questioned (54). Only two of the five members of the Privilege and Tenure Committee recommended dismissal. They sent their findings to the University of Colorado President who made his own recommendation of termination to the Board or Regents, who ultimately voted to terminate him (56). Churchill sued the Board of Regents and won at trial, but the verdict was overturned on appeal (58).

The irony of the fact that Churchill was terminated for scholarship deficiencies despite not one scholar from his discipline finding him deficient in his scholarship was not lost on *The Colorado Conference of the AAUP Report on the Dismissal of Ward Churchill*:

> From an AAUP perspective, that not a single member of the SCRM, the IC, or the P&T appellate panel legitimately could be described as a member of Churchill's research community is remarkable. That *every single witness* belonging to the AIS [American Indian Studies] research community who testified during the investigative process, the P&T appeal, and the trial, indicated that Churchill's scholarly practices were and are in fact accepted, is even more remarkable. (55)

The way universities get around criticism of academic freedom violations is to attack in other areas. In this way, universities can remove faculty members who are considered troublemakers but do it in a "genteel" sort of way that makes it appear the university is faithful to its institutional values without the stench of a university simply firing a professor who they do not agree with.

In Churchill's case, procedural firing is a "work-around" to avoid a more direct attack on the content of his words or teaching. Universities who employ the latter heavy-

handed technique can generate immediate consternation, so, in a lawyerly sort of way, universities can favor a procedural approach (i.e. the professor is in violation of her or his contract, even if a logical argument can be made in defense of the professor) instead of a substantive approach (i.e. the professors *ideas* are not allowed to be uttered either on or off campus). In shifting the means of attack, the University of Colorado bypassed the academic freedom safeguards agreed to by the faculty and administration, and allowed the whims of a passionate coterie to guide their final decision.

In addition, institutions skirt around academic freedom protections by using such vacuous claims as civility without ever challenging the ideas put forth. Such was the case in the matter of Steven Salaita. In 2013 Salaita was conditionally hired to be a tenured associate professor at the University of Illinois at Urbana-Champaign in the American Indian Studies (AIS) program. Salaita, who used social media to broadcast his controversial views, drew the ire of administrators who rescinded Salaita's offer of employment. The fact that Salaita was not given a formal offer of employment by the Board of Trustees was important, as the AAUP report on Salaita's case provides a full background:

> In the middle of summer 2014, Dr. Steven Salaita, associate professor of English at Virginia Polytechnic Institute and State University, having resigned his tenured position, was preparing to relocate to the University of Illinois at Urbana-Champaign, where he had more than nine months earlier accepted a tenured appointment as associate professor in the Program of American Indian Studies (AIS). Both the administration and his prospective colleagues had made arrangements for him to assume his position in the fall term. The appointment still

> needed final approval by the Board of Trustees of the University of Illinois, but Professor Salaita and the AIS faculty had reason to believe that this was a formality. The fall term was set to begin on August 25, more than two weeks before the board was to meet and confirm new appointments on September 11. At the same time [Israelis and Palestinians were fighting in Gaza]. Professor Salaita, who is of Jordanian and Palestinian descent, was outraged by these events and expressed his views in a series of impassioned "tweets" on Twitter. (1)

Salaida's anti-Semitic postings (cited partially here) did not exactly profess a love of the state of Israel or members of the Judaic faith. His highly inflammatory (and unsubstantiated) comments painted the Israeli government and the Zionist political movement in the worst possible light:

> You may be too refined to say it, but I'm not: I wish all the f**king West Bank settlers would go missing… (June 19) Let's cut to the chase: If you're defending #Israel right now you're an awful human being. (July 8) By eagerly conflating Jewishness and Israel, Zionists are partly responsible when people say anti-Semitic sh*t in response to Israeli terror. (July 10) Zionist uplift in America: every little Jewish boy and girl can grow up to be the leader of a murderous colonial regime. (July 14)… At this point, if Netanyahu appeared on TV with a necklace made from the teeth of Palestinian children, would anybody be surprised? (July 19) I repeat, if you're defending #Israel right now, then 'hopelessly brainwashed' is your best prognosis. (July 19) Zionists: transforming 'antisemitism' from something horrible into something honorable since 1948. (July 19)… When I am frustrated, I remember that, despite the cigarettes and fatty

> food, I have a decent chance of outliving #Israel. (July 21). (Reichman, Scott, and Tiede 20)

As the AAUP report on Salaita's case noted, the university acted on Salaita's tweets, rescinding his appointment by citing a lack of civility. The rescission was done methodically in a formal manner:

> The tweets…came to the attention of UIUC chancellor Phyllis Wise, UI system president Robert Easter, and members of the board when it met on July 24. On August 1, Chancellor Wise wrote to Professor Salaita to inform him that his appointment would "not be recommended for submission to the board of trustees" and that a board vote to confirm the appointment was unlikely. In a statement issued on August 22, Chancellor Wise explained that the University of Illinois could not and would not "tolerate . . . disrespectful words or actions." On the same date, the board of trustees and President Easter issued a joint statement supporting the decision not to forward Professor Salaita's appointment. The statement declared UIUC "a community that values civility as much as scholarship." Some weeks later, however, Chancellor Wise did submit the appointment to the board with a negative recommendation, and on September 11 the board voted to reject it. (1)

The university coded its decision to rescind the offer to hire Salaita in terms of civility. But using civility as an end-around for discussions about scholarship allows administrators to dismiss *any* ideas (and academics) that are "beyond the pale".

Due Process and Attacks by Other Means

The attack on Salaida's politics (truly, his "job" at the University of Illinois) as a matter of "civility" was an attack on his academic freedom nonetheless. A legal interpretation of academic freedom to protect the individual from outside interference may protect academics. As Julie Margetta, in discussing Churchill's controversy noted, academic freedom should focus on the *academic* aspect of the idea and competence of the professor:

> By instituting an individual right of academic freedom, but limiting it through the autonomy of the university, the doctrine of academic freedom would be restored to the original purposes evident in cases like Sweezy, Keyishian, and Shelton: the individual professor should be protected from political interference with his academic speech, but the university should maintain the autonomy to choose who may teach and what may be taught. (33)

Margetta's interpretation of academic freedom is the purest, in the sense that the academy is the best judge of who has the competence to be a part of the academy. Comments such as those made by Churchill would be sanctioned "in house" -- did the comments rise to the level of hate speech without any basis in fact? Did the comments move the professor's discipline further along, or generate a conversation that the discipline (and perhaps the public at large) could eventually benefit from? Using an “in house” standard, the professor would attempt to defend her or his comments in a reasoned way since universities pride themselves in using reason to solve problems. If speech such as Salaita’s, deemed the worst of the worst, could not be logically defended, the Board could banish him. In reality though, the end result can be less academic and more pragmatic.

Universities use “due process” to actually obscure what faculty members are being charged with. Robert O'Neill summarized two factors to consider regarding Churchill's case:

> We might usefully return to considerations of process. Should a university choose to seek the dismissal of (or impose some other major sanction upon) an outspoken professor, leading to a formal due-process hearing, the administration would bear the heavy burden of persuading a committee of faculty peers that such statements did indeed constitute cause for dismissal from the faculty, if not from an administrative position, because they related "directly and substantially" to the accused scholar's "fitness in his professional capacity as a teacher or researcher."[in the language of the applicable AAUP standard] The presumption would, of course, favor the professor, and the outcome would be closely scrutinized. A valid dismissal seems unlikely, even inconceivable, in such a case. (41)

If we were to use O'Neill's analysis of fitness to determine continued employment, it would be generous to Churchill irrespective of the negative value of the speech. O'Neill views professorial comments less from the view of offensive content and more from the view of competence. Admittedly, few universities think this way in our present moment, and perhaps during all of the 20th century. Unfortunately universities can attempt to define professors as “pundits”, which is a more effective tact to dehumanize a professor.

A *due process* right can still be ineffective in protecting academic freedom. Essentially, due process is a constitutional right in which the government cannot deprive a person of their liberty without notice and a hearing. The concept of due process can also

be applied to employment matters in which the government is the employer. Although private employers are usually not bound by a due process concept, it can be codified in a contract. For example, a private university, in bargaining with the faculty union, may stipulate in a contract the right to notice and a hearing for tenured faculty members before they can be dismissed. If a private university fails to follow a due process procedure or if the aggrieved educator believes the notice or hearing itself was flawed, she or he may seek recourse in court for a breach of contract (but not as a constitutional right, which would be used by educators in public universities).

Academic freedom is at its core a freedom afforded to professors to empower their students and improve society, but universities who are in the wrong attempt to gut academic freedom by latching on to something else. In a discussion on the University of Colorado's faculty committee's deliberations on Ward Churchill, Ellen Schrecker noted "It is only by construing academic freedom in the very narrowest of procedural terms that we can conclude it was not violated" (Churchill 21). Churchill was subject to several investigations; his incendiary writings were not part of the official investigation because of constitutional protections (12). After formal process, Churchill was terminated based upon his "self plagiarized" research, which itself is a curious and an oxymoronic claim, not his incendiary comments. Although some sort of process is still valuable, in this case a due process right can work against the faculty member. If due process is an aspect of academic freedom, the use of the process to "cover" true intentions leaves the due process right as misconstrued. Although it appears his writings were the linchpin for his termination, the official hearing did not make note of it. Alas, although there can be the

appearance of a fair process which supports academic freedom, the use of that process can stifle innovation.

In conjunction with process, civility is another tool that can be used against educators when faced with a violation of academic freedom claims. Professors who state the most misguided ideas should be "called out" as having faulty ideas, and not as having a lack of civility. A charge against Salaita was that his rhetoric was not civil. If an utterance is protected by academic freedom, civility should not be an issue. This is not necessarily the case, as value judgments about the civility of the utterance can cause issues for the offending speaker. In an AAUP report on the case of Steven Salaita, Henry Reichman, Joan Wallach Scott, and Hans-Joerg Tiede state in part regarding civility:

> "[C]ivility" is vague and ill-defined. It is not a transparent or self-evident concept, and it does not provide an objective standard for judgment…the notion of civility consistently operates to constitute relations of power. Moreover, it is always the powerful who determine its meaning -- a meaning that serves to delegitimize the words and actions of those to whom it is applied.

Collegial civility employed as a measure of intellectual value goes against the concept of academic freedom, in which academics attempt to move their discipline forward through new and perhaps un-orthodox interpretations. Of course many new ideas will be controversial, and some may make other academics furious. The tricky part is for the academic to "push the envelope" without actually appearing that she or he is outside the mainstream lest criticism from forces far more powerful than a typical professor. It is safer for the academic to stick to the script and not challenge traditional orthodoxy for fear that she or he ends up on a social media site where condemnation is swift and

immediately noticeable by higher powers. Or, even worse, is the professor who creates new ideas but in fact takes the edge off to make the idea less “controversial”, but is still able to claim academic freedom since she or he was not dissuaded from publishing the new ideas. Faculty self-restraint becomes a façade in which the acceptable bounds of civility are understood. The bounds of civility include “acceptable ideas”, in which it appears there is academic freedom but in actuality there is not academic freedom. No professor will dare to broach the boundaries of acceptable thought. Taken too far, policing campus speech with muddy ideals about "civility" will lead to only acceptable thought.

One wonders if a discussion of the “climate” of a university portends less academic freedom in equal measure as a discussion of “civility”, and who may be the subject of those discussions. In a discussion of university administrators and faculty members not supporting the provocative speech of faculty members, Christopher Newfield notes in *Academic Freedom as Democratization* that civility may work against faculty who wish to call out the racial and sexual injustices of their administrations:

> We can see how high the stakes are when we note that academic freedom shades into a much broader range of experiences that are lumped together under the term "climate" and that shape the institutional lives of faculty of color, queer and transgender faculty, and others. These include microaggressions, subtle forms of disrespect, and the lack of racial and gender parity in faculty hiring.

A claim of a lack of civility leveled against a white hetero-normative male can be a thin veneer of a more insidious “dig” at those “outsider” members of the academy who may be viewed in less favorable terms by the academic institution at the outset. A claim of a

lack of civility based on speech can have a sharper undercurrent of a prejudice or bias based on stereotypical assumptions about the faculty member. As noted by Nicole Rangel, "the discourse of 'civility' plays into colorblind racism in the academy" (370).

It may not necessarily be the case that notions of civility are always congruent with humanistic ideals. In discussing Salaita's case, Bill V. Mullen and Julie Rak note his "'right' to free speech was delimited by an imagined 'civil society' that could be invoked at any moment to remove that right" (728). Civility assumes a "majority" rhetoric for acceptable speech which does not have a clearly defined rational. Academic freedom may work against a vague notion of civility since, in theory, new ideas can be controversial. For primary and secondary educators, civility is part and parcel of the student's learning experience -- how to mainstream students to follow societal norms and expectations and focus on skill building. Universities move beyond that. Not necessarily by fighting with each other over ideas, but allowing the rough edges to "play out" to create something meaningful.

An accusation of incivility places the burden on the academic since proposing a controversial idea can be viewed as uncivil. In their critique of civility on academic conduct, joint authors Dana L. Cloud, Karen Gregory and sava saheli singh argue "This reduction of anger, passion, or outrage to a measure of 'civility' allows institutions to control what is deemed appropriate academic speech based on an expectation of civil discourse, the definition of which is set by the institution rather than the context ([*qtd. in*] Cloud 2015, 15)" (184). Acceptable ideas are those which will not garner the most back-lash, irrespective of the validity or logic of the idea. Belittling ideas as uncivil undermines faculty speech without the academic imprimatur of questioning, discussing

and deciding the idea's worthiness. Since *any* idea can be critiqued as causing a stir in some circles it is easier to tone down the rhetoric of the idea and perhaps highlight the less or non controversial aspects of the idea to prevent unwanted attention. Thus, there is an unfairness of campus authorities using "civility" on Churchill and Salaita, especially if they could have justified their decisions by discrediting their ideas, demonstrating that the hateful rhetoric they used is entirely illogical. In a sense, they unwisely 'lifted them up" to some by not intellectually knocking them down, which was entirely plausible. But short-sighted pragmatism almost always wins out. This is pointedly demonstrated in the rhetorical sphere of social media.

Extramural Speech and Academic Freedom

Academic freedom, as it has been expressed in the 20th century, didn't face the unique challenges posed by social media, a problem that even passionate defenders of academic freedom might admit. Digital expression and social media are part and parcel of educating. Unfortunately, it is easy to misconstrue and take out of context any website, tweet, post, emoji, gif, meme, snapshot, mashup, vlog, remix, demix, strip, hype, sync, clapback, shoutout, shoutdown, shoutup, blowup, ray, shade, presence, represent, answer or comment. This can cause dangers for academic freedom. Any member of the public can act as a watchdog, report and publicize any activity on the internet, resulting in a firestorm. Overall, digital rhetorics have tremendous potential to greatly improve society in every aspect. Of course, as in every new medium, the improvement does not occur immediately at conception. There are fits, stops and starts along the way. As digital rhetorics such as AOL Message Boards, MySpace, Facebook, Twitter, Instagram, Snapchat and TikTok have shown us, it takes a while for people to fully embrace and

utilize new rhetorics to their fullest intellectual capabilities. Such is the case with digital rhetorics such as Twitter and their use by members of the academy in the early 21st century. As this section will demonstrate, tweets have recently got people into trouble and questions have arisen if faculty should be protected from bad tweets. Although there are some reasons why faculty members should be prohibited from bad tweets, in actuality bad tweets are no different from the 20th century's other controversies. Let the academy tweet.

One interesting analysis of Steven Salaita's incendiary tweets, beyond the basis for his termination, would be applicable to *Humanitarian Law Project* as proving support for terrorists. Although Salaita was not teaching anyone at the time of his posts, Abigail M. Pierce notes that Salaita:

> [did not lose] his job because of his anti-Israel tweets, but the Material Support Statute allows the government to seek a more serious remedy. For the government to press charges under the Material Support Statute, it would need to prove that: (1) the tweet(s) evidenced support for a foreign terrorist organization; (2) the person who tweeted the support knew that the organization was a foreign terrorist organization; and (3) the tweet(s) were formed in coordination with that foreign terrorist organization. (266)

Salaita's comments, not necessarily protected by the ideals academic freedom, would not necessarily be protected by the ideals of freedom if an aggressive prosecutor chose to pursue it.

Salaita's lack of condemnation for Hamas may be used as support for terrorism as Pierce notes "On its face, a tweet can be seen as showing support simply by looking at its

plain language… In Professor Salaita's case, his tweets seem to be pro- Hamas. In fact, Salaita states on his twitter, 'Will you condemn Hamas? No. Why not? Because Hamas isn't the one incinerating children, you disingenuous prick. #Gaza #GazaUnderAttack.'" (266). Taking Salaita out of the realm of the scholar places him as a plain supporter of a terrorist group. In fact, Salaita's academic standing could be used against him in meeting the standard of knowledge of a group's terrorist ties: "Additionally, Professor Salaita is a professor, and an activist, in this area. While more facts are certainly needed, it is likely that he knew Hamas was a foreign terrorist organization" (266). In an dystopian reading of *HLP*, Salaita's academic pedigree as a middle-eastern specialist, which entitles those to more liberties if commenting in service to their discipline, in this case makes his intellect a liability since his pedigree affords him "knowledge" of terrorist organizations. However, in another sense Salaita is not taking government funds to do so, which is part of *HLP's* logic. In addition Salaita was not out of the country, and *HLP* does not apply to domestic teaching.

HLP's main finding, that teaching (aka speech) must be in coordination with the terrorist group would make Salaita's conviction more difficult as Pierce notes:

> As in most, if not all, cases that involve this type of speech, the government would face its biggest challenge in proving that a person's tweets were either "in coordination with" or "at the direction of" a foreign terrorist organization…In Professor Salaita's case, if the only evidence presented were his tweets, the jury would likely find it difficult to find that Professor Salaita acted in coordination with Hamas. Tweets alone fit neatly into 'wholly independent' speech that is not prohibited… (267)

If professors tend to research in locations relevant to their scholarship, a fact pattern could be crafted that Salaita's support for Hamas, coupled with his research in the Middle East, implies working with the terrorist organization. In fact, almost any "Middle Eastern specialist" might find herself or himself vulnerable to the government's Material Support accusations. Of course, Salaita may not be researching Hamas, and researching alone shouldn't give credence to providing coordination, but a prosecutor can attempt to weave a narrative that implies a connection. Academic freedom should allow for latitude, especially in dealing with inflammatory subject matter. An assumption that *learning about* a repugnant group (which is a hallmark of academic freedom) qualifies one to *become* repugnant themselves (not a hallmark of academic freedom) is not necessarily a given, even within the logical analysis of *HLP*.

Social media posts by professors that are outside the mainstream do not necessarily have constitutional protection through the first amendment. In cases such as *Garcetti v. Ceballos* (discussed in Chapter 1) "for speech to be protected… required that the speaker not only speak as a citizen on a matter of public concern, but that the speaker also must not speak 'pursuant to official duties'" (Squires 3). If viewed *strictly* through *Garcettis'* lens, public university professors who are the subject of accusations have no recourse since their speech, even on social media, can be construed to be part of their employment. Some counter that social media has generated a raft of new problems and that we may need to rethink how faculty use it; those with an expansive view of academic freedom believe faculty tweets are in bounds. Although that is a tough row to hoe, the marketplace of ideas allows for all comers in *all* marketplaces. It is simply an old problem in new clothes.

In a similar vein, Andrew Squires suggests new criteria to be applied by the courts in cases involving professors and their extramural statements. He notes "[c]ourts must instead look to a new theory of academic freedom that will extend it into intramural speech, regardless of public concern, so long as this speech extends to the knowledge-seeking activities of the university" (8). Extramural statements that are knowledge-seeking should be allowed. People may differ if Salaida is knowledge-seeking or ranting. Extending the knowledge-making capacity outside of the classroom gives professors who want to use social media the outlet to "push the boundaries" to a larger audience. Of course, the larger audience may not have the same respect or understanding of the posts, which can be easily amplified and taken out of context.

Squire's interesting proposal does provide an alternative for hyper-inflammatory speech: "[t]he test proposed in this essay must answer this question: Is a professor's speech so inflammatory that listeners are incited to behave in disruptive ways that prevent others in the university from searching for truth? If an answer is yes, than that speech is not protected" (14). In the case of Salaita, his posts about wishing death to Israeli children and supporting Hamas might cause uproar, and people may have questions about the search for truth in those statements. Nevertheless, he is entitled to make the argument how his tweets lead to further conversations on the issue. Academic freedom allows for this conversation. *Any* variance from this idea, even for speech that many consider hideous, goes against the ideals of a democracy, as discomforting as that sounds.

Although teaching has traditionally taken place in a physical classroom, the classroom -- and all of the utterances a professor makes -- has become a digital space.

Social media has radically rearranged our sense of the difference between what's "in" the world of the academy and "out"; what the educator's job is, and what the educator's job isn't, and hence what academic freedom is. Academic freedom has to continually adapt to the changing rhetoric in the digital space, which requires the traditional trope of what academic freedom "looks like" to progress.

How ideas are perceived is related to the forum in which they are broadcast. "The media is the message" -- so said Marshall McLuhan. The medium can also challenge the ideals of academic freedom for the most controversial content. Richard Levy notes that social media amplifies what had been typically kept private within classroom walls. Something different happens:

> when public university employees express themselves in controversial ways using social media. Social media emphasizes immediacy, brevity, and informality, so people typically speak and write casually -- as if they were talking only to their friends. But statements made using social media are not private and have a persistence that stupid statements in casual conversation lack. What people say or write…can be copied, forwarded, and posted, becoming very public very quickly, until a few ill-chosen words have blown up into a major controversy (80).

If a traditional trope of academic freedom is a professor pontificating in a classroom, the transference of that trope to the digital sphere is complicated because the Twitter sphere is not seen by most as a classroom of students. Professors, as an ideal, are neatly placed in the rooms of the university. They do not leave the university "space", where their ideas are heard by a privileged few. Once the professor engages with social media, the "space" is less sacrosanct and is afforded less privilege, although the privilege might be seen by

some as the same regardless of the "space". The internet is the public space, open to any and all. Although the professor believes her or his social media postings are afforded the protections of academic freedom, without the "trappings" of academia, she or he is perceived as one of many posters. For the professor who makes an incendiary statement, ideals of academic freedom that allow for statements in furtherance of one's discipline do not hold the same sway online. Statements here are "translated" without an academic context. The incendiary comment is frozen in time -- stark and memorialized. Nevertheless, all tweets should be protected.

Although academics do not have the right to say anything anywhere (i.e., explicitly threatening to kill someone) a strong form of academic freedom, such as advocated in this dissertation, argues that if a professor could say something in a classroom as a part of legitimate coursework, they should be able to say the same thing on Twitter without fearing for their jobs. Just because an idea is amplified does not make it less valuable. In other words, the digital age has indeed pushed the walls of the classroom out into the world (which is a good thing), and our sense of academic freedom needs to be fortified, not reduced.

The public reaction to such comments is often emotive and emotional, rather than intellectual. The comment is not "talkative"; it does not engage in conversation. Social media is not a classroom. Bruce Johansen notes:

> The Internet has changed the ways in which we handle information. In the old days, first drafts languished in our desks gathering dust, or were circulated among a few colleagues for review. These days they may be hung out on the Internet for everyone to see (including people we would rather not meet under other

> circumstances). There our drafts may lay like seeds in desert sand until, years later, long after our own thoughts have moved on, they may be drenched in unwelcomed attention. At that time, attention can be instant, incendiary, and overwhelming, as everyone goes for the gut (67).

Creating new knowledge is an imperfect science. "Getting to" a final draft of a publication is laborious and time consuming (for most people). People change, and the ideas they believe in may change over time as a result of new knowledge or seasoned wisdom. The ideas can be updated and amended, perhaps after several years. But the rhetoric of the digital space does not account for these variances. The first draft is wrongly believed to be the end product, and wrongly believed to be the culmination of years of thought. Creating new knowledge is a journey of stops and starts. The digital space is able to take a "snapshot" of a less-than-polished point on the journey and make the illogical assumption that the academic supports that point *in the present*. This is an interesting way to look at "permanence", which has existed for centuries -- we have lived with published thought frozen in books for a long time.

Thinking does not stop for academics once they leave the classroom, and the internet is, at its essence, an "information superhighway" (Hale and Scanlon 100). Unfortunately the musings of a professor, incomplete, take on a life of their own in a digital space. The audience is less like the town square in a marketplace of ideas and more like a fevered mob. There is an ideal of academic freedom that flows from a professor to her or his students. On the internet the audience is not necessarily "on the same page" as the professor. The give and take of the university dynamic can become lost in the real world, although it shouldn't -- the concept of academic freedom is vibrant

enough to be applied in new mediums. Academics such as Churchill and Salaita are outside of that role on the internet. A professor needs an audience to profess to, but without a reference point the digital audience is not interested in learning but in responding, which is easy by typing a response and pressing the send key.

Some would argue the immediacy of digital rhetoric makes the ideal of academic freedom dicier in a digital space -- without the acknowledged boundaries of academic thought and discussion, the thought becomes easily corrupted and used as a weapon. Of course, if the professor's utterances are shocking and offend the sensibilities in ways that are demeaning of race, religion, ethnicity, sexuality or nationality, their speech is sucked into the digital vortex along with everything else to be toasted and roasted. There is a measured and reasoned thinking that *should* follow the post. This would demonstrate the falsity and flawed logic of the ideas (as well as the hatefulness). But it is not done.

Henry Reichman suggests the immediacy of digital rhetoric is similar to the immediacy of an "older" rhetoric as demonstrated by antiwar activists during the Vietnam era. We have basically agreed to let academics rant as long as it has something to do with their jobs and expertise. An expansive view of academic freedom will not allow rants on highly suspect, implausible, or illogical ideas -- unless that's the academics research interest. In *The Future of Academic Freedom* he notes:

> Tweets may be reminiscent of slogans, chants, and agitational speeches that in previous times might have gotten a faculty member in trouble... [In 1971 University Regent William Coblentz noted in an AAUP report] that 'in this day and age when the decibel level of political debate … has reached the heights it has, it is unrealistic and disingenuous to demand as a condition of employment

> that the professor address political rallies in the muted cadences of scholarly exchanges. Professors are products of their times even as the rest of us.' Twitter is also a product of our time, and when professors tweet, they also do not necessarily communicate in "the muted cadences of scholarly exchanges". (22)

An expectation of educators to conform to a rhetorical style in an academic space does not take into account that educators are a part of society, not above society. However it is a double-edged sword. The educators who expect academic freedom in "moving the conversation forward" in new directions, prizing intellect and dialogue in a marketplace of ideas, also have their own individual opinions they may want to make known. Academics can use social media in their "academic voice". Academics should be given complete academic freedom in the digital space provided that their comments do not threaten to destroy the ability of the school to carry on debate (a severe exception, akin to armed insurrection, which would almost never be triggered). Unfortunately, to use social media as others expect to use it, as a to-the-point commentary, places the professor outside of their expected role as a professor. However, as Coblentz notes, academics should still be afforded the ability to embrace the passionate digital rhetoric with all of its flaws and imperfections.

Academics should still be afforded the ability to embrace digital rhetoric, as Henry Reichman additionally asks in *The Future of Academic Freedom*:

> What can be said in just 140 or even 280 characters? On the one hand, in a scholarly sense, not a whole lot. Academics are notoriously long-winded; our written productions tend to be cautious and constrained, hedged with all sorts of nuance and qualification. On the other hand, these brief messages can carry a lot

> of power; they are often emotional and almost always direct and simple—but owing to their frequent use of irony, often easily misinterpreted—in ways that scholarly communications rarely are. (75)

Tweets are not the ideal way to communicate because of their inability to fully explore an idea, but it is at least *some way* in the 21st century to get ideas out to large groups of people in short amounts of time. Communication leads to a fuller understanding of complex and controversial ideas. Social media does not necessarily afford that luxury, and the ease in copying and pasting a fragment of the academic's idea to a larger audience can lead to misunderstandings. For even the most incendiary of posts can be somewhat blunted in a formal article (although the offensive parts can still be pieced together). The rawness factor, with the accompanying immediacy of responses, is out of the educator's comfortable space where terms such as "academic freedom" and a "marketplace of ideas" have more standing, although the space should have the same standing in the digital space. Ideas should not be deemed "cheapened" in a vibrant medium such as the internet. Total academic freedom in social media provides the ability to introduce and develop ideas.

The understanding that the idea of a university extends beyond the traditional university parameters is key in attempting to grapple with knowledge-making avenues such as social media: "While various alternative standards of what qualifies for academic freedom have been proposed, many disregard the reality that a professor's contribution to the academic community extends far beyond scholarship and teaching, and includes intramural speech and voluntary activities within the university. This informal curriculum must also be protected" (Squires 15). Including the digital space into the pantheon of the

university discourse should be a welcoming idea, especially with the increased exposure and ability to discuss those ideas in a convenient manner. Knowledge-making occurs in many spaces, and the accessibility of social media in theory provides for the democratization of ideas. Although the medium is far from perfect, contextualizing those posts is useful, since the ability to take ideas out of context can lead to the more passionate academics unjustly asking for trouble. Even so, we should tolerate *all* tweets related to the work of faculty members.

In the early 21st century, social media has become a valuable medium for "regular folk" to make their viewpoints known to a wider audience. Unlike in previous centuries, where the middle and lower classes had to resort to letters-to-the-editor in their local newspapers and speeches to have their ideas brought into public consciousness, in the early 21st century anyone fortunate enough to have an internet connection (and live in a country where tweets or comments are not blocked or criminalized) can have their views broadcast to much larger audiences. The ideals of academic freedom and the marketplace of ideas should allow for great latitude and free rein for *all ideas* to have a public airing in the digital space, irrespective of how uncomfortable or fearful they make others feel. Sanctions by universities against professors and the sanctions by the government against citizens should be non-existent. To have it any other way goes against the ideals of a society moving forward through intellect, irrespective of the tone or words stated.

Academic Freedom as a Cultural Concept

Irrespective of whether the classroom is an actual or digital space, an academic's freedom of speech can be gauged through a cultural lens. Michael Donnelly notes "Freedom of Speech is a *cultural* concept, not merely, or even primarily, a legal one"

(23). Although academic freedom is often thought of as a sacrosanct idea of the European-American intellectual tradition, the content of academic freedom is not analyzed in a bubble. Depending on the time and place the academic is living in, society determines which ideas are worthy of academic freedom. Indeed, Donnelly states that "Freedom of Speech functions differently for different groups according to their positions in the social matrix (insider/outsider, top/bottom), and that therefore Outsider rhetorics must constantly test, challenge, and stretch the ''acceptable speech'' boundaries defined by those in power" (27). A court's view of academic freedom here can easily involve tangential issues surrounding the words or idea; not merely the concept of academic freedom but the *content* of academic freedom.

Total academic freedom should be the norm, without any nuance or pre-conditions. In theory academics have academic freedom; the subtext involves *publicly acceptable* freedom. What the world outside of the classroom thinks has as much agency (and at times even more agency) than educators on the inside have regarding how academic freedom is defined. Despite the proclamation in *Keyishian* that academic freedom is a special concern of the first amendment (discussed briefly above and in detail in Chapter 1), courts can weigh the democratic value of the educator's speech against the democratic value of the citizenry in not giving agency to the educator's speech. Depending on the time and place, the educator may not be afforded that freedom. It is short-sighted; an academic provides value and growth to society. For those academics that don't do that, some sort of "teachable moment" could result. It is easy to tell a Churchill or Salaita that they are anti-American and anti-Semitic and shut them down; their speech lends itself to those conclusions without a second thought. It is more difficult

for a society to *confront* them and tell them *why* and *how* they are mistaken in their viewpoints. A perception in the United States is that Americans don't debate or challenge others who have different viewpoints from them to avoid confrontation. "You won't change their minds", as wise people have said. That mindset leads to an un-academic freedom, where *thinking* is not prized.

Not every type of speech is afforded the agency of academic freedom. Ironically, Steven Salaita himself notes that total academic freedom is not good. Several years after his banishment from academia, Salaita noted "we have to apply value judgments to balance speech rights with public safety… [however] [v]alue judgments don't arise in a vacuum, and discourses don't exist in a free market. Structural forces, often unseen, always beneficial to the elite, determine which ideas get a hearing" (B14). Academic freedom should excite the passions and perhaps even cause consternation at times with the understanding that the worst ideas -- even non-ideas couched as ideas but in reality are blasphemous (including, some would say, Salaita's own comments about Israel) -- will be tested once the academy actually discusses the ideas and sees the illogical (and stupid) nature of them. Unfortunately, outside of the academy the worst non-ideas can have much longer shelf lives. A marketplace ideal can help shorten those shelf lives by keeping the conversation going. So even though academic freedom is clearly shaped by the politics and beliefs in which it is uttered, and is thus "subjective", it remains a utopian hope on the horizon that keeps the place for debate open.

The Idea of a University

In this dissertation, I have argued that the DNA of a university is challenging and questioning ideas for a better truth. Keith E. Whittington notes "Universities are sites of

contestation. Provoking controversy is central to the enterprise. The brand to be protected is that of the university as a place that respects freedom of thought and welcomes spirited disagreements…If you do not encounter ideas that provoke offense or disagreement at a university, then you are not looking very hard--or the university is failing to fulfill its most basic mission" (2457). Ellen Schrecker in *The Lost Soul of Higher Education* called the most passionate academics the "squeaky wheels" of a university (39), and even for the repulsive and rotted squeaky wheels who say the indefensible, their discourse can easily be challenged and discredited. Of course, if a university has pragmatic reasons for removing the worst squeaky wheels that goes beyond the actual offending speech such as for ideas that "run afoul of the beliefs or interests of students, parents, donors, or politicians" (Whittington 2470), the university administrator's version of seeing the forest through the trees may be to sacrifice the rotted wheels for the greater good of university goals.

The idea of a university lies in the outsiders. Richard Falk begs for defenses of academic freedom, even for firebrands:

> it remains urgent to restore confidence in academic freedom for professors with controversial views who become threatened or victimized within the university owing to pressure largely emanating from the community at large. Here the judicial institutions of society, entrusted with governmental authority and responsibility to uphold the rule of law, should shore up the protection of academic freedom when universities cave in to pressures or fail to uphold the rights of a faculty member... In the end, there are no guarantees that a legal system, even in a democratic society, will provide consistently just results. (302)

For courts, upholding the rule of law in controversies related to the termination of professors does not necessarily mean using the concept of academic freedom as a starting point. In fact, even though state university professors do have an academic freedom right (in addition to the general freedom of speech right granted to all Americans as discussed by *Keyishian* in Chapter 1), academic freedom is not an absolute. In fact, the rule of law as Falk describes it may not even take into account the concept of academic freedom as a "rule of law". For example, the university can decide not to "frame the issue" as an issue involving academic freedom which occurred in Churchill's case, when the university defined the issue as research plagiarism, sidestepping his article about the 9/11 victims.

In a conversation about academic freedom protections for the most provocative, Johnathan Zimmerman summed it up best when he said:

> whether or not professors are always free to speak their minds, we have a strong normative agreement that they *should* be able to do so. That's because of their distinctive role in creating knowledge, which requires continuous testing, discussion, and analysis. The process is both idiosyncratic and collective: professors need maximal personal freedom to try out new ideas, but they can't know if they've come up with anything truly new (or useful, or valuable, or visionary) until they have subjected it to a full and free examination by their peers. Hence any threat to their academic freedom threatens the core purpose of the academy itself. (58)

Provocative new ideas or musings should be allowed without pre-conditions. Ideas that can run the gamut from repulsive to criminal will inevitably be cast aside. However, to not acknowledge their existence in the first place without taking them seriously and

logically picking them apart to reveal the rot underneath absolve a university of the more uncomfortable aspects of their existence, but may in fact be foregoing new truths that have real energy. This is what universities help students do. Passion for or against an idea make the participants feel as if they have more of a stake in the outcome and may result in a few less “will this be on the test” musings.

Conclusion

Recent rulings by the court on the limits of faculty to teach terrorists, and the termination of Churchill and Salaita for extramural speech, demonstrates that the current cultural climate for academic freedom is souring. The ease of “information exchange” has made people think twice about the limits of academic freedom. But I have shown in this chapter that research-based expressions of faculty, even on social media, deserve the same job protections they have largely enjoyed during the latter 20th century. Although this is not an easy position to defend, given the political turmoil of our present age, the alternative is worse: a steady constriction and silencing of academic expression to the mere "classroom" of irrelevance. Research-relevant academic freedom is a difficult ideal to live up to, but it’s worth it in the end.

CHAPTER 5: ACADEMIC FREEDOM AND THE MARKETPLACE OF IDEAS: A STUDENT PREROGATIVE

Chapter Abstract

In this chapter I turn my attention to the understudied question of student academic freedom. If, as I've shown in previous chapters, academic freedom for tenured faculty has been hamstrung by lukewarm court verdicts over the 20th century (and is non-existent for adjunct faculty), the case for students' academic freedom is even murkier because our society still views adult students as child-learners rather than knowledge-producers. I review three cases where the courts have generally validated John Stuart Mills' concept of the marketplace of ideas when applied to adult college students, but colleges have also repressed student speech and thought by appealing to institutional expectations for student safety and protection of the educational environment. Universities often limit students' academic freedom within the confines of keeping a stable educational environment for all students, which is laudable, but can be taken too far as well. I will not be addressing students' general "free speech" rights in this chapter (such as the right to post vulgar comments on Twitter without school reprisal), but rather, I will examine the academic freedom of students to develop and publish their coursework in class; to hold and debate controversial views; and to engage in political activity on campus. In a surprising historical turn, in today's academic environment, academic freedom often revolves around the rights of conservative students to air their views, form student groups, and invite controversial conservative speakers to school. Whereas the

victories for academic freedom in the Vietnam era were to allow liberal students to protest the war within an academic context, many of the cases of academic freedom today revolve around the right of conservative students to freely voice their opinions on religion, politics, anti-race or anti-homosexuality on campus. I will argue that although I do not share the views of some of these student groups, I support the ACLU's position that they have a right to do so, provided they do not infringe upon the rights of others. In agreement with Mill, I argue that the only avenue to truth is through open debate. By couching academic freedom for students within a marketplace of ideas framework, I argue this provides the greatest possibility for students to be contributors within the academic endeavor, while acknowledging their responsibility in being responsible participants.

I begin by asserting the enduring value of Holmes' ruling in *Abrams* even to the 21st century, especially as it applies to students via analyzing John Stuart Mill's marketplace of ideas concept, which essentially states that no idea should be repressed -- all ideas deserve to be uttered in public, and the populace, through debate and discussion, will determine the validity of the idea. This is to ensure that current ideas do not grow stale and become dogma, as only through new ideas entering the public discourse can a society grow and flourish.

I will draw on Elmer Thiessen's analysis of the modern conception of the marketplace of ideas in the context of academic freedom. Particularly useful to my argument is Thiessen's discussion about a balanced view of academic freedom in which

educators and researchers can engage in an ongoing search for truth -- a true marketplace of ideas. (63).

Second, I argue that this marketplace of ideas encompasses students deserving scholarly recognition for their knowledge production; they can make contributions to the academy as well as professors. Marc Bousquet has advocated for equality between the faculty and students in terms of sharing capital towards the ultimate goal of societal productivity (*University* 154). He has defined this as student academic freedom (*Ritalin* 199). However, in attempting to quantify student academic freedom within the sphere of knowledge production, there is surprisingly a dearth of scholarship. Louis Menand notes professors virtually monopolize the business of knowledge production in many areas, but proposes that academic inquiry, at least in some fields, may need to become less exclusionary and more holistic (*Marketplace*). Students are not explicitly stated as a part of that endeavor.

Menand doesn't think much about students and I, in contrast, want to enlarge our view of university knowledge production. Bruce Macfarlane addresses this in his argument that the traditional definition of academic freedom is condescending to students, relegating them to a mere by-product or callow apprentices, whereas students and faculty are scholars learning together (*Freedom to Learn* 24). Publishing term papers, acting as research assistants, being involved in student groups and participating in service learning is more than the mere realm of student "work". I argue that defining student academic freedom as equally participating in the knowledge production of the university is worthy of scholarly recognition.

Third, I apply the concept of a marketplace of ideas to three U.S. Supreme Court cases. Two cases from the civil rights era support the notion of a marketplace of ideas. One case from 1969 allowed high school students to wear black armbands to protest the Vietnam War (*Tinker v. Des Moines Independent Community School District*), and a second case from 1972 allowed students to form an on-campus organization opposed by college administrators, provided their organization meets the standard put forth by the university as determined after a hearing *(Healy vs. James)*. A more recent case from 2010 in which a law school denied full recognition to a student organization (the Christian Legal Society) that wanted to limit membership to students who abided by Christian principles (*Christian Legal Society Chapter of Univ. of Cal., Hastings College of Law v. Martinez)* reaffirmed the marketplace of ideas theory. A student group cannot infringe on fellow students ability to attend their group's meetings. In the court's ruling the marketplace is open for business.

I will heavily draw on Philippa Strum and William Van Alstyne's analysis of *Healy*, and how their critique relates to how the courts view academic freedom for college students. Particularly useful to my analysis is Strum's argument that court decisions define students as a part of the educational endeavor and should be viewed as participants in the marketplace of ideas. Also useful is Van Alstyne's discussion regarding *Healy* about how administrators can impose reasonable limitations on student groups provided they do not alter the substance of the student's speech. The key is the high value the court places on the student's speech, acknowledging a student's role in the academic marketplace.

Keep in mind that there is no clear definition of student academic freedom. As the AAUP notes in their position paper "Academic Freedom of Students and Professors, and Political Discrimination" student academic freedom is unclear, not only because it sometimes blends into First Amendment territory (which is not academic freedom, strictly speaking), but also because students are regarded as fledglings, apprentices, and frankly as symbolic "children" who are being raised by symbolic parents (faculty) who deserve protection, but they are not exactly endowed with adult agency equivalent to their teacher's responsibilities. This is different from faculty academic freedom in which the U.S. Supreme Court in cases such as *Keyishian* (discussed in Chapter 1) has supported a version of faculty academic freedom.

The Marketplace of Ideas

The phrase a "marketplace of ideas", cited by U.S. jurists in controversies involving freedom of speech, is based on the writings of John Stuart Mill, a 19th century philosopher. A brief biography notes the English-bred Mill was an administrator for the East India Company but was also an influential philosophy writer (Renaud 928).

In 1859 Mill published *On Liberty*, a treatise on liberty, individualism, and societal limitations over the individual. In his chapter "Of the Liberty of Thought and Discussion" Mill argues in support of the sanctity of ideas. Although he never uses the phrase "marketplace of ideas", Mill argues on behalf of protecting the variety of human ideas and expression:

> If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind…But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error. (19)

This is a verbal argument parallel with Charles Darwin's 1839 *Origin of the Species*: variations from the normal are how better animals survive. Holding the idea up to scrutiny allows the community to think about the idea and its merit. If the new idea has merit, it benefits the community. If the new idea is wrong, debate over the idea *strengthens* interpretations of the idea since the process of debating the idea leads to a greater understanding of the "truth" of the idea. The community benefits from this debate by improving on the idea. Silencing a new idea at the outset (or, even worse, preventing the idea to be uttered in the first place by criminalizing it) allows the unchallenged truth to become dogma, lacking in vitality. Academics must constantly fight against dogma since their responsibility is an ongoing pursuit of greater truths.

For Mill, the failure to consistently challenge our sense of the world leads to stagnation. Mill writes:

> There is no such thing as absolute certainty, but there is assurance sufficient for the purposes of human life. We may, and must, assume our opinion to be true for the guidance of our own conduct. (21)

Societies function based on truths, or at least on the assumption of truths. Theoretically, societies create laws to progress. These laws are based on accepted truths. Universities should function as the nucleus of a progressive society. Knowledge benefits all.

However, if the truth is not examined, it could be to the detriment of society, thereby limiting progress. Mill continues:

> I answer, that…[examining truth] very much more. There is the greatest difference between presuming an opinion to be true, because, with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation. Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right. (21)

Truth is the result of overcoming challenges to it. In fact, liberty demands every idea to be challenged and refuted if possible since ideas form the basis of laws that societies follow. These laws lead to the betterment of society. Truths are functional in that their purpose is to lead to *action*. This is why ideas must constantly be challenged. Societies use these ideas to progress, and untested ideas are not a strong basis on which to build a society. Academics provide the ability to analyze ideas in their most succinct, rational,

and logical form. Once these ideas are practical, society can use these ideas in beneficial ways.

The intellects of a society, if they are confident in the logic of their ideas, should find no harm in having all members of society "put their ideas to the test" since the public will be the beneficiaries of those ideas. Per Mill:

> It is not too much to require that what the wisest of mankind, those who are best entitled to trust their own judgment, find necessary to warrant their relying on it, should be submitted to by that miscellaneous collection of a few wise and many foolish individuals, called the public. (22)

A marketplace includes every individual in the marketplace irrespective of their standing in society. To limit discussion of the validity of ideas to a chosen few based on their intellect lends itself to a form of despotism, in which the masses are viewed as apart from society more than a part of society, The populace is walled off, invisible in a sense, with little value and worth. Their function is primarily to carry out the wishes of the intellectual upper class, even if the ideas are faulty. Academics in the marketplace of ideas have multiple publics to vet their ideas: their peers through academic publications, their community through public conferences and lectures, and, of course, the most discerning public -- their students.

A society which prides itself on self-reflection is a society that progresses, as Mill notes:

> No one can be a great thinker who does not recognise, that as a thinker it is his first duty to follow his intellect to whatever conclusions it may lead. Truth gains more even by the errors of one who, with due study and preparation, thinks for himself, than by the true opinions of those who only hold them because they do not suffer themselves to think. Not that it is solely, or chiefly, to form great thinkers, that freedom of thinking is required. On the contrary, it is as much and even more indispensable to enable average human beings to attain the mental stature which they are capable of. (33)

Societies that do not value intellect in all segments of society can lead to societies having a superficial understanding of ideas and processes. The end result is a society that can fall short of its potential.

In fact, awareness is essential. Mill notes "If the teachers of mankind are to be cognisant of all that they ought to know, everything must be free to be written and published without restraint" (37). Limiting ideas in any way does a disservice to the educators who provide well-founded and well-rounded knowledge. Scholars must be free to explore all ideas so they can use their best judgments to separate the good ideas from the bad ideas. Educators, held in high esteem for their ideas, must have the ability to work through the unorthodox theories if society truly has an expectation that they will be fully informed educators.

Frozen creed is not good doctrine, as Mill notes:

> Then are seen the cases, so frequent in this age of the world as almost to form the majority, in which the creed remains as it were outside the mind, incrusting and petrifying it against all other influences addressed to the higher parts of our nature; manifesting its power by not suffering any fresh and living conviction to get in, but itself doing nothing for the mind or heart, except standing sentinel over them to keep them vacant. (39)

Mill's commentary on his own society, in which complacency has overtaken progress, is still relevant today. Accepting the status quo, and assuming that challenges to the status quo are unfounded, does not bode well for societies to flourish. In Mill's view, educators who view some ideas as sacrosanct and simply profess without questioning are doing a disservice to their students. Even at the most basic level, educators who challenge their students, as well as take into account their students own interpretation of ideas, may very well light a spark for at least one student to explore and research that idea further. No one can imagine what new ideas may eventually come forth by that initial query. Good education is always a struggle, not the memorization of rules.

To understand that one should never assume is important. Mill writes "Popular opinions, on subjects not palpable to sense, are often true, but seldom or never the whole truth" (44). An educator who does not question doctrine that is *understood* and logically sound is still not providing her or his students with the ability to point out the flaws. These flaws can lead to abuse by society if popular opinion makes people complacent.

In sum, no idea is untouchable. Mill succinctly notes "only through diversity of opinion is there, in the existing state of human intellect, a chance of fair play to all sides

of the truth" (46). The nature of the university is for students and educators to search for truth. The most heated and shocking exchanges can at least bring notice to the unorthodox, even if it is to be cast aside. But it is to be cast aside after re-affirming the truth, which can make it all the stronger. By having an unspoken understanding that pushing the boundaries will lead to sanctions for the student and educator, the popular notion of truth promotes boredom and a lack of inspiration.

The Introduction of a Marketplace of Ideas in Classroom Jurisprudence

In the next section, I lay the groundwork for understanding why students deserve more consideration as intellectual contributors to the academic freedom of the university. I first turn to Elmer Thiessen's argument that a contemporary notion of academic freedom recognizes that ANY discourse has limitations borne of its time and place. Academic freedom is not a protection for "anything" a student (or faculty member) says -- judgment and critique are part of the university system. In this sense, the classroom always comes with limits and boundaries, as does a marketplace.

However, this leads to my second point, which is that in today's public discourse, students are most often treated as "consumers" and passive receptacles of professor's knowledge, rather than producers. There are two places where this insight recognizing "student production" has significance: 1) acknowledging that the modern liberal arts university classroom curriculum is partly created by student work and 2) and most importantly, the activities of student groups and clubs are a key part of academic freedom. In today's university, the intellectual production of student clubs outside of the classroom are under unreasonable attack. The second half of this chapter will discuss the

legal travails these student groups have been facing, and demonstrate that many educators and jurists still think of university student intellectuals as children, incapable of legitimate cultural criticism and inquiry.

The marketplace of ideas, an unruly place, is an essential aspect of having a freedom to speak and discover truths, especially inside the classroom. The concept of a marketplace of ideas in a U.S. Supreme Court case was first introduced in *Abrams v. U.S. (1919)*. Although *Abrams* is discussed at length in Chapter 2, in sum the dissent by Oliver Wendell Holmes introduces the concept of a "marketplace of ideas" into the legal lexicon. His dissent heralded the beginning of modern academic freedom. The case did not involve an educator, student, or university but Holmes notes the essence of the first amendment is the ability to bring forth ideas deemed unpopular. It is not a stretch to assume that a classroom is a place where ideas are commonly discussed, tested, and either refuted or supported.

His common sense approach to when an idea becomes valued is his defining of a marketplace of ideas:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out (630).

Holmes, in stating the ideal of the ultimate good, believes those ideas viewed as valid can lead to “better” truths. As a result of "better" truths, a society can grow.

Although imagery of individuals meeting in a town square conveys a marketplace, in the 21st century in the U.S. the university classroom is seen as the main marketplace. To cast suspicion or criminalize ideas without vigorously questioning the ideas, even if it leads to uncomfortable conclusions, can cause the old ideas to be recycled continuously, not changing and adapting to the populace. Dogmatism can result.

The classroom provides the place for ideas to be tested, theoretically judgment-free, and learning from this give-and-take about the idea in question and permutations of the idea. The *process* begins anew as a crucial first step -- the educational enterprise. This process provides the marketplace with its impetus of questioning instead of memorizing.

Modern Conceptions of the Marketplace of Ideas in the Context of Academic Freedom

There is no easy means of applying John Stuart Mill’s view of a marketplace of ideas to the classroom in the guise of academic freedom, partially because of the structural limitations placed on traditional university teaching, including time constraints and content coverage requirements (which may leave less time for the free flowing ideal of discussing and debating ideas and concepts). One modern conception of applying the marketplace of ideas to the classroom notes the obvious: that the limitations of the marketplace can be viewed as strength.

Elmer Thiessen advocates for a “new ideal” of the marketplace that leads to an open academic freedom. His ideal looks at academic freedom as a journey which leads to a greater understanding. The academic or student is cognizant of the fact that they live in the “here and now”, and they are one among many in the search for truth. The goal is to

provide as much space as possible -- including the space to keep going back and tweak the ideas. This follows the tenor of Oliver Wendell Holmes pragmatism in *Abrams*, in which Holmes closes his discussion of the marketplace of ideas on a thoughtful note, stepping back to remind us that the achievement of perfection is impossible: "That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge" (630). Theissen follows along a similar path:

> The suspicion of any limitations on academic freedom fails to recognize that a researcher or teacher inherits a standpoint from which he or she pursues and expounds the truth. What is needed, therefore, is a new ideal of academic freedom which recognizes that we are all situated in a particular time and a particular place, and that the best scholarship is honest in admitting the limitations imposed by its prior commitments. Good scholarship will, of course, also go on to defend the possibilities opened up by starting with these prior commitments. (8)

Thiessen acknowledges that we are products of our time, with rules, values, and expectations that overtly or subliminally curtail our ideas at the outset. For example, placing some ideas into the marketplace may not even occur to educators or students because of societal pushback. These concepts can be as varied as issues related to race, religion, ethnicity, or gender identity, as well as issues related to economic or foreign policy. Academics can acknowledge those limitations by noting time and place "taboos" and, perhaps gingerly at first, look at these ideas with a fresh set of eyes. Academics and students must be honest with themselves that pushback will always occur, and make note of that pushback in working with these ideas. If they choose to "push the envelope" in

terms of style or substance, there can be consequences, some of which those in the society may not even view as consequences but as the natural order of things. Quality ideas brought into the academic marketplace will at the outset attempt to acknowledge the "obvious" by actually "spelling it out" in their production. This may not prevent pushback once the taboo slowly begins to be broached, but at least all those in the academic endeavor can "see" a jumping off point. And perhaps, this is as far as the "radical idea" will go for now, as a product of its time and place. Future generations may attempt to take this "radical idea" into new and exciting directions. Students will have this knowledge and can apply it (either directly or indirectly) to their own real-world experiences.

A balancing act is key, as Thiessen notes:

> A middle way…[that] will lead to a balanced view of academic freedom in which it is acknowledged that, while teachers and researchers are unavoidably rooted within a tradition, they will invariably also be seeking to transcend their limitations in an ongoing search for truth. While the notion of pure freedom is an illusion, the notion of "a view from nowhere" must be kept as a heuristic principle in order to encourage an open-minded search for truth. What this will lead to is an ideal of "normal academic freedom." Normal academic freedom maintains a proper balance between an acceptance of the limitations that are inherent in academic work and a striving to move beyond these limitations in the search for truth. (11)

Educators work within traditions (for example, using processes and formulas created by others), but the nature of their work always has them "looking beyond". Although

freedom is not absolute, there must be absolute open-mindedness as students ponder and work through ideas. The "normality" of this process that educators, researchers, and students engage in is a shared belief that in the marketplace of ideas, all the participants will work towards new truths. This normal academic freedom is actually organic in nature. Ideas are simply being created by people having a curiosity about something they heard or read, and "looking into it" to make connections, whether through classroom discussion, internet posts, or research. This is far from perfect and is quite messy -- words and meanings can be misconstrued by any of the participants in this endeavor (as well as by the outside world). But this is "the human condition" in searching for meaning to understand things in a macro sense and, if there is a terrific energy (such as when there is great debate and discussion in a classroom lesson), understand things in a micro sense. In this sphere, there is no "teaching manual", no pre-supposed way to approach material, no dis-incentive to theorize and apply and go beyond the formulaic. For if there is a "guidebook", there is less incentive to actually delve into the marketplace's "view from nowhere" since the view is defined by others.

Students in the Marketplace of Ideas

For educators to "push the boundaries" in their research and pedagogy involves many possible pitfalls, especially if political or community pressure forces the academic out, if the academic works at a private university where she or he can be more easily terminated for their ideas than at a public university, or if the academic is an adjunct or non-tenured which usually does not afford the same freedom to teach. It follows that for students, who are on an even "lower rung" in the academic food chain, the concept of a robust academic freedom in a marketplace of ideas is less attainable. The marketplace of

ideas encompasses students deserving scholarly recognition for their knowledge production; they can make contributions to the academy as well as professors. Students are usually left out of the equation in the larger discussion of academic freedom. However, students play an active role in the marketplace of ideas, and if they are valued for their intellectual prowess, new knowledge can be produced.

At first blush, the narrative of the student as a passive receptacle of knowledge should be reframed. Marc Bousquet has advocated for equality between the faculty and students in terms of sharing capital towards the ultimate goal of societal productivity (*University* 154). All of the participants in the marketplace have *some* contribution to make. Bousquet discusses this in terms of the corporate universities view of students as consumers. This provides them with a college (and graduate) education which may provide less monetary value as compared to previous generations of graduates. As the consumer, this also saddles them with unusually large debts to pay for the credential.

This consumer driven model permeates the ideal of the marketplace of ideas for all participants. Bousquet notes: "And here we've run up against the classic question of education and democracy: Can we really expect right education to create equality? Or do we need to *make equality* in order to have right education?" (154) A more democratic "definition" of the university can acknowledge the professor's scholarly role and value in her or his disciplinary expertise. It can also privilege the students as intellectual beings in the early or formative stages. The academics help provide the foundation, and the students, providing more than passive acceptance, have the agency to "enhance" the idea building through their interpretations, fully thought through for deficiencies. It goes beyond the professor telling the student "that's a good question" and tells the student to

look for more than the answer given by the professor to the "good question". This involves a commitment on the part of the student, who has to have the motivation and drive to follow through (with the professor's guidance). An acknowledgement of this dynamic provides an opening for students to be cognizant of their agency in intellectual contributions, going beyond a consumer-driven model to at least understanding that "knowledge is power" can mean more than monetary value (a credential which, as Bousquet notes, is providing less monetary value than in previous generations) .

Viewing the academy as a societal good lends itself to an academic freedom which educators and students can benefit from. Bousquet notes: "For me, the basis of solidarity and hope will always be the collective experience of workplace exploitation and the widespread desire to be productive for society rather than for capital" (154). In the realm of the marketplace of ideas, hope comes from an understanding that all members of the academic community view their experience with at least a semblance of a "shared action". Professors and students have the ability to work together, with the student's contributions a bit more impactful for society. It is the student as the producer, which can be seen in student newspapers, journals, and joint publications. Bousquet's discussion of workplace exploitation places the student without much agency, especially in the realm of independent intellectual rigor. Students in a traditional professor-student dynamic can use their knowledge upon leaving the university for the betterment of society, but Bousquet may let students have a bit more agency at the university level in creating knowledge to be used for the betterment of society, which provides more of an impetus of acknowledging a student's academic freedom.

In the university, students do not necessarily have agency over their intellectual production. Bousquet has defined student academic freedom in terms of structural constraints:

> the academic freedom of undergraduates is under direct, sustained, and steadily increasing assault by administrations. With the active participation of state and corporate partners, undergraduate culture is steadily commercialized, militarized, and vocationalized…we need to ask the same question of undergraduates that we ask of faculty: To what extent does the structured precariousness of their existence affect the very possibility of their exercising academic freedom? In other words: What are the consequences for students of universalizing the literacy, culture, and subjectivity of precarity? (*Ritalin* 185).

Academic freedom flourishes in settings where participants are at ease to exercise agency over their intellectual pursuits. If students do not have the "head space" to pursue their own interests because of worries over their financial opportunities and debt, it is easier to forego disciplines they have a passion for. Academic freedom requires motivation on the part of the participant and the time for the participant to act on her or his motivations. Intellectual rigor and quiet time for reflection can lead to students creating fresh ideas. However, precariousness in the guise of rationalization can motivate students not to waste too much time on deep inquiry since obtaining the most financially stable credential is "what college is for". In this scenario, challenging dogma has little benefit for students.

If the rise and fall of a society can be found in our institutions of learning, so can the truthfulness of ideals valued by the society, as Bousquet notes:

> In elite circumstances, and in more democratic, secure societies, there is a demonstrably larger "market demand" for an education that provides the encompassing student academic freedom to produce poetry, consume philosophy, and practice politics. In the United States, by way of institution-specific missions and vocational curricula, higher education attempts to shunt those defined by assessment instruments as labor market losers (the defiant, the inattentive, the unmedicated, those who view culture as an instrument for liberation) into their place in a class society as quickly and quietly as possible. (*Ritalin* 198)

Liberation is key here. The ideals of academic freedom apply to every discipline. Students may want to pursue their passions in disciplines that embrace individuality and get to the heart of how government works (or should work). They can "cut their teeth" by trying out new ideas and theories and attempting to put those ideas and theories into action. In disciplines that are marketed more narrowly (even though they may not have to be marketed in that way), liberation is less about student academic freedom and more about proscribed reasoning; "getting through" a syllabus with too much content jammed into too few weeks. The "losers" in the United States are those students who "take the reins" of their discipline to have some sort of agency over what is being learned -- first learning the fundamentals and accepted theories of the discipline but *also* making the academic journey one in which they attempt to add to the discussion with their own interpretations. Of course, those interpretations can be faulty and checked by the professor, but the understanding that education is about taking free speech ideals and applying those ideals in a more substantive way to the student can be lacking in the U.S. education system.

Academic freedom for students is addressed through creating fundamental change in how education is defined and administered. Bousquet notes:

> Under what conditions will our students be able to learn freedom—in what kind of schools, in what kind of culture? Our schools must therefore be more democratic, and our culture as well. How democratic are our laws and system of political representation? What forms of security must be shared by all for higher education to become a zone of intellectual and personal freedom for those who don't control capital or serve it? Once we've begun to address those questions—and asked what higher education can and must do in that regard—we can also address some of the questions particular to colleges and universities. Once higher education is no longer urgently necessary as a form of risk management, what purpose does it have? (*Ritalin* 199)

For Bousquet, academic freedom for students would only exist in a system where personal freedom is embraced. Personal freedom is not embraced if the purpose of education is to stay within rigidly defined contours to meet the needs of the market. If a more open view of personal freedom takes hold in the academy, students can begin to exercise freedom of thought, which leads to a more direct academic freedom in which they have more agency in knowledge production. For example, once students "nail down" the traditional doctrine of a course, students learn to apply their own "take" on it by *questioning* it. Not simply memorizing it for application in a fact pattern on an exam.

The closed universe of "academy knowledge" does not necessarily lend itself to contributions by others, especially students. Louis Menand notes professors virtually monopolize the business of knowledge production in many areas, but proposes that

academic inquiry, at least in some fields, may need to become less exclusionary and more holistic (*Marketplace*). Students are not explicitly stated as a part of that endeavor.

The traditional university functions as a producer of knowledge going "one way" -- created by the academic/professor and proscribed to the student, as Menand notes:

> the most important function of the system, both for purposes of its continued survival and for purposes of controlling the market for its products, is the production of the producers. The academic disciplines effectively monopolize (or attempt to monopolize) the production of knowledge in their fields, and they monopolize the production of knowledge producers as well. (*Marketplace*)

Traditional education may assume that students, although highly intelligent and highly analytical, have knowledge commensurate with success in a university program. Not necessarily knowledge beyond that. Not the type of knowledge that can add to the discipline in creating new ideas, theories, or interpretations. The concept of student academic freedom, at least in the guise of agency, is not applicable in this framework. Menand states that traditional education creates a standard body of knowledge all practitioners can follow (he uses law as an example). Presumably, traditional education allows for a minimum standard of competence in a discipline. Student academic freedom, in a true sense, cannot exist in this paradigm.

For example, students begin taking courses in a major. They learn the concepts and are tested on them. Once they succeed they progress to more advanced courses in the major, where it can be more of the same. Of course, there are variances in the spaces used

for learning once the students begin taking advanced courses in the major (such as lab or field work) but the knowledge usually stays "in house". New knowledge is created by academics that publish but stay "in house" with ideas that may not veer too far from the mainstream view of things. Professors who serve on academic committees to re-vamp the major may look to this new knowledge in advising of changes, but the new knowledge may be more of the same. Educators who are in the academic system long enough may see "new" ideas that were actually re-hashed and re-branded from a generation or two earlier. Although this is not always the case, the traditional tropes that students (and the larger public) "expect" from a particular discipline can be difficult to push back against.

However, future academics may have to acknowledge disciplinary contributions from students. Menand notes: "Professors teach what they teach because they believe that it makes a difference. To continue to do this, academic inquiry, at least in some fields, may need to become less exclusionary and more holistic" (*Marketplace*). Although Menand does not want to venture too far down this rabbit hole for fear that the "public culture" will take hold in the university, he understands that for the academy to maintain relevancy, there has to be *some* opening up of the participants invited to contribute. The ability of students to contribute to the discipline, with guidance from their professors to make sure they are on the right track, helps students see disciplinary knowledge "in action". It may have a bit more relevancy for them. If students worlds are shaped in some small or large way by technological advances where information can be shared for a public understanding, perhaps the academy can slowly begin to allow for a little of that energy to be brought inside the university.

The narrative of students as second-hand participants in learning has at least one theorist. Bruce Macfarlane addresses this in his argument that the traditional definition of academic freedom is condescending to students, relegating them to a mere by-product; students and faculty are scholars learning together (*Freedom to Learn* 24). He notes:

> Attention…often focuses on the role that the professoriate might play, deliberately or inadvertently, in influencing student freedom of expression through strident advocacy of particular views. Here, the concern is that professors with charismatic demeanors and strident opinions… can force them on their students and, in the process, retard the extent to which the students are allowed to develop and express their own thinking. This has led to student academic freedom being seen as something that can be taken away or removed from students by professors as a negative right.

Students are given short-shrift in this regard. This hearkens back to Paulo Freire's concept of educational "banking": "Education [is] an act of depositing, in which the students are the depositories and the teacher is the depositor…the scope of action allowed to the students extends only as far as receiving, filing, and storing the deposits" (72). The student's ability to pursue independent thinking is solely reliant on the professor's academic freedom. Students are assumed to have the academic freedom to exist as students in the university paradigm. This defines student academic freedom as the ability to analyze and independently think through issues. However, this freedom does not focus on the *content* of the analysis and independent thinking. It is a freedom that fits into a larger narrative about academic freedom.

One query is if students and professors can simultaneously have academic freedom in the same space. The push-and-pull of classroom dynamics may not allow for "grandiose ideas" by the students or professor to be equally evaluated; can more than one theory dominate? Macfarlane notes:

> The exercise of academic freedom by professors can potentially restrict or harm student academic freedom especially where self-censorship takes hold. By the same token, the realization of academic freedom for students might involve restrictions on professorial academic freedom.

The trope of the traditional learning space does not necessarily bring forth images of a shared intellectual endeavor of educators and students as intellectual equals, which can be seen in primary and secondary schools most starkly. With these age groups, the adult educator is giving state-mandated content to the child student, and the student's traditional function in this regard is to learn this material and "report back" to the teacher by a state-mandated evaluative tool, usually a test; in modern times the school system embraces more creative evaluative means. Although the expectation is that the academic freedom of two distinct groups can exist simultaneously, unfortunately this dynamic is usually not radically altered on the college level. This lack of alteration may be partly because of the traditional expectation of what college *is* -- learning initiated and chaperoned by professors. Students apply the knowledge learned in the non-academic world. Partly this relates to the "vision" of a marketplace of ideas as being a bit chaotic, and order must be maintained for new ideas to be brought forth in the classroom marketplace. Educators, as traditional authority figures, provide the ideas in an orderly manner.

But this dissertation goes further. Academic freedom for students should be viewed in an expansive manner. Macfarlane notes:

> Students need to be given the capability to be able to become independent learners, and to develop their knowledge and skills in order that they can make their own decisions and choices about what to study and, ultimately, what to believe in. These are positive rights that need to be developed within (higher) education.

"True" student academic freedom occurs if students are viewed as a part of the educational endeavor with the ability to contribute. A "positive rights" framework takes into account the understanding that students are expected to eventually contribute to the disciplinary conversation, not only sit back and let the disciplinary conversations take hold without further action by the students. Admittedly, this type of insight may have a more noticeable effect on liberal arts curricula than professional schools. But even professional schools, such as accounting programs, often face legitimate critiques from their students, and also have student clubs and groups which can be quite active.

Although students are in the space (the classroom) in which the marketplace of ideas can be utilized, students do not necessarily participate in the intellectual debates, as Macfarlane states:

> another of the barriers to thinking of students as scholars is that we increasingly defer to the market analogy... As a result of this students are labeled as customers, rather than members of the academic community. Perversely this means that they have a reduced status as members of the academic community. The hierarchical

nature of academic life further means that the student is cast in the role of a novice.

The students are the “market”. Their “place” is not necessarily to contribute new ideas, but to listen to the words of scholars since that is what they are paying for. This viewpoint is not exactly akin to academic freedom for students. Once students have an understanding of the theories being put forth by the professor, evaluations may be viewed as the end point. By *not* “leaving it there”, further exploration by providing students with intellectual agency may enhance their academic experience; they may get more than what they paid for. The metaphor of the "marketplace" is largely good, but not always -- it's not simply that cheaper and most useful is better.

Of course, professors can argue that courses voluminous in content do not leave time to embrace the marketplace of ideas mantra in an equal manner for students and professors. There’s only so much time a professor can dedicate to student input in 16 weeks, especially if courses are structured to “hit” on a different topic every week. In addition, it can also be more of a problem with speech codes, such as punishment for political tweets. In a larger sense, this can lead to questions about what the purpose of higher education in the U.S. truly is about.

The answers may not bode well for the academic freedom (and academic survival) of professors. If the space in which the exchange of ideas is more of a one-way consumer transaction with the students only role as “listeners”, the professor’s utility may be lessened. Essentially, the “classroom space” for some disciplines can eventually become unnecessary. Since there is no expectation of a lively debate between students and professors to create something new, universities may begin to designate a substantial

amount of courses as “online only”. Universities may hire academics on the cheap who lecture and post videos that students can watch from home with a requirement of a test or paper due at the end of the semester. Academics in this thin learning environment may not enjoy an equivalent level of academic freedom. The lack of a two-way marketplace of ideas makes the expectation of knowledge producing less “open-ended” and more about “sticking-to- the script”. A market analogy can eventually create an opening for a more “streamlined” understanding of knowledge.

Universities that view students as a “by-product” in the educational endeavor fail to see the additional intellectual contributions that can benefit the university and society. Macfarland notes:

> Students need to be able to evaluate claims to knowledge without inhibition or restriction. Postgraduate students are very often engaged in completing pieces of independent research which require the protection of academic freedom. Doctoral students need to produce work that makes a new contribution to knowledge in order to graduate. Surely to achieve this high ambition they need and deserve academic freedom in challenging existing understandings and interpretations? The received wisdom students may choose to challenge will invariably be based on the research and publications of academics. If they are not permitted to challenge it, how can new knowledge be created?

Macfarland believes students could understand at the outset (even as undergraduate freshmen) that their ideas and opinions are not only functional -- to achieve a passing grade. They will develop the self-esteem early on to *question*. Student academic freedom

is first and foremost about agency. Academics are understandably leery of giving up some of their power in the classroom; as Macfarlane states "It follows that students, as apprentices or novice members of the academic community, require less protection as they are not risking their necks in putting forward a controversial new theory or contradicting received wisdom." Providing a space for an undergraduate student's academic freedom at a university is challenging, especially since there is probably no preparation for this type student agency in high school. In the current student/professor dynamic, if a student puts forth a controversial new theory during a classroom discussion, the professor, as the person responsible for the class content, may face the most criticism.

However, without an acknowledgment of different iterations of knowledge production, academics are less equipped to challenge. Professors in graduate programs waste precious time teaching their charges "how to think". Even worse, professors have to re-program students at the ultimate stage of academic rigor, the dissertation stage, that it is acceptable for students to *not* merely parrot their mentor's ideas; it is acceptable for students to begin to break out on their own in bold and insightful ways that substantively challenge conventional orthodoxy. By planting the seeds of an academic freedom for students, the eventual growth of an intellectual curiosity can result in untold benefits.

An Analysis of Student Academic Freedom through University Fact Patterns

A more expansive view of student academic freedom is essential in allowing students to play an active role in the marketplace of ideas. Giving the students leeway to explore controversial ideas and even ideas that shock the conscious is imperative to develop the agency needed to contribute to the academic universe. With this in mind, a few questions should be addressed: (1) Do students have a right to say what they want on

campus without reprisal? (2) Will they be evaluated fairly? (3) Will they be protected from unfair disclosure beyond campus, such as interference from administrators, society, or the law?

In looking at questions such as these, Susan Kruth, an attorney who has worked with the Foundation for Individual Rights and Expression (FIRE), provides several examples of college students. She concludes that universities should be able to handle the most passionate and visceral ideas and be able to distinguish them from ideas that are truly threatening to shut down the space of education for all, such as bombs or the exclusion of minority groups. Such is the case when activism is interpreted as a threat.

For example, in 2007 in Georgia, a court vindicated a student expelled from a state campus for publishing critiques of the university president's construction plans. Although the student's publication activities were formidable and quite likely infuriating to campus administration, it posed no actual threat to the school:

> In the Spring of 2007, former Valdosta State University ("VSU") student Hayden Barnes was expelled for posting a satirical, cut-and-paste collage on his personal Facebook page that was deemed a threat by the university president. The collage criticized former VSU President Ronald Zaccari's plan to spend $ 30 million dollars' worth of student fees to construct parking garages on campus… He registered his opposition in a variety of ways, posting flyers and sending emails to Zaccari, the student newspaper, student and faculty government, and the Board of Regents of the University System of Georgia. Barnes proposed that Zaccari spend the money earmarked for the parking garage on what he perceived to be more environmentally friendly measures. Angered by Barnes' persistent criticism, and

> embarrassed to have been contacted about Barnes' communications by members of the Board of Regents, Zaccari summoned Barnes to a meeting in his office. Zaccari lambasted Barnes, telling him he "could not forgive" him and asking him, "Who do you think you are?" Despite the admonishment, Barnes continued to advocate against the parking garage. In response, Zaccari redoubled his efforts to silence Barnes. Zaccari monitored Barnes' personal Facebook page and seized upon the opportunity he perceived in the collage, which included pictures of Zaccari, a parking deck, and the caption "S.A.V.E.--Zaccari Memorial Parking Garage." …Zaccari was repeatedly told by senior VSU officials that Barnes did not present a threat to himself, others, or the campus. Nevertheless, Zaccari personally ordered that Barnes be…expelled… Signed by Zaccari and attached to a print out of Barnes' Facebook collage, the [expulsion] letter informed Barnes that because of "recent activities directed towards me by you," including "the attached threatening document," Barnes was "considered to present a clear and present danger to this campus."…[Two subsequent federal court hearings which ruled] Barnes' "clearly established [a] constitutional right to notice and a hearing before being removed from VSU"… and [a] "First Amendment retaliation claim against Zaccari had been improperly dismissed by the federal district court" led to a $900,000 settlement for Barnes but with no admission of liability or wrongdoing. (468)

Here, Barnes had the "right" to speak about an issue of concern to him -- using his student fees for the construction of a parking garage instead of more environmentally friendly measures. Academic freedom allows for debate on issues, especially here where

Barnes was providing a debatable alternative. His social media posts, which included a collage advocating for an alternative action than a parking garage, were deemed a threat without any debate or discussion. His speech was not protected from the actions of the administrator who used the term “threat” as a bureaucratic device to shut off all discussion and trigger the student’s removal with no questions asked.

School club advertisements for membership that use parody in an edgy way are also susceptible to being labeled as “threats”. In 2008, a student group published a flyer that poked fun at handgun safety tips. The group was sanctioned by their university because of addressing (in a comical way) the subject of handguns. Kruth notes:

> In September 2008, the Young Conservatives of Texas ("YCT"), a registered student organization at Lone Star College-Tomball in Texas, distributed flyers during a "club rush" event where organizations recruit new student members and increase awareness of their presence on campus. Adorned by the club's logo, the flyers read:
>
> Top Ten Gun Safety Tips
>
> 10. Always keep your gun pointed in a safe direction, such as at a Hippy or a Communist.
>
> 9. Dumb children might get a hold of your guns and shoot each other. If your children are dumb, put them up for adoption to protect your guns.
>
> 8. No matter how responsible he seems, never give your gun to a monkey
>
> 7. If guns make you nervous, drink a bottle of whiskey before heading to the range

6. While unholstering your weapon, it's customary to say "Excuse me while I whip this out."

5. Don't load your gun unless you are ready to shoot something or are just feeling generally angry.

4. If your gun misfires, never look down the barrel to inspect it.

3. Never us[e] your gun to pistol whip someone. That could mar the finish.

2. No matter how excited you are about buying your first gun, do not run around yelling "I have a gun! I have a gun!"

1. And the most important rule of gun safety: Don't piss me off.

Join us for an informational meeting Monday, September 15th at 4 p.m. in the commons area. If you have any questions or would like to join please contact either Rob Comer (President) at 832-372-7192 or Joshua Pantano (VP) at 281-352-8088.

The college…informed YCT…that the flyers were "inappropriate" and confiscated them. After [YCT President Robert] Comer complained about the violation of his expressive rights, he was invited to speak with [a] Dean… who [referenced] the 2007 mass shooting at…Virginia Tech… She told Comer that the organization would likely be placed on "probation" for the school year because of the flyer.

[The Foundation for Individual Rights in Education] wrote to remind the college of its First Amendment obligations pointing out that the flyer's text was plainly protected speech…The plainly unserious "Top Ten" list expresses no such intent [as a true threat defined by the US Supreme Court]…In response, the college's

> general counsel replied that "[t]he mention of firearms and weapons on college campuses" is inherently a "material interference with the operation of the school or the rights of others" because such language "brings fear and concern to students, faculty and staff." [and also referenced Virginia Tech]. (470)

Here, YCT had a "right" to advertise for club membership using parody -- there is no sense of imminent danger towards any group and the text may relate to the values of the student organization, the young conservatives. Also, Texas had loosened restrictions on gun laws before this incident: "[In] the mid-1990s, when the Republican Party became dominant in Texas politics…a loosening of firearms regulations in the name of personal self-defense began. In 1995 then-Gov. George W. Bush signed a law authorizing properly licensed residents to carry concealed handguns" (Rivas). Several years after this fact pattern in 2015 "Texas passed a controversial measure allowing licensed gun owners to carry concealed handguns on college campuses" (Sparber). So, if by 2015 standards, concealed handguns are allowed on college campuses, a flyer such as that posted by YCT should be less likely to take away that right. Also YCT was not evaluated fairly; a blanket ban based on the phrase "inappropriate" and a garbled response to a major school shooting has no relation to the information or tenor of the flyer. Finally, campus administrators were the ones who removed the flyers from campus with a paucity of due process (from the fact pattern, the process appears pro forma at best without a substantive inquiry -- a hearing evaluating both sides of the case).

Things are not always cut and dry, as when two groups of students disagree. In 2015, a feminist student group was harassed on a university social media application by other students. The feminist student group requested that these messages (which they

perceived as threats) should be blocked by their university. The university disagreed. Calls for universities to block social media applications on their internet network because of “threats” directed at a student group should be heeded only in the most extreme circumstances. Kruth noted:

> In 2015, students at the University of Mary Washington ("UMW") requested that the university attempt to block [a social media] app on campus in response to so-called threats, but the context of their requests revealed a failure to distinguish between true threats that warrant police involvement and insults that may not be punished by a public institution such as UMW. The controversy at UMW began in the Fall of 2014, when students posted critical and strongly worded remarks on Yik Yak in response to advocacy by the then-president of the student group Feminists United on Campus ("FUC")…The university president published a statement saying that "[u]niversity policies prohibit discrimination, harassment, threats, and derogatory statements of any form." The First Amendment prohibits UMW from punishing statements that are simply "derogatory" with no determination that they fall into an unprotected category of speech such as true threats, but this statement set the stage for students to demand an institutional response to constitutionally protected speech…FUC alleged that in violation of Title IX, UMW failed to take sufficient steps to eliminate a hostile environment created by students posting negative messages about FUC on Yik Yak. FUC alleged that its members had "been threatened hundreds of times." Yet the supposedly threatening messages ranged from pop culture references to profane

but plainly protected insults--they were not "serious expression[s] of an intent to commit an act of unlawful violence."… UMW declined FUC's "request. (485)

UMW analyzed the accusation of threats in an objective manner, looking specifically at what was posted. FUC was aiming for a more subjective determination, which is problematic in the realm of the first amendment (and academic freedom). Everyone can take offense at being insulted; offensiveness in and of itself is not a bar to academic freedom. The ease in conflating “shock” to true threats that place others in peril provides an easy out to prohibit uncomfortable speech without taking hard positions which academic freedom rests on.

Student responses to classroom assignments can also be perceived as “threats”. In 2015, a graduate student in a writing fiction course wrote about a fictional shooting at the college he was attending. The student was reported by the university to the police. Kruth states:

> In 2015, St. John's University student Daniel Perrone wrote a work of fiction about a school shooting for a class titled "Graduate Fiction Workshop: The Monstrous." The university reported him to the police. Perrone was ultimately cleared of wrongdoing by the New York Police Department. But St. John's decision to subject a student to a police investigation and several hours of questioning, despite the fact that the work was plainly fiction within the scope of the class and the assignment, risks chilling a substantial amount of student speech. A coalition of free speech organizations, led by the New York Civil Liberties Union and including FIRE, wrote to St. John's in April 2016 asking the university to publish a policy that clearly protects student fiction writers from similar

> repercussions. St. John's had previously declined to take this step upon request from Perrone himself. Without such a policy, students and faculty will be forced to choose between avoiding all topics that might be disturbing--even if exploring hypotheticals and made-up worlds--or potentially being the target of a police interrogation. (485)

In this case, Perrone was following the professor's lead in producing risqué work. Especially regarding the humanities, students are usually given leeway in "answering the professor's question" since the answer may not be clear cut. Such is the case in a fictional creative writing class, in which the student is required to be creative in writing fiction. Academic freedom requires objectivity, and in a course in which the student's evaluation was based on risqué assessments in line with the theme of the course, there was an inability to "step back" and see the academic purpose here.

The range of these cases is endless; Liz Jackson provided an example through a list of hypothetical fact patterns: "A student says something morally problematic—such as something racist or sexist, which could be read as inspiring harm or violence—in a classroom discussion…A student argues for racial and sex segregation in universities, on the ground that it can allow for more safe, fair spaces… a student from a disadvantaged background, who is mimicking those around them, hoping to be successful, and trying in vain" (8).

Universities engaging in an open marketplace of ideas ethos should be able to handle students who push the envelope in exploring ideas or concepts, even the most offensive and threatening ideas within the context of a university device application, off-campus party and class assignment. The key is to use reason (something universities are

in the business of) in addressing the idea, condemning it if warranted and offering counter ideas that are supported in the academic universe. Teachable moments in the university should be learned within the confines of the university which allows for discussion, not necessarily through university or criminal sanctions where the idea "ends". It is interesting to note, as demonstrated in Susan Kruth's examples, there are different kinds of "punishment" and sanctions. Racy tweets could get students suspended; controversial papers could result in less of an academic sanction but more of a law enforcement action.

Universities provide a safe space for their students through the assumption that all ideas can have merit. This space allows students the ability to explore ideas and theories that may be shunned in the outside world, especially those ideas and theories that relate to disciplinary knowledge and growth. If ideas and concepts are "off-limits", that is not necessarily a good thing, as Kruth notes:

> [I]f overzealous administrators continue to punish protected speech under the guise of responding to threats, students will increasingly find themselves less informed about issues that are highly relevant to them…Campus community members will not hear warnings meant to prevent history from repeating, as all references to past tragedies will be interpreted as an intent to reenact them. At the same time, students will be dissuaded from being outspoken on the issues that they are most passionate about, lest their passion cross an unarticulated line determined by administrators' whims. Such a result is harmful to students' sense of civic responsibility and harmful to any well-functioning democracy. Students will also be left without opportunities to receive professional feedback on projects

> that explore upsetting ideas or push the envelope as long as they are burdened with the fear that doing so may prompt their institutions to react as St. John's did, by involving the police. (492)

Students who feel hamstrung because of sanctions that may be imposed on them by the university or outside authorities will inevitably not take intellectual chances in their education for fear of "rocking the boat". However, a goal of a university should be to "create". It can be a messy process since humans, who are fallible, are doing the creating. Treating students as *intellects* producing information in an intellectual endeavor provides students with the real wherewithal of how to explore their ideas in an effective way to the benefit of society. Assuming the worst of students can create graduates who are not the best. Using a blunt instrument approach does not do the students or their classmates who are using their agency in furtherance of their discipline much good (unlike those who clearly want to do harm), especially once they get the message that silence (in some iteration) is golden. Principles of academic freedom in an expansive marketplace of ideas framework -- such as encouraging all student ideas to "make themselves known" without fear of heavy-handed retribution -- should guide administrators to tread lightly. It is all in the approach; attempting to speak with the offending student or students to get an initial response, even initially off campus via a phone call, text, video-chat or email, or even restricting the student from presenting on campus without first speaking to their professor or an administrator, acknowledges some sort of intellectual machination before taking it to another level if need be.

Growth in the university is important, as Kruth states: "Students and professors who value students' personal and intellectual development must demand unfettered

discourse at their institutions" (493). For the student who is searching for ideas to explore or how to present those ideas, a professor can ask the student what conversation she or he wants to be a part of (Denny). If the student truly has an interest in the subject matter, which includes even the most unpopular or unspeakable material, by sanctioning and censoring the conversation it shuts off any acknowledgement of intellectual growth or understanding in coming to a greater understanding or truth. This privileges certain lines of inquiry over others.

The Marketplace of Ideas and University Speech Codes: "Offensiphobia"

Some universities have implemented speech codes in which certain words are "banned" by the university or can result in punishment. However, these speech codes can be at odds with the concept of academic freedom. In "On Freedom of Expression and Campus Speech Codes" the AAUP notes "rules that ban or punish speech based upon its content cannot be justified. An institution of higher learning fails to fulfill its mission if it asserts the power to proscribe ideas—and racial or ethnic slurs, sexist epithets, or homophobic insults almost always express ideas, however repugnant. Indeed, by proscribing any ideas, a university sets an example that profoundly disserves its academic mission". The concept of the academy as welcoming all comers is essential for the free-flowing of ideas. A university-sanctioned code of speech demonstrates to students that the university "takes sides", which students can take as a cue to censor ideas they think will "cross the line". Of course, repulsive speech does not become *less* repulsive speech simply because it is uttered in the academy; academic freedom works by demonstrating the hatefulness, illogic and stupidity of the repulsive speech since it can be aired out in the marketplace of ideas.

"Crossing the line" could have no end point, as even offensive speech could be grounds for sanctions. J. Angelo Corlett has defined this as "offensiphobia":

> Simply put, what I shall refer to as "offensiphobia" is the fear of offensiveness and the attempt to prohibit it by way of law or public policy. But my main concern here in higher educational contexts is the fear of offensiveness due to human expressions and the attempts to censure them. More specifically, I am primarily concerned with higher educational offensiphobia and whether or not it is morally justified insofar as it seeks to censure human expressions which merely offend. (116)

This can stifle faculty as well as student academic freedom. Offensive speech can be used for any or no reason to sanction someone, and its nebulous nature lends itself to being used for sanctions quite a bit. As Corlett states: "Accounts abound of college and university faculty being terminated, placed on leave, reprimanded, or otherwise disciplined for expressing ideas which used to be deemed to be within the bounds of protected discourse in academic settings but are now deemed by an increasing number of persons to be offensive to others and thus legitimately censurable" (120).

Three examples among many highlight how this can be used against faculty and students, inadvertently leading to student academic freedom to be limited since exposure to "offensive ideas" can be limited.

In one instance, an Adjunct Lecturer in History at St. John's University, Richard Taylor, was terminated in 2020 for a discussion of the "Columbian exchange" that contemplated its positive and negative aspects. The controversy started when a student thought Taylor was saying that there were positive and negative aspects of slavery, not

positive and negative aspects of the meeting of Europe and the Americas. As the Foundation for Individual Rights in Education noted:

> On Sept. 7 [2020], Taylor taught the Columbian Exchange to his "Emergence of a Global Society" class. As it has in earlier years, Taylor's instruction focused on early global trade, including trade in silver and potatoes. As part of the class, he also covered the more pernicious aspects of early trade, such as slavery, the abuse of indigenous populations, and the spreading of disease. On his final slide was a discussion prompt: "Do the positives justify the negatives?" A lively discussion ensued. One student said slavery could never be justified. According to Taylor, he clarified that no one is justifying slavery and asked students to consider global trade as a whole, including lives lost to disease and lives saved from famine. ("Teaching history not permitted: St. John's bulldozes academic freedom, punishes professor for posing question about 'Columbian Exchange'")

Taking offense to utilizing a discussion of slavery in a non-traditional format foregoes academic freedom for the sake of academic acceptance, in which the students own academic freedom is stunted by a failure to question the unquestionable, even if the answer is obvious.

In a second instance, an Adjunct Lecturer in English at St. John's University, Hannah Berliner Fischthal, was terminated in 2021 for a discussion of a *Pudd'nhead Wilson* by Mark Twain in which she quoted a passage that included a racist term. Fischthal explained how Twain used actual dialect and the use of this term was a realistic form of speech at the time. She apologized and offered dialogue, but it wasn't enough. As Jonathan Turley noted:

This incident involves the reading a passage containing the N-word from Twain's anti-slavery novel "Pudd'nhead Wilson" in her "Literature of Satire" class. The work is a poignant satire of racism and satire. Published in 1894, the work focuses on a light-skinned slave named Roxy who has a baby boy at the same time as the master's wife. She decides to spare her child the cruelty of slavery and the risk of being sold by switching the babies. Roxy's son, however, grows up to be a cruel and spoiled man while the master's biological child grows up humble and true… Fishcthal explained to the class that "Mark Twain was one of the first American writers to use actual dialect. His use of the 'N-word' is used only in dialogues as it could have actually been spoken in the south before the civil war, when the story takes place." However, after the class, a student objected to the reference and Fishcthal reached out to apologize for any offense and arranged a private discussion online about the incident. She wrote "I apologize if I made anyone uncomfortable in the class by using a slur when quoting from and discussing the text. Please do share your thoughts." That was not enough….Many academics view reading original texts like this one to be important to understanding the language and context of writings. That has long been protected as a matter of academic freedom... Faculty like Fischthal warn about the appearance of such language and recognize how offensive the term is. The action taken against Fischthal suggests that this type of decision is no longer left to the professor as a matter of academic freedom. ("St. John's University Reportedly Fires Professor For Reading Racial Slur In Mark Twain Passage")

The offensiveness of the term in and of itself, without larger context regarding the course and how utilizing the passage through a direct quote provides meaning and a discussion of larger issues regarding the work, leaves students lacking in how to "break down" text that includes offensive and, in this case, racist language. To critique (and criticize) the use of the word in the context of satirical literature is one thing. To delete the word itself to shut down any debate leaves students without the academic freedom to confront and debate the most offensive terms and ideas used behind them.

In a third example a sociology professor from Old Dominion University, Allyn Walker, resigned in 2021 after an outcry resulted from her research on pedophilia by some students as well as from news personalities and social media scribes. As Geoff Shullenberger notes:

> [Walker's] research revolves around one of the ultimate taboos: pedophilia. To be clear, Walker's work is concerned not with perpetrators of child abuse but with "non-offending minor-attracted persons" — those who experience pedophilic attractions but do not act on them. The latter's experiences, Walker claims, offer "valuable insights into the prevention of child abuse." Walker, contrary to what many have alleged, shares the consensus disapproval of sexual abuse of children, and differs only on how best to avoid it. Needless to say, these nuances were lost on those who demanded Walker's dismissal.

"Offensiphobia" does not factor in nuances which are what the academy needs in order to have academic freedom. It may take a while to break down and explain a concept or theory. Without reasoned discussion and *thinking* such things as university speech codes become a blanket for sanctioning any uncomfortable speech. This impinges directly on

student academic freedom. Students do not learn about the most controversial or "outside of the box" ideas and get the message that these ideas should not be brought up.

Ben Cross and Louise Richardson-Self provide a slightly different frame of reference in analyzing Corlett's definition of offensiphobia. Cross and Richardson-Self note that self-censoring may be based more on the speaker's belief on what is deemed offensive (defined as independence) and having the assuredness that the utterance will result in the audience being offended (defined as confidence) (35). Thus, academic freedom would be viewed from the motivations of the speaker moreso than the validity of the academic speech. It is similar to the questions regarding extramural utterances by professors (discussed in Chapter 4). Does the professor have the academic freedom to "speak" about offensive material provided the professor does not intend for the speech to be uncivil?

Some universities also have instituted a "fighting words" exception code to free speech to prevent hate speech. In the 1942 U.S. Supreme Court Case *Chaplinsky v. New Hampshire, 315 U.S. 568*, "fighting words" were deemed outside of constitutional protections. In fact, the court defined "fighting words" not even as speech. To visualize this, "fighting words" could be characterized as pure venom spewed from the depths of hell which, without question, would causes unmitigated fright in others. Michael J. Mannheimer notes:

> "the Supreme Court enunciated, for the first time, a theory of the First Amendment explicitly excluding so-called "fighting words" -- "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" -- from constitutional protection. Although it had never before dealt

> directly with the issue, the unanimous Court in Chaplinsky v. New Hampshire announced that the regulation of such language by the state "has never been thought to raise any Constitutional problem." Chaplinsky has generally been read as placing fighting words outside the coverage of the First Amendment on a per se basis. According to this approach, there is a category of "fighting words" that, because of their content, do not constitute speech at all. Therefore, any restriction on such "speech" is constitutionally permissible. (1527)

Universities that ban hate speech by conflating hate speech with “fighting words” is a lazy way to not address the speech on its merits. It is easy to demonstrate the illogical and unintelligent nature of hate speech. Academic freedom would let the worst of the worst ideas be at least uttered so the censoring of speech would not give the speech more gravitas. It is easy to challenge hate speech by pointing out that it’s hateful; it’s a lot harder for universities to take that stand. Of course, to ask universities to tolerate physical threats apparently based on race, religion, or sexuality would be a non-starter, but this is tough and obscure territory. There are no easy answers.

In fact, universities can embrace the best aspects of academic freedom while leaving space to address hate speech. As Rodney Smolla notes in “Academic Freedom, Hate Speech, and the Idea of a University”, this balancing act is possible:

> …the battle against hate speech will be fought most effectively through persuasive and creative educational leadership rather than through punishment and coercion. The conflict felt by most administrators, faculty, and students of good will on most American campuses is that we hate hate speech as much as we love free speech. The conflict, however, is not irreconcilable. It is most

> constructively resolved by a staunch commitment to free expression principles, supplemented with an equally vigorous attack on hate speech in all its forms, emphasizing energetic leadership and education on the academic values of tolerance, civility, and respect for human dignity, rather than punitive and coercive measures… The sense of a community of scholars, an island of reason and tolerance, is the pervasive ethos. But that ethos should be advanced with education, not coercion. It should be the dominant voice of the university within the marketplace of ideas; but it should not preempt that marketplace. (224)

Smolla acknowledges the threats but feels that softer responses need to be employed rather than expulsion and legal reprisal. Geoff Shullenberger notes, "Appeals to academic freedom from across the political spectrum are often selective, if not cynical. An ideological ally's victimization occasions the invocation of lofty principle, while an enemy's analogous travails meet with indifference or approval". Consistency is important.

On a university campus, the free-flowing of ideas allows for all ideas to be tested out. There will be pushback at the most revolting and shocking of ideas. If logic prevails, racist, sexist, homophobic, religious-phobic, ethno-phobic, and nationalistic ideas will be demonstrated to be banalities of empty rhetoric and nothing more. There will be confrontation, but squelching the speech because of its confrontational nature leaves only the most boring and non-confrontational speech up for debate, where there may be no need for debate. Universities in the United States are the envy of the world; they can deal with the speech of Americans (and visitors from other countries) as well. Outright censorship of university speech on campus demonstrates little faith in Americans being

civilized enough to have intelligent discussions, which may speak to a larger assumption of all Americans. Once that assumption begins to take root in the U.S., reasoned ideology becomes temperature-raising idiot-ology.

The Marketplace of Ideas and Free Speech Zones

Limiting student free speech spaces on campus is an anathema to the "spatial metaphor" of the marketplace of ideas. As Joseph Herrold summarizes, the marketplace of ideas is actually far more than a metaphor:

> Even colleges and universities, frequently thought of and utilized as "the marketplace of ideas" by students and communities, have engaged in the designation of free speech zones on campus. Though the Supreme Court has championed the idea that educational settings welcome the expression of all opinions, officials at educational institutions may not share such opinions, or may fear having the message associated in any way with the college or university. Designating free speech zones on campus allows school officials to keep undesired or unpopular expressive activity out of mainstream campus life and, in most instances, also out of the public eye. (955)

Sometimes free speech "zones" are a three foot square piece of sidewalk. They effectively silence serious campus debate. The phrase "free speech zones" is an oxymoron; a zone connotes limitations. A marketplace that is "hemmed in" does not afford the wider university community the ability to hear alternative viewpoints. It is akin to "preaching to the converted"; it is difficult to begin to effectuate change when the public is not made aware of what needs to be changed. The concept of academic freedom

allows students more than a few limited “out of way” and practically invisible spaces to practice the art of making meaning through broadcasting ideas.

One rationale for the support of free speech zones on college campuses is the argument that the marketplace of ideas has never been defined by the courts as a completely open space to protest; forcing universities to be a "true marketplace of ideas" is not something that is constitutionally required. Troy Lange states that free speech zones do not run afoul of a marketplace of ideas concept:

> The "true" marketplace would mean a complete lack of government control, which is viewed as ideal from a libertarian perspective. However, this completely unregulated marketplace does not guarantee the furtherance of the self-government and autonomy rationales of the First Amendment…Since there is nothing that [legally] requires a "true marketplace" approach to the First Amendment, regulations which promote the self-government and autonomy rationales should not only be permitted, but encouraged… One can understand the concern [of free speech zones], but the "marketplace of ideas" is not the only First Amendment rationale at play. Further, university administrators have an interest in regulating activity that takes place on their campus. In so regulating, administrators can craft a free speech zone policy that ensures all its students who desire to express themselves have the opportunity to do so in an orderly, organized, fair, and safe way. This will ensure that young adults across the country are afforded a chance to take part in discussions of public matters, which is vital to a democracy, while also allowing them to exercise their autonomy in

> other ways that they see fit without disrupting the normal operations of campus nor interfering with other students' ability to do the same. (216)

The author frames the marketplace of ideas as an "anything goes" hindrance to freedom of speech, maintaining that a balancing act between student expression zones and the orderly functions of a *university* in exercising their first amendment rights are warranted. This misses the mark; free speech zones are created at the behest of the *universities* interests which run counter to a marketplace concept in which ideas can flow freely on campus by *students*. The assumption that free speech zones allow for different viewpoints ignores the concept of a marketplace in which ideas are shared without hindrance. Of course, a marketplace of ideas concept does not encompass shutting down campus or interfering with other student's freedoms, but Lange makes the faulty link that on-campus protest or debate leads to a lack of safety. It is difficult to finesse this problem, but a good starting point could be the understanding that students need to be heard without the foolish spectacle of having students "zoned" in a box or a space miles from the center of campus that looks completely unnatural and comical.

In fact, although universities justify free speech zones to prevent harm, the overuse of this remedy goes against a marketplace of ideas ideal. As A. Celia Howard surmises, free speech zones are haphazard at best, and at times discriminatory:

> For fifty years, universities have gerrymandered speech to corners, sidewalks, and gazebos in the name of student safety. However, it seems as though colleges have conflated physical safety with emotional safety, attempting to shield students from potentially offensive or controversial speech. Though civility is admirable, it is not always constitutional; the implementation of free speech zones in the name

> of political correctness violates students' First and Fourteenth Amendment interests in participating in the speech process. Yet, when students contest the speech zones in court, the outcomes vary according to each court's assessment of the forum in which the speech took place. In that way, freedom of speech has become too dependent on the location in which it occurs, preventing courts from striking down regulations that are largely discriminatory. Courts must revert to traditional standards of scrutiny by refusing to accept place restrictions on speech. In doing so, the burden on speakers and courts alike will be lifted, as students will no longer feel deterred from speaking and courts will no longer need to weigh the complex factors involved in current forum analyses. (430)

All university spaces are not created equal. Legal challenges to university free speech zones involve a type of nitpicking in which the courts weigh *where* on campus the free speech zone is located and if the designated zone is too restrictive. Essentially, if there is an expectation that the space (i.e. the forum) is a public space (such as the trope of a town square where citizens can exchange views in a robust marketplace of ideas) the free speech zone could be deemed too confining. (The court also weighs other aspects of the free speech zone such as the time of the restriction and the manner in how the speech is restricted.)

It can be convoluted; as Howard notes: “The outcomes of these cases largely depend on the forum in which the zone was located. The forum then controls the level of scrutiny with which courts assess the issue. Therefore, a speaker's constitutional rights depend on where he chose to stand on a given day, and courts reach different outcomes because they must consider these competing layers of analysis” (408). The problem lies

in courts determining large swaths of the university as non-public spaces for a myriad of reasons, including the motivation for creating the free speech zone. In this way courts *at the outset* acknowledge the concept of free speech zones. To the courts, the marketplace of ideas is not an absolute.

An Overview of the U.S. Supreme Court and Student Academic Freedom

The American Association of University Professors says in its position paper *(Academic Freedom of Students and Professors, and Political Discrimination)* that student academic freedom is not well formulated, not just because it sometimes blends into First Amendment territory (which is not academic freedom, strictly speaking), but also because students are regarded as fledglings, apprentices, and frankly as symbolic "children" who are being raised by symbolic parents (faculty) who deserve protection, but they are not exactly endowed with adult agency equivalent to their teacher's responsibilities.

In fact, before 1961 courts viewed the university as *in loco parentis* (standing in place of the parents). Students, although adults, were viewed as "under the care" of the university and not afforded individualized freedoms. As Philip Lee notes, "The concept of *in loco parentis* placed the decision making control over student life with the university. This is evident in early court cases. In legal challenges to university rules and subsequent discipline for violations thereof, courts routinely upheld the university's authority to stand in place of parents" (68).

However, existing big cases since then have supported a version of student academic freedom, especially rooted in the ideal of a marketplace of ideas.

The U.S. Supreme Court and the Marketplace of Ideas Regarding Students

The concept of a marketplace of ideas for students has been addressed by the U.S. Supreme Court. Two cases from the civil rights era support the notion of a marketplace of ideas. In *Tinker v. Des Moines Independent Community School District (393 U.S. 503; 89 S. Ct. 733; 21 L. Ed. 2d 731; 1969)*, the court found that students have a place in the marketplace of ideas.

As the court noted, in December 1965 three high school students in Iowa (John & Mary Beth Tinker and Christopher Eckhardt) planned to wear black armbands to school to publicize their protest of the Vietnam War as well as publicize their support for a truce. The principals got wind of this and adopted a policy banning armbands in school. The three students wore the black armbands and were suspended from school (504). The court found that the students have a constitutional right to political expression within the school.

At the outset of the court's discussion, they noted that "the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it" (505). It is informative that at the outset the court "drew" a fine line between non-disruptive and disruptive speech by students, especially by inferring that speech that is *potentially* disruptive does not fall within the purview of a type of academic freedom for students. Perhaps for students (and adults) the marketplace of ideas has proscribed boundaries, especially in an academic setting where there is a concern for violence.

In fact, a few weeks after the *Tinker* decision, the court referenced this point. In *Barker v. Hardway (283 F. Supp. 228, 1968)*, college students held a protest during a

football game. The protest spilled into the stands, becoming confrontational. The students were suspended. The students eventually appealed to the U.S. Supreme Court, who declined to hear the case *(Barker v. Hardway, 394 U.S. 905, 1969)*. Although not considered precedent, Abe Fortas, who wrote the majority decision in *Tinker*, stated "The petitioners were suspended from college *not* for expressing their opinions on a matter of substance, but for violent and destructive interference with the rights of others… the [students] here engaged in an aggressive and violent demonstration, and not in peaceful, nondisruptive expression, such as was involved in *Tinker*.... The petitioners' conduct was therefore clearly not protected by the First and Fourteenth Amendments" (905).

Students and teachers do not completely leave the universe of constitutional law protections once they enter the school grounds. The *Tinker* court noted "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (506). Interesting in the court's analysis is the framing of "special characteristics of the school environment". The school environment is a laboratory for ideas to be "tried out" and brought to the forefront for discussion. Even if the ideas are controversial or shock the conscience, the ideas should be given a "fair hearing" in a non-judgmental environment for society's benefit. Latitude is inferred for ideas or the expression of ideas. The special characteristic of the school environment, with an inference that ideas are welcome, is important for students who are acknowledged in this decision. They have ideas worth exploring, and have worth as intellects in the school environment.

Also noteworthy is that the decision notes the speech rights of "teachers and students" on equal footing, which may also include the disruptive free speech of professors. Usually the academic freedom of educators comes first in the intellectual pecking order, but in *Tinker* the court laid down the marker of the school as a place of ideas, bar none. The privileging of ideas is most important for *Tinker*; not as important is the worthiness of the idea based on the speaker.

Students should have a place in the academic marketplace, as *Tinker* implies. Although students' ideas may cause discomfort, an academic realm should provide an intellectually inviting space for the presentation of the idea. The idea should not be sanctioned based on the distaste or response of the audience. As the court notes:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago, 337 U.S. 1 (1949)*; and our history says that it is this sort of hazardous freedom -- this kind of openness -- that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society. (508)

Tinker understands that academic freedom for anyone is an imperfect freedom; it may not be met with complete approval. Add to this imperfection the traditional role of the

student in the educator/student dynamic as a "follower of ideas" that are stated by the educator. It follows (for some) that students cannot have academic freedom since they are regarded as "minors" not having earned grown-up rights (although in actuality *Tinker* suggests they *do* have adult agency). In this context, the utterances and expressions of students, even with the confines of a course, are viewed by some through a lens of disruption, and are viewed first through a filter of safety and security.

However, for *Tinker*, this "hazardous freedom" provides the foundation of a republic to improve. The trying out of ideas is important to help improve the republic. It is understood that this occurs in an academic setting. For educators and students, academic freedom is a *freedom to*, not only a *freedom from*. This allows for those ideas outside the mainstream -- the hazardous ideas -- to have a public airing based on the merits of the idea itself. For *Tinker*, the armbands were an expression of a response to a current event not directly related to a course. In a classroom, an idea that may bring new truths to a subject should allow for this "hazardous freedom" by educators and students. Clamping down should be based on something *real* since *Tinker's* hazardous freedom allows for the testing of the academic waters. Without this type of academic freedom for students and educators, the dogmatic majority response to the idea or expression leads to a "safe freedom". It is not an academic freedom for students (or educators), but more of a recitation of ideas, or at least not much variance of those ideas. This "safe freedom" variable leads to stagnation.

Tinker notes sanctioning student speech must only occur in very rare circumstances where bodily harm may result, more than only a "mere desire" to avoid

"unpleasantness that always [accompanies] an unpopular viewpoint" (509). Students in the marketplace of ideas are afforded more leeway than sanctions resulting from the mere response of a "gasp" from the audience. To be sanctioned, the speech should demonstrate real harm to be done to the school or others. This relates back to the fighting words problem in *Chaplinsky* discussed earlier in this chapter. If derogatory speech targets such identifying characteristics as a person's race, religion, ethnicity, gender, or sexual orientation universities may place that type of speech in the same category as a true threat of bodily harm. The context in which the speech is made is not specifically addressed here too; there may be instances where the environment is important when analyzing the material and substantial interference caused by the speech, such as a student submission of an assignment in a course that appears to give the student leeway in providing an answer.

Tinker gives a nod to the idea of an academic freedom for students by understanding the school environment as a marketplace. In support of this concept, *Tinker* quotes from *Keyishian v. Board of Regents of Univ. of State of N.Y.* (discussed in Chapter 1), an important case for proponents of academic freedom and an open-minded marketplace of ideas. The court in *Tinker* clearly validates student speech rights in their widest and most expansive sense:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they

> themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. (511)

Tinker reiterates that students have a *voice*. In the marketplace of ideas, students have a right to challenge dogma or even ideas that appear completely logical. Even if the student's ideas are misleading or shocking, they still have a right to be uttered without sanctions; this would seem to hold even truer in a classroom where the ideas are in relation to the discipline and the context of the lesson. The school (or university) is a reflection of the society which benefits from the ideas promulgated in the school. In a totalitarian society a totalitarian learning environment may serve the state well. In the United States, the messiness of a student academic freedom can create ideas that may help prevent totalitarianism in the U.S. However, interestingly *Tinker's* reasoning infers that non-state operated schools (such as private universities) *can* be enclaves of totalitarianism.

Academic freedom for students is more than theoretical. *Tinker* states that although speech can be reasonably regulated in circumstances that are carefully restricted, "free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact…we do not confine the permissible exercise of First

Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom". (513)

The court agrees that a free-flowing discussion of ideas not hamstrung by a particular location is part of the fabric of the U.S. This may be in the classroom, or, as the court notes (512), on the larger school campus. If the ability for students to discuss and debate is limited, it is not truly academic freedom. Restricting student speech in the classroom undermines the ideal of a marketplace of ideas; certain participants in the marketplace are allowed to discuss in designated locations. The ideas never get a true airing to be tested by the larger world and, if accepted, to be implemented in society. This marketplace ideal is the "fabric" of the U.S. -- to counter dogmatic ideas with enlightened new approaches. But enlightened new approaches can only truly be accomplished in the academic venue if the students are viewed as participants in this endeavor.

Three years after *Tinker*, the U.S. Supreme Court again supported the notion of a marketplace of ideas. In *Healy v James*, the court allowed students to form an on-campus organization opposed by college administrators, provided their organization met the standard put forth by the university as determined after a hearing. Before delving into the facts of the case, the majority in *Healy* provided context at the outset, reminding the audience of the social unrest that had occurred on college campuses several years earlier in 1969 when the students wanted to form their organization. College campuses were hotbeds of activity, unrest, and civil disobedience "accompanied by the seizure of buildings, vandalism, and arson…SDS [Students for a Democratic Society] chapters on some of those campuses had been a catalytic force during this period". The court realized

that even in trying times, a blanket ban or student expression was unconstitutional: “One of the prime consequences of such activities was the denial of the lawful exercise of First Amendment rights to the majority of students by the few” (171). Even during a period of campus student unrest the court acknowledged the value of the marketplace of ideas for students.

Interestingly, within this initial discussion, *Healy* implied that if student actions interfered with other students first amendment rights, those actions may not be constitutional. Since *Healy* set limits on the membership requirements of student groups, *Healy* implied that limits of student action signifies limitations of the speech right, which is a typical “gray area” in determining what is defined as permissible student academic freedom and what is classified or framed as conduct considered disruptive. It would be predictable if a university determined a lower threshold of framing the conduct “more disruptive” than other entities, including students.

In sum, students were denied permission to form a local campus chapter of a national organization which had committed acts of violence. However, the students asserted independence from the national organization and also asserted their goals were essentially to create a think tank for leftist ideals and coordinate those ideals into constructive actions. Although the organizers did not completely renounce using violence and disrupting classes as part of their strategy, their chapter was initially approved before being rejected by the College president, as the court noted in discussing why the university viewed the student chapter of SDS as a tool for the larger violent organization:

…[S]tudents attending Central Connecticut State College (CCSC)…in September 1969…undertook to organize what they then referred to as a "local chapter" of SDS…[P]etitioners filed a request for official recognition as a campus organization with the Student Affairs Committee…The request specified three purposes for the proposed organization's existence. It would provide "a forum of discussion and self-education for students developing an analysis of American society"; it would serve as "an agency for integrating thought with action so as to bring about constructive changes"; and it would endeavor to provide "a coordinating body for relating the problems of leftist students" with other interested groups on campus and in the community…The Committee…exhibited concern over the relationship between the proposed local group and the National SDS organization. [The students] stated that they would not affiliate with any national organization and that their group would remain "completely independent." In response to other questions asked by Committee members concerning SDS' reputation for campus disruption, the [students stated]:

"Q. How would you respond to issues of violence as other S. D. S. chapters have?

"A. Our action would have to be dependent upon each issue.

"Q. Would you use any means possible?

"A. No I can't say that; would not know until we know what the issues are.. . . .

"Q. Could you envision the S. D. S. interrupting a class?

"A. Impossible for me to say."

[The students] stated flatly that "CCSC Students for a Democratic Society are not under the dictates of any National organization." … One of the organizers

> explained that the National SDS was divided into several "factional groups," that the national-local relationship was a loose one, and that the local organization accepted only "certain ideas" but not all of the National organization's aims and philosophies… [T]he Committee ultimately approved the application [because] varying viewpoints should be represented on campus and that since the Young Americans for Freedom, the Young Democrats, the Young Republicans, and the Liberal Party all enjoyed recognized status, a group should be available with which "left wing" students might identify…Several days later, the President rejected the Committee's recommendation…He found that the organization's philosophy was antithetical to the school's policies, and that the group's independence was doubtful. He concluded that approval should not be granted to any group that "openly repudiates" the College's dedication to academic freedom [This same conclusion was reached after a subsequent due process hearing]. (172)

The irony here is that the university openly repudiated their own dedication to academic freedom by coding academic freedom as what is deemed acceptable based on the *university's* understanding of what academic freedom is, not based on the speech itself, which the university makes quick work of by deeming the student chapter as a mouthpiece of a violent organization.

The court also detailed the effects of the university decision on the students, in particular the squelching of association and speech rights, noting they could neither post announcements for meetings or rallies in the student newspaper nor use campus facilities for holding meetings, which presented a special problem when determining the next steps after their organization was rejected by the college president (176). Academic freedom

for students (and faculty) should not be unduly burdened, which here is viewed as the disruption of "a meeting of the minds".

The court ruled the university's decision unconstitutional. Using the term "disability" is appropriate, even for extremely controversial groups such as SDS; public universities are welcoming places for even less-than-desirable students to "test out" their ideas. A true academic freedom allows for all comers in the marketplace of ideas.

Healy began by acknowledging the college campus as a space "in equal value" to other public spaces: "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large" (180). The court argued that an assumption cannot be made that a marketplace of ideas primarily populated by students, especially young adults, will result in violence. The college space should be afforded the same liberties of a free-flowing exchange of ideas as in a public park or community center. To ban the speech at a university at the outset because of how the speaker identifies herself or himself is antithetical to freedom of speech, irrespective of an unfounded fear that the student audience will react violently. An idea should be heard as long as it does not clearly impose on another individual's freedom. For educators and students alike in the 21st century, the danger is that once a college campus can classify a student speaker's *identity* as criminal, the college can shut down any ideas the speaker wishes to put forth, even if the ideas (or the effect of those ideas) are not criminal or violent. An academic freedom for students should allow for their identity as students to flourish and grow, with their ideas to be given a public airing.

An open marketplace of ideas is essential for student growth and the formulation of ideas. After *Healy* notes the students have freedom of assembly and speech rights, the court states the denial of university outlets disrupts the free flow of information that is essential in promoting academic freedom; “the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students. Such impediments cannot be viewed as insubstantial”. (181)

The ability to access spaces to advertise and proclaim ideas is essential in the marketplace. For students, the ability to access university spaces to communicate information gives notice to the larger marketplace (the student body, as well as faculty and staff) of ideas that may facilitate student and community advancement. The lifeblood of a vibrant democracy is the inclusion of new entrants to bring forth new ideas as well as new interpretations of previously understood ideas. A student’s academic freedom hinges at the outset on exposure. A university that bans exposure of an organization stating ideas, no matter the repugnancy of the ideas, is a type of censorship that denies students an avenue to formulate and “try out” new ideas that could improve society in a small or large way. To later generations, although the space may “look” different (such as a web space on an official university page that links to the student organization and their goals) the result is the same: in common areas where the student community is more likely to be present, such as a physical campus or searching through a university webpage, the accessibility of communication is key to provide as much opportunity for members of this marketplace to participate in the free flow of ideas.

The importance of the *designation of the space* for the free flow of ideas is not to be underestimated. *Healy* notes that students may meet off campus and may meet on campus informally as students and *not* as SDS members with the "administrative seal of official college respectability". An indirect assault on academic freedom is still an intellectual blockade: " [T]he Constitution's protection is not limited to direct interference with fundamental rights…[I]n this case, the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action. We are not free to disregard the practical realities". (182)

For students to have a place within the academy to discuss and challenge ideas is essential to having a modicum of academic freedom. A defined space is the starting point. Even if the issues the organization wants to bring forth are expressed in off-campus venues (and, if allowed on campus, without any recognition of its existence), the idea of the university is a place to discuss and challenge, welcoming "all comers" to the conversation. The market*place* is the vehicle for the discussions. Without a designated space, especially for a large and diverse college community, the discussion of ideas becomes disjointed since there is no ease of access by the college community to participate in the exchange. Students may have work, family or life responsibilities (not to mention multiple course requirements) that make participating in a less tangible space difficult. The exchange of ideas is not to be covert or in hushed tones on campus -- especially if the vehicle to shine a light on those ideas, the campus organization, has been shut down by the university, inferring disagreement with those ideas. Simply put, it's difficult to have true academic freedom for students in a vacuum. There isn't much of an echo in a vacuum for the ideas to take root, and whether it is through a student

organization, student speech in a classroom or a student's written work, the ultimate goal of a true academic marketplace of ideas is the same -- growth through knowledge.

The banning of a dedicated university space to discuss ideas is an action that should not be taken lightly. In making reference to three other cases, *Healy* notes:

> While a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safeguarding of that interest may justify such restraint, a "heavy burden" rests on the college to demonstrate the appropriateness of that action. (184)

Universities traffic in ideas. If the university seeks to silence or ban a student organization with a particular ideology, the university should have a high degree of certainty that the organization, by its very existence as a group on campus, will lead to disruption. To shut down a marketplace of ideas is more than a reflexive response of a university. If the repugnant ideas are allowed to have an airing to test their validity in a place that *should* welcome the production of ideas, "erring on the side of caution" should not be the standard.

However, in a type of cost-benefit analysis, a university may determine that banning organizations or having students arrested who attempt to organize a conference or organize a chapter of a controversial group on campus is worth the amount of money the university will have to eventually pay out in legal fees and a possible settlement when they are sued by the students. It may at first blush be a bad "look" for the university, especially if there is not a clear correlation between the ideas being espoused and the

likelihood of violence. But in the short term the university can attempt to legitimize an "alternative narrative" that frames the controversial idea not as an idea at all. The university may make the argument that the shutting down of the organization, idea (or student) is not relevant to academic freedom but was done purely for student safety. In the long term, the universities admission numbers and funding may not be affected. Overall, a payout would be a small price to pay; especially since memories fade quickly and the media coverage may be slight and fleeting (especially once the universities alternative narrative is put forth and placed on equal footing by the media with the student's narrative of a violation of their constitutional rights and academic freedom). Of course, this cynical hypothetical scenario flies in the face of the understanding that a university should be by their very nature be an "idea factory". This understanding should not be theoretical, and *Healy* would view university pragmatism without serious and deliberative reflection as antithetical to the student's right to be heard (as an individual and collective) and the freedom to interject herself or himself into the academic conversation.

The idea or ideology put forth by the student or student group should not be the lone deciding factor to ban the student's speech on campus. The court notes that the mere expression of repugnant views does not allow for limiting academic freedom; "Whether petitioners did in fact advocate a philosophy of "destruction" thus becomes immaterial. The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent" (187). An idea, on its own, is a starting point for a larger discussion. Universities are incubators in exploring these ideas. *Healy* defends students by establishing their right to a

space, without haphazardly placing a value judgment on the idea before it is even uttered. Students have the academic freedom to *state* the idea, philosophy or theory. So, for the student (or student group) that supports the *concepts* of terrorism, anti-Semitism, and Islamophobia, the university, not based on these factors alone, can censor the speech. Based on this legal analysis, if a student group introduces the idea of an even more stark "philosophy of destruction" it appears it would be logically sound under *Healy*. For example, the student (or student group) wants to debate the theory of "shooting up a campus to address racial, gender, and religious inequality in academia".

However, courts have an interesting way of parsing an idea to make sure there is enough nuance so the extremes don't come to fruition. Right after the above discussion, the court provided limitations on the extent of the abhorrent idea allowed. Especially take note of the court's acceptance of a prohibition of actions which noticeably disrupts the work and discipline of the school, which could amount to anything. The court felt that the previous activities of a student group may have an effect on how their future promises and claims are weighed:

> The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (unanimous per curiam opinion). See also Scales v. United States, 367 U.S., at 230-232; Noto v. United States, 367 U.S. 290, 298 (1961); Yates v. United States, 354 U.S. 298 (1957)*. In the context of the "special characteristics of the school environment," the power

> of the government to prohibit "lawless action" is not limited to acts of a criminal nature. Also prohibitable are actions which "materially and substantially disrupt the work and discipline of the school." *Tinker v. Des Moines Independent School District, 393 U.S., at 513.* Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.

Healy takes the concept of an academic "safe space" in a more literal context. Important in this analysis is the ability for the university to take into account *more* than the repugnancy of the idea. Note the court qualifying student expression as *mere*. The university can couple the mere student idea with a likelihood (*not* a certainty) of *inciting* a disruptive action, not directing a disruptive action. The imminence of the action is important. Student academic freedom does not allow for an idea (coupled with action that may result from the idea) that can be seen as "code" to push a student or group to do something disruptive. Of course, where the line is drawn can be nebulous.

Very rarely are student ideas or ideologies so stark as to engender automatic censorship. In the aforementioned example of the student (or student group) who wants to debate the theory of "gun violence on campus to address racial, gender, and religious inequality in academia", it is easier to forbid a student group who wants to explore a theory of academic disenfranchisement by calling it campus violence. Even here, lawyers can make an argument that the degree of threat is not high since students' hypothesizing of violence is coupled with the systemic barriers leading to academic disenfranchisement. As for more abstract concepts such as terrorism, anti-Semitism and Islamophobia, as

repugnant as they may be, the logical leap from the concept to violence is less clear cut. Do student discussions on campus justifying terrorism, anti-Semitism, and Islamophobia lead to these acts occurring on campus? *Healy* answers that universities have to go beyond the initial reaction of abhorrence and look deeper, providing a clear and logical reason to support their argument. Logic and clarity is also what professors expect from their students.

In fact, the court notes that there can be limitations to the ideas expressed in the marketplace by students, which is the same standard for groups outside of academia: "Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected" (192). The existence of a valid rule that is *reasonable* is key here. *Healy* allows universities to place some limits on students participating in the marketplace of ideas. For example, a university can make a claim that certain locations on campus are off-limits due to safety concerns, or that a student organization has been denied recognition because they may disrupt a class to further their aims (as SDS was queried about). If the university deems for safety concerns that a student rally can only be held between the hours of 5 and 7 AM on Monday mornings in February on the furthest edge of the campus where there is debris and out of view of all people, this may not be reasonable. Reasonableness implies that students should be allowed to pursue their ideas unimpeded, as long as they do not disrupt others in their pursuits. However, conflict arises when the campus rules become too broad or generalized so that a good number of ideas a student wants to pursue via class or by forming an organization can be deemed in violation of the rules.

Even with the nuanced limitations placed on student's academic freedom, *Healy* reiterated the importance of students having a role in the marketplace of ideas and being afforded academic freedom. In fact, in language that would seem to be more amenable to faculty academic freedom, the court uses language such as "wide latitude" and allowing expression despite risking the "maintenance of civility". This language hearkens back to *Keyishian's* firm support of academic freedom as a special concern of the first amendment (see Chapter 1):

> [T]he wide latitude accorded by the Constitution to the freedoms of expression and association is not without its costs in terms of the risk to the maintenance of civility and an ordered society. Indeed, this latitude often has resulted, on the campus and elsewhere, in the infringement of the rights of others. Though we deplore the tendency of some to abuse the very constitutional privileges they invoke, and although the infringement of rights of others certainly should not be tolerated, we reaffirm this Court's dedication to the principles of the Bill of Rights upon which our vigorous and free society is founded. (194)

Free speech is tough and difficult but so be it. The court recognizes that the marketplace of ideas can be a bit messy and discombobulated at times, and students exercising their academic freedom may inflame tensions and be provocative. But if the true essence of the university (and society) is to grow and develop, the messiness must be tolerated, at least to an extent. With blunt limitations placed on the "idea factory", the university will stagnate, which is to the detriment of the larger society.

But there are limits: a more recent case from 2010 in which a law school denied full recognition to a student organization (the Christian Legal Society -- *CLS*) that wanted to limit membership to students who abided by Christian principles (*Christian Legal Society Chapter of Univ. of Cal., Hastings College of Law v. Martinez)* reaffirmed the marketplace of ideas theory. A Christian based student organization wanted to form an on- campus student organization at Hastings Law School. Their bylaws do not accept homosexuals or members of different faiths from joining. The law school rejected their application based on the discriminatory practice.

The court ruled student groups cannot be singled out because of their point of view-- a college can only prohibit non-expressive speech that does not alter the group's message. It can be inferred, at least in this instance, that the marketplace is still open for business. The court defined the issue at the outset with a question: "May a public law school condition its official recognition of a student group--and the attendant use of school funds and facilities--on the organization's agreement to open eligibility for membership and leadership to all students?" (667). The court answered yes.

CLS provided a different look at the marketplace and the concept of student academic freedom. Interestingly, in spite of Hastings non-discrimination policy that "accepts all comers" and CLS, an association of Christian lawyers and law students, that required members to sign a "Statement of Faith" that forbade homosexual conduct, the court also noted that the university allowed the student club to hold functions on campus even though the club did not formally "exist" as a university-sanctioned club (which also meant no formal university funding for their activities). For the 2004-05 school year CLS

actually did hold events on campus such as holiday church services and religious-themed lectures (669).

The court found Hastings did not violate the student organization's rights by rejecting their application for official college status because CLS preemptively banned students from their organization.

Before analyzing ideas more directly related to the marketplace of ideas and student academic freedom, the court first discussed the *gravity* of the speech limitation. *CLS* framed the standard to be used: Hasting's restrictions of *on-campus* speech (as a limited public forum, in which less people are adversely affected) versus a violation of first amendment principles applied to the general public (as a general public form, in which more people are adversely affected). The court decided to use the standard of a limited public forum. In elaborating on this, the court nicely summed up this standard: "Application of the less restrictive limited-public-forum analysis better accounts for the fact that Hastings, through its RSO program, is dangling the carrot of subsidy, not wielding the stick of prohibition" (683). The court read into Hastings *intent* in denying CLS recognition, and found that Hastings actions were less impactful on the overall result in the marketplace of ideas to welcome all comers.

In fact, *CLS* clarified the "space" of the marketplace, giving student organizations the same intellectual importance as a class by *defending* the school's censure. It sounds antithetical to the ideal of academic freedom. Unlike the analysis of other cases in this dissertation, here the best place to begin the analysis is with the side *that lost* (which

appears to be a common sense defense of academic freedom), and then counter with the majority's reasoning.

In part, the dissent claimed the majority was straying from the freedom of group ideology espoused in *Healy*. The dissent noted:

> The [*Healy*] Court held that the denial of recognition substantially burdened the students' right to freedom of association…It is striking that all of these same burdens are now borne by CLS. CLS is prevented from using campus facilities--unless at some future time Hastings chooses to provide a timely response to a CLS request and allow the group, as a favor or perhaps in exchange for a fee, to set up a table on the patio or to use a room that would otherwise be unoccupied. And CLS, like the SDS in *Healy*, has been cut off from [usual means of communication in the academic community]. (719)

However, *Healy*'s support of SDS freedom of association was not dependent on the *lack of* freedom of association allowed by other university members in the same space. Under *Healy's* reasoning, SDS would have allowed all comers, even those students who were against everything SDS stood for, to associate in the same space and debate to change minds. It may be contentious, but the ideology of the student group allowed other students' access to the same space, even if they would feel uncomfortable. This relates to the majority's reasoning that the academic marketplace is open for all.

The dissent also claims that speech rights are being violated. The dissent notes:

> [T]he *Healy* Court, unlike today's majority, refused to defer to the college president's judgment regarding the compatibility of "sound educational policy" and free speech rights. The same deference arguments that the majority now accepts were made in defense of the college president's decision to deny recognition in *Healy*…(720)

However, *Healy* did not state that the court could *never* defer in some way to a university; a student organization cannot do whatever it wants. Although the dissent in *CLS* posits that freedom of speech protections have a "lesser" level of protection on college campuses that is not necessarily the case:

> Unlike the Court today, the *Healy* Court emphatically rejected the proposition that "First Amendment protections should apply with less force on college campuses than in the community at large." 408 U.S., at 180, 92 S. Ct. 2338, 33 L. Ed. 2d 266. And on one key question after another--whether the local SDS chapter was independent of the national organization, whether the group posed a substantial threat of material disruption, and whether the students' responses to the committee's questions about violence and disruption signified a willingness to engage in such activities--the Court drew its own conclusions, which differed from the college president's (*sp*). The *Healy* Court was true to the principle that when it comes to the interpretation and application of the right to free speech, we exercise our own independent judgment. We do not defer to Congress on such matters… and there is no reason why we should bow to university

> administrators…This leaves just one way of distinguishing *Healy*: the identity of the student group. (720)

It initially appears that the refusal of the court to unequivocally defer to the university is a stronger argument. However, *Healy's* fact pattern provides clues that may go against the dissent's reasoning. *Healy* was not a blunt instrument giving unfettered rights to students. In noting the college's ability to place restrictions on student organizations, the *Healy* court (the majority) noted: "If [the decision to deny a SDS chapter on campus was] directed at the organization's activities rather than its philosophy, were factually supported by the record, this Court's prior decisions would provide a basis for considering the propriety of nonrecognition" (188). If CLS noted in its by-laws that homosexuality goes against the mission of CLS, it appears that *Healy* would be fine with that. The on-campus SDS chapter advocated for violent change but did not promote violent and disruptive change in their on-campus activities. CLS viewed homosexuality as antithetical to their mission and *followed through with that* in their on-campus activities by banning homosexuals from attending their meetings.

This distinction is further analyzed in *Healy*. In quoting from the college's student's bill of rights, there is not an "anything goes" attitude that allows for students to do everything and anything in the name of "speech", keenly pointing out a "distinction between advocacy and action" (189). The *Healy* court stated:

> [The Student's Bill of Rights] purports to impose no limitations on the right of college student organizations "to examine and discuss all questions of interest to them." (Emphasis supplied.) But it also states that students have no right (1) "to

> deprive others of the opportunity to speak or be heard," (2) "to invade the privacy of others," (3) "to damage the property of others," (4) "to disrupt the regular and essential operation of the college," or (5) "to interfere with the rights of others." The line between permissible speech and impermissible conduct tracks the constitutional requirement, and if there were an evidential basis to support the conclusion that CCSC-SDS posed a substantial threat of material disruption in violation of that command the President's decision should be affirmed. (189)

Regarding the difference "between advocacy and action", *Healy* was qualifying the concept of advocacy, and implies the five points in the "Student Bill of Rights" would pass constitutional muster. One of the points, "to deprive others of the opportunity to speak or be heard," would appear to be consistent with the majority's holding in *CLS* that students who are homosexuals should be allowed to speak or be heard at CLS meetings on campus, which would not be allowed by the group. Of course, the on-campus activity should be civil, but "allowing all comers" gives all students the right to "present" at an on-campus event.

The *Healy* court expands on this idea regarding the right to *physically associate* in their footnote to the above bill of rights. The university does not have an unfettered ability to limit the freedom of others:

> It may not be sufficient merely to show the existence of a legitimate and substantial state interest. Where state action designed to regulate prohibitable action also restricts associational rights -- as nonrecognition does -- the State must demonstrate that the action taken is reasonably related to protection of the State's

> interest and that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien, 391 U.S. 367, 377 (1968)*…On this record, absent a showing of any likelihood of disruption or unwillingness to recognize reasonable rules governing campus conduct, it is not necessary for us to decide whether denial of recognition is an appropriately related and narrow response. (fn 20)

This appears consistent with the majority holding in *CLS*; the group was denied recognition because of their ban on homosexual members.

Healy understood that legitimate learning goes beyond the traditional four walls: "A college's commission--and its concomitant license to choose among pedagogical approaches--is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process" (686). By placing student organizations within the sphere of a class, *CLS* gives agency to the concept of letting "outsiders" into the discussion, since every discussion in the university is a demonstration of a student's academic freedom. For the court, knowledge creation does not follow one path, and the seriousness of academia allows all members of the university community to freely "enter the discussion" and question dogma irrespective of the subject matter, even if the subject matter discounts certain members of the academic community. The marketplace is about questioning. If a student organization places limitations on the people who are accepted into the doctrine, the academic marketplace is the place where this doctrine can be challenged and debated, even heatedly, by those who disagree with it. *CLS* places student

organizations within a more intellectual and theoretical framework instead of being viewed as "side projects" with less intellectual value than a course.

All students have a place in this endeavor. In quoting from Hastings brief, the court noted:

> "[Hastings] open-access policy 'ensures that the leadership, educational, and social opportunities afforded by [Registered Student Organizations] are available to all students.' Just as 'Hastings does not allow its professors to host classes open only to those students with a certain status or belief,' so the Law School may decide, reasonably in our view, 'that the . . . educational experience is best promoted when all participants in the forum must provide equal access to all students.' (687).

The constitutional ideal of providing equal access to an educational form is a reminder of a central concept demonstrated throughout this chapter: the marketplace of ideas should be a space for growth. The allowance of all voices, especially in an academic setting, provides the ultimate learning experience for students. Exposure to all ideas, especially those viewed as antithetical, provides a basis to test out those ideas for validity. Limiting ideas or audiences provides less opportunity to analyze "new avenues of thinking". Also, an open marketplace is the best "space" in academia since ideas in a public sphere provides students with the ability to formulate and support their ideas in front of "society". Ideas are strengthened in front of a critical audience, which is necessary if those ideas are to be implemented in society over the objections of doubtful observers. It's better to be familiar with the nay-sayers arguments in the academic space.

CLS provides a good that comes out of the naysayers. The court states: "And if the policy sometimes produces discord, Hastings can rationally rank among RSO-program goals development of conflict-resolution skills, toleration, and readiness to find common ground" (689). The broad concept of discord is a succinct way to limit academic freedom and limit the marketplace of ideas. It is easy to censor ideas (or students) who may "wake up" the intellectual senses of others in a less-than serene manner. But "waking up intellectual senses" is what universities can do; a failure to take chances with ideas and viewpoints may not result in the most inspiring results. *To challenge* should have a space in academic discourse. Challenging student's belief systems, pre-conceived notions, or ways of thinking provides motivation. This can lead to discord. Universities may quickly make the leap from discord to danger, but *CLS* is framing discord as a way to find workable solutions to problems, as imperfect and awkward as that may be.

Interestingly, the concurrence by Justice John Paul Stevens implies that the academic freedom of students is maintained by an *academic* marketplace of ideas, not a literal one, and the campus is not to be equated with the public square. Stevens notes:

> Public universities serve a distinctive role in a modern democratic society… As a general matter, courts should respect universities' judgments and let them manage their own affairs. The RSO forum is… not an open commons that Hastings happens to maintain. It is a mechanism through which Hastings confers certain benefits and pursues certain aspects of its educational mission. Having exercised its discretion to establish an RSO program, a university must treat all participants evenhandedly. But the university need not remain neutral--indeed it could not

> remain neutral--in determining which goals the program will serve and which rules are best suited to facilitate those goals. (701)

Universities support democratic functions by providing a space for all students to test out theories and challenge prevailing ideas. It is the hope that some of this intellectual "thinking" will lead to graduates placing these new and better ideas "in society" to make life better and fairer for the entire society. A university that provides every space to be used as an open space, even those spaces that will have students espousing passionate beliefs, creates a "welcoming" aesthetic that invites student to test out different ideas or even merely be exposed to different ideas which can foster their intellectual growth.

Overall, the college would argue that they have a legitimate and substantial state interest in allowing all students to have equal access to all campus functions to further their educational growth. The academic marketplace must be open to all academic members. CLS could still meet on campus but without official recognition.

Analysis of *Tinker*, *Healy* & *CLS*

Scholarship acknowledges the concept of academic freedom for college students. Instructive here is Van Alstyne's discussion regarding *Healy*, where the court allowed students to form an on-campus organization opposed by college administrators, provided their organization met the standard put forth by the university as determined after a hearing. He notes how administrators can impose reasonable limitations on student groups provided they do not alter the substance of the student's speech.

Healy provided a strong reaffirmation of free speech protections. Van Alstyne referenced the majority's point that even a student group whose philosophy "countenanced violence and disruption" (Van Alstyne 122) was not reason enough to forbid them the ability to attempt to persuade others of their ideas. In analyzing *Tinker* and *Healy*, Van Alstyne noted:

> *Healy*, even more than *Tinker*, is an exceptionally strong first amendment decision [for state schools]…Neither implies that unaffiliated outside groups may willy-nilly wedge themselves onto public school or state college premises. On the other hand, neither case (certainly, not *Healy*) permits the college to draw a sharp line according to the ideological auspices of student groups free to claim campus breathing space of their own up to the point of actual threats, acts of intimidation, actual acts of disruption, or interference with the educational program or rights of others on campus, as both cases are at pains to say. (123)

The strength of *Healy* in relation to academic freedom for students is the willingness to allow ideological viewpoints but not allow restrictive action against others that are at odds with how the university functions. On the surface, the ideology of the student group is shocking and makes others take notice. The college's inability to draw an ideological "sharp line" prevents an institution from privileging certain viewpoints over others. This should be at the core of a university's understanding of academic freedom. In bringing forth imagery of the marketplace, students need "breathing space" to at least introduce unpopular and disruptive ideologies to see how they rise or fall in an academic space where they can be questioned. *Healy* allows for a distinction between disruptive

ideologies and disruptive *acts*, without the assumption at the outset that the ideology leads to the act. The court tells universities to hold off a bit more instead of squashing the idea outright or at conception since it *is* a university (unlike an off-university public space) and a university has the gravitas of intellectual development for the betterment of society. *Healy* ascribes to the concept of academic freedom more so for students and faculty than for the university. The university cannot strive for "perfect" in an imperfect system that allows for the vagrancies of free speech and academic freedom. The courts of later generations may find a more receptive argument in the universities attempt at perfection, especially when it comes to disruptive ideologies, although *Healy* reminds the academy that striving for perfection comes at a price -- the belief in the ideal (not merely the idea) of the university.

However, courts rarely provide total affirmation (or total rejection) in their rulings. As Van Alstyne noted, even in *Healy* the court hedged a bit: "The Court thus left the possibility open that the group [SDS] might be banned if, notwithstanding a request to do so, it declined to submit a statement of willingness to be bound by the valid rules that the college maintained for the protection of academic freedom and for general order on campus" (123). Van Alstyne commented on the limitations placed on certain ideological student groups based on that finding; in a footnote he provided an interesting scenario:

> Extracting such a commitment to observe the rules necessarily puts groups such as SDS under a strain. In the circumstances, the act of making such an affirmative expression is inconsistent with the group's view that such rules are not entitled to respect (because, in SDS's opinion, they constitute a parliamentary facade by

means of which dominant classes maintain elite control). It may be argued that refusal to express acceptance of such rules may not be sufficient grounds to ban the group, though enforcement of the rules would be utterly sound. The problem is akin to a pledge of allegiance test. Compare these two statements:

(a) In applying for recognition on campus, we accept and agree to observe all college rules applicable to recognized student organizations;

(b) In applying for recognition on campus, we acknowledge that the College has a set of rules applicable to recognized student organizations, and we understand that we will not be regarded by the College as exempt from them.

The second form effectively records the fact of notice of the rules; it makes clear that recognition in no way implies waiver by the college of its rules. The first form, requiring acceptance of the rules, however, seeks a concession respecting the accepted legitimacy of the rules; somewhat like a "pledge of allegiance," it is more doubtful on that same account. (fn 141)

Van Alstyne is correct regarding the bind a student organization could be in. In effect, the above first form statement is a forced upon mandate that could alter the student organization's speech. If the ideology of a student group is at odds with the university ideology, the university's ideology wins. The concept of academic freedom for students should allow for an acceptance of an alternative ideology. However, in a scenario such as this, academic freedom for students is "carved out" by the university. In this space there is an implicit understanding of the limits of academic freedom, as the university attempts

to define the parameters of what academic freedom looks like (based on the universities ideal). Limiting student academic freedom based on the universities goal of general order is nebulous at best. The university could posit hypothetical situations of student organizations causing disorder. For example, a student organization can advocate hatred of foreign born people but the university has to let the student organization meet, in accordance with the policies of university inclusivity. These scenarios could be stretched far and wide to limit or ban student organizations.

In a similar expansive view of the marketplace Philippa Strum noted "the Court's view of the classroom as an integral part of the 'marketplace of ideas' lay behind its decision in *Healy v. James*" (149). The term integral is useful here. The *Healy* court recognized that there are no "idea free zones" in a public university; the educators and students that make up the classroom university space are to have input in the "idea making" concept of a university. Idea making, which is messy, incomplete, and at times off-putting, is the province of student's intellectual growth and their ability to take their knowledge into the world for society's benefit.

The concept of academic freedom does not "flow one way" from educators to students. In discussing a later case Strum notes "If, as the court suggested in *Keyshian* [discussed in Chapter 1, the court found that university employment as a professor was conditioned on the signing of a loyalty oath to be unconstitutional], academic freedom helps produce the nation's future leaders through the free exchange of ideas, then logically all the participants in that exchange – that is, both teachers and students – must be the possessors of the right to academic freedom" (150). An untested freedom is not

really a freedom. For the idea to have a type of agency, it has to go beyond the mere utterance to be put into action. To have true academic freedom, the idea is most useful when others who hear the idea, such as students, can "work with it". If the idea of an "academic" is limited to educators, the university production of future scholars, thinkers, leaders, and members of society is limited to simply reproducing what educators put forth. Providing students with the space to take the idea and interpret it in her or his way is integral in having society progress when the students move beyond the classroom.

"Student academic freedom" is not a term that the courts have clearly defined. The "idea" is to have courts reinforce the theory over generations to provide society with a reminder of the bedrock principle put forth in the first place (as a matter of first impression) and that it is still valid. Courts, however, may not be as clear-cut in their pronouncements over time; this is sometimes done to provide consensus for a majority decision. If a casual observer was to view how the term "student academic freedom" has been applied over generations by the U.S. Supreme Court, the observer would find, as in some legal jurisprudence as well, a term that is a bit "foggy". Courts do not always spell out or define a legal theory or concept with quotidian precision. Attorneys are expected to glean from the decisions how the court's interpretations of a statute is to be applied based on their client's particular set of facts. As Strum notes "Exactly how students fit into the constitutional theory of academic freedom, however, is unclear" (150). Or, to put it another way, this is the "No, because…" refrain that attorneys can use. One way this could be applied is if, for example, a student says something in class or writes something logically related to a class discussion or assignment that is shocking and may even result in revulsion or fear from their classmates. The student may defend herself or himself by

stating a right based on student academic freedom. The counterargument could be "No because academic freedom is to be applied only for educators or institutions" or "No because student academic freedom has content limitations even if related to the classroom topic". Strum, in noting the U.S. Supreme Court's changing definition of *who* has the academic freedom right (i.e. if academic freedom is the primary right of educators, students or institutions), highlights the "No because" legal premise that an argument can always be made to challenge the prevailing idea. For students and educators, applying a legal "spin" to academic freedom will always result in gray areas. Simply put, a handbook for students and educators on the "academic freedom rules in law" will not be clear-cut.

Encouraging speech on campus is in line with *Tinker* and *Healy's* support of student academic freedom. In commenting on the legacy of *Tinker* and other free speech cases, Christina Bohannanor notes that an expansive "more speech" first amendment principle could be feasible on college campuses if universities are proactive:

> ["More speech"] is typically described in negative terms—it is what should happen *instead of government regulation*. In practice, this has traditionally meant that government must get out of the way and leave the targets of hate speech to fend for themselves. Courts and government officials rarely talk about "more speech" as a *positive* goal that requires effort and resources to achieve. What would it look like if universities took the "more speech" principle seriously? Coupled with the previous suggestion to spread the costs of free speech, it would mean intentionally devoting resources to diversify the faculty and student body,

> encourage speech, and enhance the marketplace of ideas on college campuses. (2269)

Unfortunately, most schools are going the *other* way. Students are products of their campus environment. Universities can take the lead in being inviting places for all speech, allowing for open dialogue, sponsoring forums in which all viewpoints are allowed, and recognizing that all spaces on the university campus can be spaces where a marketplace of ideas can flourish. A curriculum in which courses on constitutional jurisprudence, especially first amendment jurisprudence, are mandatory, can begin to create an atmosphere where students become *cognizant* of their own academic freedom. Not that it is perfect; it is messy by allowing "all comers", even those students with repulsive or disturbing ideas. But the environment is important.

Open and frank dialogue is the essence of academic freedom for all. In commenting on *Tinker* and the competing interests of educators and students, Christy Hutchison notes that a certain level of discomfort should be expected in the university and is perhaps actually beneficial to the learning process based on the premise that universities provide intellectual rigor:

> In *Tinker*, the Court challenged high school officials to justify suppression of speech by something more than "the mere desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint" (*Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 1969). If we require that students endure a degree of discomfort and unpleasantness in high school education, then shouldn't our expectations for college students be at least as challenging? After all, college

> students are nearly always adults who enroll in college and particular courses by choice. (14)

Universities are "idea factories". To have an open marketplace of ideas, students have to work through challenging and sometimes controversial ideas that goes against their orthodoxy. Only through an expectation of academic freedom can students begin to take risks that challenge them to think through the *how* and *why* instead of "leaving well enough alone".

Despite the inherent challenges in legal applications of constitutional theory, *Healy* provides students with agency as contributors of ideas in the academy, even if they do not have the gravitas of educators. As Strum states, "the concept of academic freedom is in effect the recognition that there is an important societal utility in the diversity of ideas" (152). The ideal of diversity in academia is an acknowledgement that all viewpoints, as well as the role of the individual uttering those ideas, are to be given a fair-shake. Diversity allows for a democratization of the academic process in which universities can grow and the students who come from the university can prosper.

Public universities should act in the public good; the inclusion of ideas should be important in a universities decisions regarding student academic freedom. In a discussion of the university as an autonomous institution that cited several cases, Rachel Moran notes that *CLS* provides the flexibility universities sometimes need in affording students a place in the marketplace of ideas: "Decisions like [*CLS*] demonstrate that the Justices have consistently accorded colleges and universities considerable deference in constituting their speech communities. These rights of expressive association create space

for colleges and universities to determine their membership and to establish conditions that enable speech communities to flourish" (2616). As long as universities are in service of the development of student speech, *CLS* provides that buttress. The university should "lend a gentle hand" in allowing students to explore various viewpoints in a non-discriminatory manner. Of course, those who are the vanguards of free speech should be on the lookout for universities who go beyond this gentle hand approach to prevent discrimination and extend their regulations into forbidding *ideas*. The university, by stepping in to allow people of all sexual orientations to have access to university spaces, serves a purpose. If the university begins to dictate the *content* of the spaces, that goes against the marketplace of ideas ethos.

Content neutrality is important to focus on in *CLS*. However, as Mary-Rose Papandrea notes, if the court begins viewing the university in the same intellectual vein as primary and secondary schools, this would not be good for a free flowing marketplace of ideas ideal:

> The majority attempted to console those disappointed with its decision with its reassurance that the policy was content neutral and did not permit the school to engage in viewpoint-based discrimination. [Justice] Kennedy's concurring opinion emphasized the same point, that there was no showing that the policy was designed with the purpose or effect of disadvantaging student groups based on its views. But the Court's willingness to embrace a deferential attitude to public officials potentially demonstrated a dramatic abandonment of its commitment to the university as the quintessential marketplace of ideas. This opinion arguably

> leaves open the possibility of deference to the university on a much broader range of decisions impacting the freedom of speech. (1741)

The *CLS* court treaded lightly: in weighing the potential exclusion of LGBTQ+ students versus students whose belief system was in opposition to the LGBTQ+ lifestyle the court provided sexual orientation with a similar type of protection against discrimination as those protections based in race and religion -- the concept that the marketplace of ideas is open to all students, irrespective of their identity. The marketplace is inviting to all. However, Papandrea's concern that overreach is possible is sound: would the courts begin to view universities as "benevolent dictators" whose main mission is education, similar to primary and secondary schools, and be willing to squelch student speech *of adults* that focuses on highly controversial subject matter for the sake of order to continue the sole mission of education? As long as the court *stays within the boundaries* of making sure the students have access to all university spaces, and not actually regulating what is said in those spaces that are open to all regardless of their identity, *CLS* represents a logical extension of *Tinker* and *Healy*.

If the focus remains on the university-wide ethos of diversity, student academic freedom can flourish. As Michael Scudder notes in a general free speech discussion of cases penned by Justice Anthony Kennedy which supported an expansive marketplace of ideas, *CLS* can be seen as a case that is beneficial to an expansive understanding of the marketplace of ideas by being exposed to diversity, which leads to "important and lasting educational benefits":

> I believe this same institutional interest - a state's promotion of higher education and its many benefits - likely explains Justice Kennedy's vote and separate concurring opinion in [*CLS*]…So, while *Christian Legal Society* may seem like an instance where Justice Kennedy endorsed a form of forced association at odds with…more generally, his belief in the importance of individual autonomy and self-expression, another interpretation is possible. *Christian Legal Society* may have reflected Justice Kennedy's willingness to recognize - at least at the level of a program's facial design - the state's institutional interest in advancing objectives of higher education. (1510)

Academic freedom involves *every* member of the academy. The term "benefits" is instructive here. If one of the benefits of higher education is having the academic freedom to explore all viewpoints, then *CLS* can be viewed as embracing the open-access ideal. Also, if the university framework is to allow "all comers" access to all ideas *irrespective of* the ideas, then students have the ability to be fully engaged in the marketplace of ideas.

However, different kinds of colleges may have different degrees of academic freedom and different problems regarding academic freedom. An interesting analysis distinguishes the type of student academic freedom afforded to college students as opposed to students in professional programs. In referencing *Hazelwood Sch. Dist.v. Kuhlmeier*, 484 U.S. 260, a U.S. Supreme Court case from 1988 that found no constitutional infirmity in a high school censoring student newspaper articles on abortion and divorce, Mary Grace Henley noted "Logically, professional programs fall less into

the "marketplace of ideas" context that defines university-level free-speech cases under *Tinker*, and closer to the "legitimate pedagogical concerns" discussion stemming from *Hazelwood*" (431). Henley partially argues that professional programs, because of their licensure requirements and focus on a specific skill that will directly be imparted to the community, should have less of a free-speech standard than undergraduate students at a university (*e.g.* 434). However, Henley's categorization of college students tends to generalize the premise of cases such as *Tinker*, *Healy*, and *CLS* in which all students benefit academically and professionally by "questioning", even if their speech is not related to their studies. The marketplace of ideas should inevitably lead to intellectual growth for the betterment of society, not necessarily impose a hierarchy of academic freedom based on student curriculum.

Student Academic Freedom and Social Media

There is a surprising dearth of scholarship on student academic freedom in relation to social media. An expansive view of the marketplace posits embracing more university spaces. In commenting on the challenges between academic freedom and institutional autonomy, Nathan Adams cites *Healy* for increasing public forums to expand the marketplace of ideas. The accessibility of additional spaces for discussion lends itself to "a lively" marketplace of ideas:

> [B]roaden public fora to provide an additional avenue to share views without biasing by reference to viewpoint the expression of ideas or associations that meet or post in the forum. "[A] public educational institution exceeds constitutional bounds … when it 'restrict[s] speech or association simply because it finds the

> views expressed by [a] group to be abhorrent.'"[*Healy*] Curricular speech doctrine has expanded the "classroom" so much that there are precious little public fora left…Speakers in public fora will generally not wield the influence that the professor does in the classroom and research laboratory, and so will offer mere supplemental support for academic freedom, but public fora are still important to ensure a vibrant marketplace of ideas at public institutions. (65)

Adams use of "vibrant" is instructive here. Allowing "more" ideas, even abhorrent ones, in more university spaces is the best way for students to debate and learn, even if through the opportunity to access all ideas in physical and virtual spaces. This is especially so in virtual spaces, where students are more likely to congregate in the 21st century.

In a discussion on faculty academic freedom and social media posts, Vikram David Amar and Alan E. Brownstein note "Nor could any public university impose negative consequences on a student for posting on social media the intemperate (and in the minds of many people anti-Semitic) comments that Steven Salaita - whose tenured position at the University of Illinois never materialized – tweeted" (1976). Salaita, discussed in detail in Chapter 4, had an offer of employment revoked after he tweeted anti-Semitic posts in response to international events. A vibrant conversation for students in virtual spaces does not necessarily result in the most inclusive ideas. But students should be afforded the leeway to post their ideas provided those ideas do not present a clear a present danger; they should not necessarily be sanctioned by their universities (see the discussion of student academic freedom and threats earlier in this chapter).

The problem is that there is not a universal acceptance of student's posts on social media as a logical extension of the type of thinking done in the academy. In summarizing lower court opinions on student academic freedom and social media, Kaitlin A. Quigley notes "clear policy language and consistent adherence to policies is essential to treating students fairly and withstanding legal challenge…Fourth, there is uncertainty and debate related to the proper application of legal standards in assessing student online speech rights and corresponding institutional authority. Finally, institutional authority over student online speech is dependent upon the context in which the speech occurs" (iii). Universities, courts, and students are grappling with the free-flowing nature of online posts and the reach of universities to sanction students.

The free-flowing nature and openness of social media has created easy opportunities for universities and governments to sanction students. In a discussion on the government's interference with academic freedom, William Tierney and Michael Lanford state "The challenge for academic institutions is that, as their communication and work becomes more 'virtual,' such sanctions go to the heart of academic work. Increasingly, student communications are monitored, and hundreds of students have been expelled from universities because of what they have posted online. Both students and professors have been arrested for their expression of peaceful views online" (18). For some students, social media is a place where they publish their ideas, granted in a very raw form. Students hone these ideas in the university and use social media to amplify and make the ideas better with feedback from others, including students and academics. Although social media is far from perfect, and some social media posts might jar others, in general if universities and governments use a heavy hand in squelching speech because of a

concern for student (or professorial) disruption, a 21st century tool with great potential can easily be tossed aside.

Commercialization can also play a less noticeable but equally deleterious role as related to student academic freedom and social media. As Tierney and Lanford note in discussing commercialization and its effects on academic freedom:

> "We are also experiencing a new form of infringement on academic freedom which has to do with the commercialization of the university. Although these sorts of concerns are in evidence throughout the world, the grossest violations appear to be in industrialized nations that are poised to commercialize knowledge. To be sure, such issues, as well as the advance of social media and the development of new sorts of institutions such as for-profit universities, will remain as critical concerns" (19).

Social media platforms are private spaces, which mean that the social media providers can censor any information for no reason. If students view these private platforms as the only spaces to engage in the initial posting of ideas, the ideas can be curtailed to fit into what is acceptable by the social media corporations.

Conclusion

Students should be meaningful participants in the marketplace of ideas. As we enter the 21st century, student academic freedom is beleaguered more than ever, but this is probably the area where thoughtful nurturing is most needed. Especially as expressed in student clubs, but even in coursework, students face a formidable legal dragnet for

simply debating ideas and issues that mean something to them. I have shown that student academic freedom does not mean that "anything goes," and that there are always soft cultural and pedagogical restraints that shape a student's voice but which hardly need draconian penalties and legal repression to be effective.

Regrettably, as demonstrated throughout this chapter, some universities have engaged in hysterical repression of both students and faculty irrespective of political persuasions and appear to be moving away from, rather than toward, the enlightened ideals of free inquiry embodied by Holmes' marketplace of ideas. As with faculty academic freedom, there will always be gray areas where we struggle to sort nihilistic destruction from fair dissent, such as in the emergent use of social media, a form which seems prone to amplification and undue insult. However, as one author noted in commenting on several cases, including *Healy*, "universities do not have the authority to burn down academic freedom in order to save it" (Lomonte and Shannon 791).

CONCLUSION

Academic freedom is an issue that transcends time and maintains relevancy. We can choose to learn from past academic censorship, understand the relevance of academic freedom in current debates, as well as see academic freedom as an emerging issue in new spaces.

We can look to the past to see how academic speech was squelched and evaluate the consequences of those actions, as well as find historical guidance in combating current academic censorship. We can make meaning of academic freedom in our present time, cognizant of academic freedom's always "in the moment" value in curriculum decisions as well as college administrative and governmental actions. We can predict the shortcomings and strengths of academic freedom in coping with future national traumas related to war, famine, pandemics, social and economic protests and challenges, as well as unfathomable disruptions. We can also make meaning of academic freedom in future virtual spaces including non-traditional "classrooms" near or far. There will be an understanding of what "academic" and "freedom" means to future generations, as well as the role and identity of the "teacher" and "student" in making use of academic freedom.

Government institutions such as the U.S. Supreme Court are in a continuing conversation with the scope and substance of academic freedom. As a legal understanding of academic freedom ebbs and flows within (or outside of) the confines of the first amendment, there is a never ending tension between the ideal versus the idea of academic freedom.

And essentially, that is what academic freedom is. It is a concept that all people can grasp, and a basic understanding of academic freedom boils down to what educators (and students) can say or not say based on their academic discipline and ability to move their discipline forward. It's not that difficult to put into practice. In fact, an open-minded and lively use of academic freedom provides its greatest value in one simple belief: hope for the future.

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