The University’s Stake in Educational Freedom and Faculty Rights

Barbara A. Lee
Rutgers University and
Edwards Angell Palmer & Dodge, LLP

and

Ann Springer
American Association of University Professors

If one views the relationships between faculty and administrators (or the college or university as a whole) through the lens of litigation only, one would assume that the interests of faculty often differ from the interests of the institution. But a more thoughtful analysis shows that, more often than not, the interests of administrators (and the institution as a whole) are aligned with those of faculty. Recent news reports of attempts by legislators and others to force colleges to fire controversial faculty are just one example of situations in which both the institution and its faculty have a strong interest in “educational freedom,” the right of self-determination while remaining accountable to funders, policymakers, and other stakeholders.

This paper reviews several areas of academic life in which the rights of faculty (individually and collectively) are aligned with those of the institution as a whole (and its administrators). We examine the issue of academic freedom and its significance to the institution as well as to faculty as individuals and as a collective. We discuss the concept of “academic custom and usage” and its significance for institutional autonomy and self-determination. We review the circumstances under which judges will defer to the professional judgment of faculty and administrators when their decisions are challenged in court. And we analyze the protections for intellectual property that both faculty and their institutions have a strong interest in preserving. Finally, we offer some observations on how faculty and administrators can work cooperatively to ensure that these critical interests are protected.

Academic Freedom

“Continuing attacks on the integrity of our universities and on the concept of academic freedom itself come from many quarters. These attacks [are] marked by tactics of intimidation and harassment and by political interference with the autonomy of
colleges and universities…” A Statement of the Association’s Council: Freedom and Responsibility, Redbook at 173 (going on to note that such tactics “provoke harsh responses and counter responses—[e]specially in a repressive atmosphere, the faculty’s responsibility to defend its freedoms cannot be separated from its responsibility to uphold those freedoms by its own actions.”). This statement was adopted in 1970, yet remains very much pertinent today.

In legislatures around the country, elected representatives have been debating David Horowitz’s so-called “Academic Bill of Rights.” (ABoR) The ABoR sets a series of purported “academic freedom” requirements designed to restore “ideological balance,” which Horowitz claims is necessary because “faculty and administration” are “ideologically conformist in their liberalism.” The central issue posed by the ABoR, however, is not one of conservatives versus liberals, but rather political interference with the autonomy of higher education institutions. As an outspoken critic of this legislative effort, Daniel L. Anderson, president of Appalachian Bible College in West Virginia and a self-identified conservative, is “outraged” by the ABoR. He fears such legislation “would inhibit his college’s efforts to provide a faith-based education and would put pressure on the college to hire professors . . . to the campus who espouse views contrary to those of the institution.” Anderson also notes that there is always “a potential risk once the government starts defining academic freedom.” Alyson Klein, “Worried on the Right and the Left,” The Chronicle of Higher Education (July 9, 2004). To many, however, Horowitz’s language of “equality” for all viewpoints strikes a chord, and fuels their distrust and suspicion of higher education customs and practices.

The state of Ohio presents another, but quite different, example of legislative interference. There, faculty and administrators alike are required to sign a “loyalty oath,” ensuring among other things that they have not used “any position of prominence…to persuade others to support an organization on the U.S. Department of State Terrorist Exclusion list.” In addition to being obviously ineffective, such loyalty oaths were found unconstitutional in the McCarthy era, and are “antithetical to academic values.” Robert O’Neil, “Are you Now or Have you Ever…”, Inside Higher Ed, August 15, 2006. Yet the legislature has mandated that state universities, among many other state entities, require their employees to sign.

So too are there concerns among educators that the involvement of corporations in higher education has led to threats to academic freedom in research when corporate interests clash with the unfettered pursuit of truth. As Johns Hopkins University general counsel Estelle Fishbein predicted in 1985:

During the next twenty-five years, the lure of the corporate dollar may just as insidiously lead to the surrender of important academic freedoms to big business. . . [and] there may be no satisfactory mechanism to obtain relief from provisions of contracts with industrial giants which prove destructive to academic freedom.
"Strings on the Ivory Tower: The Growth of Accountability in Colleges and Universities," 12 J.C. & U.L. 381, 398 (1985). And still today administrations and faculty are concerned about the effect of the increased reliance of higher education institutions on corporate sources of funding. There is concern that research will focus more on the commercial benefits to the sponsoring companies than on the advancement of knowledge and the pursuit of truth, and that corporate funders have suppressed and are suppressing research results with which they are displeased. Companies that do not necessarily fund academic research sometimes try to gain access to research—which can have the impact of a different kind of "gag" rule—through subpoenas. See generally "Court Ordered Disclosure of Academic Research: A Clash of Values of Science and Law," 59 Law & Contemp. Probs. 1 (1996) (a series of articles on the topic); see also, e.g., Beverly Enterprises v. Dr. Kate Bronfenbrenner, No. 98-cv-00256 (W.D. Pa. May 22, 1998)(order granting motion to dismiss)( Beverly Enterprises, a national nursing home chain, sued Professor Bronfenbrenner for defamation allegedly caused by her testimony to legislators regarding the corporation’s labor law violations. Beverly sought Dr. Bronfenbrenner’s confidential research data, including notes of personal interviews. The court dismissed the suit on the grounds of legislative immunity); United States v. Microsoft, 162 F.3d 708 (1st Cir. 1998) (two professors successfully defeated efforts by Microsoft Corporation to compel disclosure of their confidential research. Both Harvard and MIT represented the professors in an effort to quash the subpoena, arguing that "forcing [the professors] to disclose the [research] would endanger the values of academic freedom safeguarded by the First Amendment and jeopardize the future information-gathering activities of academic researchers."); Dow Chemical v. Allen, 494 F. Supp. 107 (E.D. Wis. 1980), aff’d, 672 F.2d 1262 (7th Cir. 1982) ( researchers were studying the effects of a chemical on monkeys, and in the middle of the study Dow Chemical sought preliminary data from the researchers to challenge EPA allegations. The courts supported the researcher, finding that “enforcement of the subpoena carries the potential for chilling the exercise of First Amendment rights.”).

The above scenarios are situations involving the need for academic freedom, or autonomy, for faculty and institutions. There are numerous constituencies that make sometimes completing claims to academic freedom and freedom of speech in the academic community, and yet there are many situations where those needs for protection are coextensive. “[F]irst Amendment values justify protecting both the professional speech of faculty and the autonomy of universities to make decisions about educational policy. In order to engage in critical inquiry, professors need some degree of independence from their university employers, and universities need some degree of independence from the state.” David Rabban, “A Functional Analysis of ‘Individual and Institutional’ Academic Freedom Under the First Amendment,” 53 Journal of Law and Contemporary Problems 227, 230 (1990).

Thus the concept of academic freedom, originally imported into this country from European universities, has grown and evolved, covering both the individual rights of professors and the autonomy rights of institutions, and stemming from professional standards (like those set forth by the AAUP, see below), the Constitution and particularly the First Amendment, and other legal protections in contract provisions and state law and
regulations. It is a complex and confusing web, often meaning that even professors, lawyers and judges “are not always clear whose academic freedom is at stake.” Robert M. O’Neil, “Academic Freedom and the Constitution,” 11 J.C. & U.L. 275, 281 (1984).

Nonetheless, academic freedom as a concept, and as a protection to the educational goal of colleges and universities, has traditionally “been considered to be an essential aspect of American higher education.” William A. Kaplin & Barbara A. Lee, THE LAW OF HIGHER EDUCATION 613 (4th ed., 2006). As Chief Justice Warren recognized in Sweezy v. New Hampshire, 354 U.S. 234 (1957), “[t]he essentiality of freedom in the community of American universities is almost self-evident.” And as Justice Frankfurter went on to elaborate, “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.” Sweezy, 354 U.S. at 263 (Frankfurter, J., concurring)

The dual conceptions of academic freedom--individual and institutional--can be mutually reinforcing in the search for knowledge and truth in higher education. Justice Frankfurter’s concurrence in Sweezy emphasized the value of academic freedom in academic decisions that require “the exclusion of governmental intervention in the intellectual life of a university.” 354 U.S. at 262. The First Amendment and “Academic Freedom” in the Supreme Court: An Unhurried Historical Review, 53 Law & Contemporary Problems 79, 137 (1990); reprinted in Freedom and Tenure in the Academy (W. Van Alstyne ed. 1993) (“To gain purchase through the First Amendment, the decision in an academic freedom case, whether individual or institutional, must still rest--as Frankfurter noted--on academic and not on some other grounds.”). See also Regents of the University of Michigan v. Ewing, 474 U.S. 214, 225-226 n. 12 (1985) (“academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also, and somewhat inconsistently, on autonomous decision making by the academy itself.”) Justice Stevens emphasized the “faculty’s decision” that “was made conscientiously and with careful deliberation” and the need for courts to “show great respect for the faculty’s professional judgment.”); Piarowski v. Illinois Comm. College, 759 F.2d 625, 629 (7th Cir.), cert. denied, 474 U.S. 1007 (1985) (noting that academic freedom “is used to denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy”); Feldman v. Ho, 171 F.3d 494, 495 (7th Cir. 1999) (“A university’s academic independence is protected by the Constitution, just like a faculty member’s own speech.”). See also Association of Governing Boards of Universities and Colleges, “Governing in the Public Trust” (providing that “intellectual integrity and academic freedom are at the heart of the historic social justification for self governance in colleges and universities,” and that “board members should be able to articulate this value [academic freedom] and be prepared to support and defend it on behalf of their institutions and individual professors”) (www.agb.org). Thus, in most institutions, the faculty has the primary responsibility for those “academic decisions” that determine
“who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” See Sweezy, 354 U.S. at 263 (Frankfurter, J., concurring). And in administering those decisions, the colleges and universities as institutions earn protection from oversight by the state, and deference from the courts.

As a result of this combined and intertwined definition and understanding of academic freedom, there are many areas across higher education law where the faculty and university are mutually dependent on each other to ensure that the priorities, goals and unique approach of higher education institutions are protected from the outside world. For example, in the 2003 University of Michigan cases dealing with affirmative action and admissions in higher education, the court looked at the freedom of the university to determine for itself on academic grounds who may be admitted to study. The Court in that decision affirmed that "given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." Grutter v. Regents of University of Michigan, 123 S. Ct. 2325, 2338 (2003). Recognizing the Court's "tradition of giving a degree of deference to a university's academic decisions," Justice O'Connor went on to conclude that "good faith on the part of a university is presumed absent a showing to the contrary." Grutter, 123 S.Ct. at 311. Justice O'Connor noted specifically in discussing the facts of the case that a faculty committee crafted the admissions policy the Court was upholding, that it became the official policy upon unanimous adoption by the entire law school faculty, and that the policy was focused on evaluating applicants with an eye toward their "potential to contribute to the learning of those around them." Having recognized the deference that such academic decisions should receive, she especially acknowledged that the question of the educational benefits of diversity involves "complex educational judgments in an area that lies primarily within the expertise of the university." Grutter, 123 S.Ct. at 321.

Challenges by students and legislators not only to university policy making, but also to core educational decisions, are plentiful, and seem to be increasing. Courts have generally supported the academic freedom of educators in such situations, although they look particularly at the educational judgment behind the decision, and the consistency of the reasoning. To the extent that the faculty and the administration have consistently followed polices and procedures, and have educational justifications for their decisions, courts are more likely to accord deference to the decision as a recognition of the need for academic freedom.

For example, in Axson-Flynn v. Johnson, 151 F. Supp. 2d 1326 (D. Utah 2001), rev'd, 356 F.3d 1277 (10th Cir. 2004), University of Utah student Christina Axson-Flynn, a member of the Church of Jesus Christ of Latter-Day Saints, objected to the curricular requirement that students perform in-class plays, regardless of students’ possible religious objections to the content of those plays, and sued the theater department for violating her First Amendment rights. The university argued that the court had to balance “Axson-Flynn’s allegations that the . . . curriculum violated her constitutional rights... against the backdrop of the University’s freedom to determine its curriculum and how to instruct the students in the curriculum.” It contended that Axson-Flynn’s claims failed because constitutional academic freedom allowed the “university and its departments to
make academic judgments to determine for itself, on academic grounds, what to teach and how to teach it.” As the professors argued, “it is an essential part of an actor’s training to take on difficult roles, roles which sometime[s] make actors uncomfortable and challenge their perspective.” While the district court ruled against Axson-Flynn, reasoning that if the curriculum requirements were to constitute a First Amendment violation, “then a believer in ‘creationism’ could not be required to discuss and master the theory of evolution in a science class; a neo-Nazi could refuse to discuss, write or consider the Holocaust in a critical manner in a history class,” the appellate court reversed. The court recognized the need for autonomy of faculty and universities in setting curriculum and pedagogical decisions, but noted that such deference was only possible if such academic decisions are not pretextual. Here, the court ultimately concluded that “viewing the evidence in a light most favorable to Axson-Flynn, . . . there is a genuine issue of material fact as to whether [the professors’] justification for the script adherence requirement was truly pedagogical or whether it was pretext for religious discrimination.”

In another example, a case of a student’s challenge to the autonomy and authority of the university and its faculty involved a graduate student’s demand that he be able to add a special “fuck you section” to his thesis in contrast to the acknowledgements section. In Brown v. Li, 308 F.3d 939 (9th Cir. 2002), cert. denied, 538 U.S. 908 (2003), a master’s degree candidate sued the administration, individual faculty members on his thesis committee, and the library director on First Amendment grounds for rejecting his thesis once he added the section, and declining to place it in the university’s thesis library. In a divided decision, the Ninth Circuit three-judge panel found for the university. The court found no First Amendment violation because a court must defer “to the university’s expertise in defining academic standards and teaching students to meet them.” The opinion considered the many interests at stake, including the “university’s interest in academic freedom,” the faculty members’ “First Amendment rights,” and the student’s “First Amendment rights.” After recognizing that there existed “no precedent precisely on point,” the majority concluded that the university should prevail if their rejection of Brown’s thesis “was reasonably related to a legitimate pedagogical objective.” The court found the educational decision legitimate because it was reasonably related to the pedagogical goal of “teaching the proper format for a scientific paper.”

In another case using religion in a unique way to challenge curriculum, as Axson-Flynn did, students and individual taxpayers backed by a self-described Christian conservative organization sued the University of North Carolina at Chapel Hill for its scheduled freshman orientation discussion on Approaching the Qur’an: The Early Revelations, by Michael Sells. Yacovelli v. Moeser, Case No. 02-CV-596 (M.D.N.C. Aug. 15, 2002), aff’d, Case No. 02-1889 (4th Cir. Aug. 19, 2002); 324 F.Supp.2d 760 (M.D.N.C. 2004). The students sought to halt the summer program, arguing that the assignment of the book amounted to an endorsement of religion and violated the Free Exercise Clause of the Constitution. They objected to the university’s “guise of academic freedom, which is often nothing other than political correctness in the university setting,” and contended that because “the Qur’an is not fully presented, . . . the University is
producing only half-educated students who may well believe they are fully educated on this important matter.” The university argued that an injunction to stop the program would chill academic freedom because “the decision was entirely secular, academic, and pedagogical.” The program’s purpose, the university noted, was “to educate, not to indoctrinate,” and to hold otherwise would be to subject all future pedagogical decisions to a bizarre level of review. The federal district court ruled in favor of the university, finding that “there is obviously a secular purpose with regard to developing critical thinking, [and] enhancing the intellectual atmosphere of a school for incoming students.” The court noted the potential harm to the university, which it considered “not just the harm to faculty members or staff, but incoming students and the deprivation of an opportunity to participate in academic discussions, in critical thinking, in expressing opinion and perhaps engaging in argument in framing dissent . . .”

In a similar case, Linnemeir v. Board of Trustees, Indiana University-Purdue University, Fort Wayne (IPFW), 260 F.3d 757 (7th Cir. 2001), some Indiana taxpayers and state legislators sought to compel the university to halt the campus production of a controversial play. The Theatre Department faculty committee had unanimously approved the selection of the play as the senior project of a drama student. The plaintiffs alleged that the play was an “undisguised attack on Christianity and the Founder of Christianity, Jesus Christ,” and, therefore, the performance of the play on a public university campus violated the separation of church and state under the Establishment Clause of the First Amendment. The district court refused to grant a preliminary injunction halting performance of the play, and the plaintiffs appealed. The Seventh Circuit denied the plaintiff’s request that performance of the play be stayed while the appeal was pending, opining that “school authorities and the teachers, not the courts, decide whether classroom instruction shall include work by blasphemers.” The opinion continued: “Academic freedom and states’ rights alike demand deference to educational judgments that are not invidious . . .”

A legal clinic case in early 2001 raised the same type of questions about faculty and administrations’ freedom to make educational decisions weighed against the demands of government to control such decisions. See Southern Christian Leadership Conference v. Louisiana Supreme Court, 252 F.3d 781 (5th Cir.), cert. denied, 122 S.Ct. 464 (2001). The Fifth Circuit upheld Louisiana Supreme Court Rule XX, which restricted the types of community groups that may be represented by law clinics, and prohibited law school clinics from representing “solicited” clients. The rule appeared to have been amended in response to the Tulane Law School clinic’s successful efforts in assisting a local community group to defeat a plan to build a plastics plant in its neighborhood. A number of plaintiffs, including professors and students, challenged the rule. They alleged, in part, that the rule violated the academic freedom of professors to teach and students to learn. The Fifth Circuit ruled that the limitation on the types of clients law clinics could represent did not “implicate any speech interests,” and the solicitation restrictions did not violate the plaintiffs’ rights of free speech: “At most, Rule XX indirectly discourages speech by refusing the educational experience of acting as an attorney in a particular matter to unlicensed student practitioners in clinics whose members or employees engaged in solicitation of that matter.” In so ruling, the Fifth
Circuit noted that the impact of the court’s rule “on the educational experience is far from extreme,” even though the court acknowledged that “the clinics themselves will either be forced to change their educational model or to refrain from soliciting particular clients.” In the end, however, “this minimal impact on the clinics” was not suppressive.

**AAUP Policy Statements: Their Development and Application**

Beginning in the early 1900s, the AAUP began developing policy responses to try to address some of the distinctions and tensions inherent in protecting academic freedom and educational autonomy. In 1915, it issued its “Declaration of Principles on Academic Freedom and Academic Tenure,” relating to academic freedom and attendant “practical proposals.” It purported to “safeguard freedom of inquiry and teaching against both covert and overt attacks,” and “protect college executives and governing boards against unjust charges of infringement of academic freedom” by providing suitable judicial bodies composed of members of the academic profession which may be called into action” in cases of alleged academic freedom violations. AAUP, POLICY DOCUMENTS & REPORTS, Appendix I, 291(10th ed. 2006) (hereafter “Redbook”).

The AAUP went on to develop many additional policies, and began a long history of collaboration with organizations that speak for college and university administrations. Some AAUP policies are drafted jointly with other organizations, and proposed AAUP policies are published first for the comment of the academic community, with criticism and suggestions submitted by college and university administrators and by the national organizations that represent them. Policies are then reviewed and revised in the light of these remarks. Perhaps the most conspicuous example of this collaboration is the 1940 Statement of Principles on Academic Freedom and Tenure, which was developed by the AAUP and the American Association of Colleges and Universities (an organization run by the administrators of undergraduate academic institutions). Redbook at 3.

The 1940 Statement is a series of balances, ensuring academic freedom in colleges and universities, and recognizing that “institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole.” Id. The statement’s purpose is to “promote public understanding and support of academic freedom and tenure and agreement upon procedures to ensure them in colleges and universities,” and it recognizes that academic freedom “carries with it duties correlative with rights.” Id. Thus, for example, “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.” And “teachers are entitled to freedom in research and in the publication of the results,” but this is “subject to the adequate performance of their other academic duties, (and) research for pecuniary return should be based on an understanding with the authorities of the institution.” Id. The 1940 Statement has been endorsed by more than 200 scholarly and professional organizations, and is incorporated into hundreds of college and university faculty handbooks.
Recognizing that “[t]he variety and complexity of the tasks performed by institutions of higher education produce an in escapable interdependence among governing board, administration, faculty, students and others,” the AAUP, the American Council on Education, and the Association of Governing Boards went on to jointly formulate the *Statement on Government of Colleges and Universities*. Redbook at 136. The statement is:

… a call to mutual understanding regarding the government of colleges and universities [„which”] … is essential for at least three reasons. First, the academic institution, public or private, often has become less autonomous; buildings, research, and student tuition are supported by funds over which the college or university exercises a diminishing control. Legislative and executive governmental authorities, at all levels, play a part in the making of important decisions in academic policy. If these voices and forces are to be successfully heard and integrated, the academic institution must be in a position to meet them with its own generally unified view. Second, regard for the welfare of the institution remains important despite the mobility and interchange of scholars. Third, a college or university in which all the components are aware of their interdependence, of the usefulness of communication among themselves, and of the force of joint action will enjoy increased capacity to solve educational problems.

Redbook at 135. The statement goes on to set forth the different roles of faculty, administration and governing boards. It holds that it is the duty of the president, for example, to exercise institutional leadership, including the responsibility “to see to it that the standards and procedures in operational use within the college or university conform to the policy established by the governing board and to the standards of sound academic practice,” Redbook at 138, while the faculty has “primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process.” Redbook at 139.

**Academic Custom and Usage**

Despite the best efforts of faculty committees, administrative planning, and legal review, issues sometimes arise on campus that have not been addressed in a faculty handbook or institutional rule. Institutions sometimes consult their historical methods of addressing a particular issue, or develop a strategy for dealing with a new or unique situation without committing the resolution process to writing. When a faculty member sues an institution, however, the lack of written guidance may be part of that individual’s claim against the institution.

There is a reasonably well-developed common law theory of “academic custom and usage” that has been used—in some cases by plaintiffs, and in other cases by defendant institutions—to attempt to persuade a reviewing court that, despite the lack of
written policies or rules, a particular outcome is justified by the “common law of
academe.” Academic custom and usage encompasses established practices and
understandings within a particular institution (and, in some cases, throughout academe
generally). Within an institution, academic custom and usage may emanate from policy
statements, speeches by institutional leaders, internal memoranda, or a consistent manner
of interpreting a more general policy or practice.

For example, in Brown v. George Washington University, 802 A.2d 382 (Ct. App.
D.C. 2002), a faculty member who had been denied tenure and promotion filed a breach
of contract claim against the university. The faculty member argued that the
department’s written promotion and tenure review policy provided that any candidate for
promotion would be invited to meet with the faculty promotion committee to provide
information or to answer questions. This candidate had not been invited to meet with the
committee. At trial, department faculty testified that the department had not followed
this policy consistently and, in fact, had not invited any promotion candidates to appear
before the committee the year that the plaintiff was reviewed for promotion and tenure.
The court ruled that this application of the department’s policy was reasonable, and that
the plaintiff’s contract had not been breached. Thus academic standards as set forth by
the department faculty prevailed.

The doctrine of academic custom and usage, and support for academic standards
however, does not always mean that the institution will prevail when a faculty member
sues. In McConnell v. Howard University, 818 F.2d 58 (D.C. Cir. 1987), a tenured
professor refused to meet his class because the administration would not allow him to
eject a disruptive student from the class. The university discharged the professor for
“neglect of professional responsibilities,” one of the grounds listed in the faculty
handbook for terminating a tenured faculty member. McConnell sued for breach of
contract, stating that he had not neglected his responsibilities, since he had taught his
other courses and fulfilled all other requirements besides the one disputed course. In
addition, a faculty grievance committee had found that his single act of refusing to teach
a course did not meet the standard for “neglect of professional responsibilities.” The
appellate court agreed with McConnell that “neglect of professional responsibilities” was
subject to interpretation, and found the reasoning of the faculty grievance committee to
be compelling. The court explained:

In short, we believe that the term "neglect of professional responsibilities," by its
very words, includes a consideration of the reasonableness of Dr. McConnell's
actions under the totality of the circumstances surrounding them. We also believe
that the very concept of termination for "cause" necessarily includes the
consideration of mitigating factors. In any event, it is clear that the terms "neglect
of professional responsibilities" and "cause" certainly do not explicitly exclude
the consideration of reasonableness and mitigating circumstances. So, at worst,
the terms are ambiguous and must be construed in keeping with general usage and
custom at the University and within the academic community.
In another case against Howard University, the same appellate court applied academic custom and usage to conclude that five nontenured faculty members dismissed for allegedly participating in a campus demonstration should have been given either sufficient notice or a pre-termination hearing. In *Green v. Howard University*, 412 F.2d 1128 (D.C. Cir. 1969), the court examined the faculty handbook, as well as the university’s past practices with respect to hiring and non-reappointment. The court said:

Contracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is. The readings of the marketplace are not invariably apt in this noncommercial context . . . The employment contracts of [the professors] here comprehend as essential parts of themselves the hiring policies and practices of the university as embodied in its employment regulations and customs.

412 F.2d at 1135.

In addition to examining internal sources of academic custom and usage, courts may also look to writings or policy statements from outside the institution to assist them in defining the meaning of contractual terms. In *Katz v. Georgetown University*, 246 F.3d 685 (D.C. Cir. 2001), for example, the plaintiff, a tenured clinical professor at the university’s hospital, challenged the university’s decision to dismiss him on the grounds of financial exigency. In addition to referring to the faculty handbook’s definition of tenure, the court reviewed several books defining and discussing tenure, including one that analyzed AAUP policy statements on tenure. Agreeing with the university’s interpretation of the term “tenure,” the court upheld its dismissal decision.

Another termination case in which the university prevailed demonstrates an interesting and important application of academic custom and usage. In *Barham v. University of Northern Colorado*, 964 P.2d 545 (Ct. App. Colo. 1997), the plaintiff, a tenured professor, was accused of “harassment, misuse and/or misappropriation of government property, conduct detrimental to the efficient and productive operation of the school, unacceptable job performance, and violations of the standards of professional conduct.” The professor challenged his discharge on constitutional due process grounds, claiming that the language in the dismissal policy was unconstitutionally vague. The provision stated that a tenured faculty member could be dismissed only for cause, which was defined as “a legally sufficient ground or reason; a cause which relates to a matter material to public interest; or a cause which is just and not arbitrary or capricious.” The faculty committee that reviewed the charges against Barham consulted not only the institution’s “Code,” which contained the discharge provision, but also several AAUP policy documents, for assistance in determining what standard of professional conduct a tenured faculty member should be expected to meet. The committee decided that violations of standards of professional conduct would have to be "sufficient enough to
represent an affront to the professional sensibilities of the academic community." A majority of the committee found that Barham had violated the standards of professional conduct and that his job performance was unacceptable. The court noted that the AAUP’s Statement on Professional Ethics, which the committee had consulted, was virtually identical to the language of the institution’s Code. And with respect to other AAUP policy statements consulted by the committee, the court stated that “to the extent that the Committee relied upon the criterion of ‘professional sensibilities to the academic community,’ plaintiff fails to demonstrate in any manner that he was prejudiced by this concept.” 964 P.2d at 549.

An early use of academic custom and usage that has been cited numerous times in subsequent litigation is Krotkoff v. Goucher College, 585 F.2d 675 (4th Cir. 1978). The issue in Krotkoff was whether the college, facing a severe budget crisis, could dismiss a tenured faculty member on the grounds of financial exigency when neither the faculty member’s contract nor the college’s bylaws included financial exigency as a reason for dismissal. The college had provided an expert witness, an officer of the American Council on Education, to testify on “the national academic community’s understanding of the concept of tenure,” to which the court gave great deference. The expert based his testimony upon the AAUP’s 1940 Statement on Academic Freedom and Tenure, which acknowledges that a tenured faculty member may be dismissed for reasons of financial exigency. Despite the fact that the college had not incorporated this statement into its policies, nor had it explicitly included financial exigency as a reason to dismiss a tenured faculty member, the court ruled that the concept of tenure contemplated such a dismissal and that Goucher had not breached Krotkoff’s contract.

Although most institutional contracts and policies are clear, and therefore academic custom and usage may not be necessary to resolve most disputes, the doctrine is still useful and may protect academic institutions from the application of legal theories adopted to regulate the behavior of commercial organizations. Courts will not apply the doctrine if the contractual language is clear and needs no further interpretation (see, for example, Gray v. Mundelein College, 695 N.E.2d 1379 (Ill. 1998)); however, the theory is important to both faculty and administrators alike in its ability to persuade reviewing courts to honor an institution’s understanding of its mission, history, and culture, as well as to enable academe in general to have its decisions evaluated in light of national academic norms rather than those developed in a commercial context.

Judicial Deference to Academic Judgments

Another area where faculty and institutional leaders have common interests is in the area of judicial deference to the judgments of academics in employment and student conduct matters. Most institutions have elaborate procedures for making hiring, promotion, tenure and dismissal decisions. Most also have multi-step processes for making decisions concerning student academic performance, including admissions, grading, and academic dismissal. Unless the institution or a faculty committee has committed some egregious procedural violation or has engaged in blatant discriminatory
conduct (see, for example, Clark v. Claremont University Center, 8 Cal. Rptr. 2d 151 (Cal. Ct. App. 1992)), courts tend to defer to academic judgments that are made in good faith and supported with an appropriate scholarly rationale.

Tenure denials. Although faculty plaintiffs have occasionally prevailed in challenges to denials of promotion or tenure, such outcomes are unusual (see Barbara A. Lee and George R. LaNoue, Academics in Court: The Consequences of Faculty Discrimination Litigation (University of Michigan Press, 1987)). If the court is satisfied that the institution followed its procedures, applied its criteria fairly and consistently, and used actual academic, professional judgment to reach its decision, the court will typically defer to the institution’s decision. For example, in Craine v. Trinity College, 791 A.2d 518 (Conn. 2002), a state supreme court overturned a multimillion dollar jury verdict for a female faculty member who claimed that she was denied tenure because of sex discrimination. A faculty committee had recommended against tenure because it did not believe that the professor’s scholarly record merited tenure, and the institution accepted the faculty committee’s recommendation. The court deferred to the institution’s judgment that the plaintiff’s scholarship did not meet the standard for tenure, and refused to compare her record with the record of two male tenure candidates in a different department. The court used very strong language in its refusal to second-guess the merits of the tenure denial:

The first amendment guarantees that the defendant [college] may pass its own judgment on the plaintiff’s scholarship and accept or reject other evaluations in the process. . . . To compare these publication records would require an inadmissible substantive comparison between the candidates and an improper intrusion into the right of the defendant to decide for itself which candidates satisfied its publication requirements. In the absence of any independent evidence of discrimination, evidence that an academic institution appears to have been more critical of one candidate than of another is not sufficient to raise an inference of discrimination. 791 A.2d at 537-538.

Courts reviewing denials of promotion and tenure have deferred to the judgments of faculty and/or the institution even if there was some evidence that “academic politics” or other reasons were, at least in part, responsible for the negative decision. In Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997) (en banc), a federal appellate court reversed a trial court’s finding that a female chemistry professor denied tenure had been discriminated against on the basis of age and marital status. The college had justified its negative decision on the grounds that Professor Fisher had taken a nine-year leave to raise her children and had been “away from science” for too long. Although the trial court had ruled that this reason was not credible, the appellate court ruled in the college’s favor:

In some cases, an employer’s proffered reason is a mask for unlawful discrimination. But discrimination does not lurk behind every inaccurate statement. Individual decision-makers may intentionally dissemble in order to hide a reason that is non-discriminatory but unbecoming or small-minded, such as
back-scratching, log-rolling, horse-trading, institutional politics, envy, nepotism, spite, or personal hostility. For example, a member of a tenure selection committee may support a protégé who will be eligible for tenure the following year. If only one tenure line is available, that committee member might be inclined to vote against tenure . . . thereby ensuring that the tenure line remains open. Any reason given by the committee member, other than the preference for his protégé, will be false . . . [T]he fact that the proffered reason was false does not necessarily mean that the true motive was the illegal one argued by the plaintiff.

114 F.3d at 1337.

In an early case, Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980), the reviewing court provided strong protection for well-supported faculty academic judgments, while chiding a college for using discriminatory reasons for denying tenure to a professor of physical education. The institution denied tenure to Professor Kunda because she did not hold a master’s degree, which they stated was necessary for all tenured faculty. The court found that the dean of the college had not informed the professor that she needed a master’s degree to be granted tenure, although he had done so for male faculty, and the institution had granted tenure to three male faculty members in the plaintiff’s department, none of whom held a master’s degree. A faculty committee had found that Professor Kunda had the “scholarly equivalent” of a master’s degree based upon courses she had taken and curriculum she had developed. In reviewing the judgment of the faculty committee, the court said:

Wherever the responsibility [for evaluating faculty performance] lies within the institution, it is clear that courts must be vigilant not to intrude into that determination, and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure. Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges.

621 F.2d at 547-548. Because the trial court had found that the college denied tenure to Professor Kunda on the basis of her lack of a master’s degree, it fashioned a remedy that was consistent with the determination of her peers that she merited tenure. The court ordered that Kunda be promoted, and that she be given two years to obtain her master’s degree, at which point she be awarded tenure. Because Kunda’s competence and performance had been deemed acceptable by all individuals and committees reviewing her case, the court’s remedy was deferential to the academic judgments while rejecting the institution’s ultimate decision.

Termination of tenure. Dismissal of a tenured faculty member is the “capital punishment” of academe, and institutions do not make these decisions easily. Most
institutions have elaborate procedural protections for faculty members who are to be dismissed, including a pre-dismissal hearing, often before a faculty panel, with the opportunity to present evidence, question witnesses, and challenge the grounds upon which the proposed dismissal is based. With only a few exceptions, reviewing courts have been deferential to the reasons articulated for dismissal and to the procedures used to make the dismissal determination.

With respect to the reasons for dismissing tenured faculty, AAUP policies do not list possible causes for dismissal of a tenured faculty member, but specify, in the AAUP Recommended Institutional Regulations on Academic Freedom and Tenure, that dismissal should be for “adequate cause.” This leaves the determination of “adequate cause” up to individual institutions. Some institutions list specific grounds for dismissal, while others have a more general statement providing that behavior that violates norms of professional conduct will be grounds for dismissal. See Donna R. Euben and Barbara A. Lee, “Faculty Discipline: Legal and Policy Issues in Dealing with Faculty Misconduct,” 32 Journal of College & University Law 241 (2006). As long as the institution can demonstrate the relationship between the grounds for dismissal and the requirements of the faculty member’s job, courts tend to defer to such institutional policies. Typical causes for dismissal include incompetence, neglect of duty, dishonesty, moral turpitude, severe conflicts of interest, or harassment of students or colleagues.

A perhaps extreme example of judicial deference to an institution’s decision to dismiss a tenured faculty member occurred in Lemvermeyer v. Denison University, 2000 Ohio App. LEXIS 861 (Ct. App. Ohio, 2000). The tenured faculty member was dismissed for falsification of expense vouchers. Although there was credible testimony that the faculty member’s psychiatric disorders were relevant to her falsification, a faculty committee found that she met the standard for “moral delinquency,” one of the reasons given in the faculty handbook for dismissing a tenured faculty member. The court upheld the determination, dismissing all of the faculty member’s discrimination and breach of contract claims.

A federal appeals court has also ruled that “failure to maintain standards of sound scholarship and competent teaching” is a sufficiently clear guideline for evaluating the alleged misconduct of a tenured faculty member. In San Filippo v. Bongiovanni, 961 F.2d 1125 (3d Cir. 1992), a tenured professor of chemistry was accused of exploiting his graduate assistants by having them perform repairs on his home and treating them abusively. A faculty committee had found that the professor had “demonstrated a serious lack of integrity in his professional dealings” and thus had violated the university’s policies. The professor sued, claiming that the university policy, as applied to him, was unconstitutionally vague and thus did not give him notice of what kind of conduct could result in dismissal. The appellate court disagreed, stating that the policy was sufficiently clear to provide notice to the professor. Said the court:

It is not unfair or unforeseeable for a tenured professor to be expected to behave decently towards students and coworkers, to comply with a superior’s directive, and to be truthful and forthcoming in dealing with payroll, federal
research funds or applications for academic positions. Such behavior is required for the purpose of maintaining sound scholarship and competent teaching.

961 F.2d at 1137.

The AAUP Statement on Professional Ethics has been viewed by reviewing courts as a sufficiently clear articulation of the behavior required of faculty, such that the statement itself can survive a constitutional challenge. In Korf v. Ball State University, 726 F.2d 1222 (7th Cir. 1984), the university had adopted the Statement and published it in its faculty handbook. The university attempted to dismiss a tenured professor after a faculty hearing committee found that he had made sexual advances toward and had exploited male students, citing the portion of the Statement that prohibits the exploitation of students for private advantage. The professor sued, claiming that the dismissal violated due process guidelines because it did not mention that sexual misconduct was grounds for dismissal. The court ruled for the university, stating that a code of conduct need not “specifically delineate each and every type of conduct . . . constituting a violation.” 726 F.2d at 1227-28.

In reviewing the procedures used to dismiss a tenured faculty member, courts apply a minimal version of due process protections to faculty at public institutions, and apply standard contract law to faculty at private institutions. If a public institution’s tenure termination procedures comply with Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) (requiring notice of the reasons for dismissal, opportunity for the faculty member to be heard, and an impartial decision-maker), and if a private college’s procedures are fair and the college follows them, reviewing courts will generally defer to the institution’s decision. For example, a court reviewing the dismissal decision of a public university ruled that the institution need not have perfect compliance with its dismissal procedures as long as fundamental due process protections were afforded the individual to be dismissed. In de Lano v. Berglund, 282 F.3d 1031 (8th Cir. 2002), North Dakota State University decided to dismiss Professor de Lano on six grounds: 1) lack of collegiality; 2) harassment of department staff; 3) refusal to process complaints through proper channels; 4) making false accusations about the department chair and dean; 5) failure to correct problem behavior after several reprimands; and 6) excessive filing of frivolous grievances. Although one faculty committee concluded that the charges were insufficient to support tenure revocation, a second faculty committee, empanelled at de Lano’s request, held a hearing and concluded that there was sufficient cause for dismissal. De Lano claimed constitutional due process and First Amendment violations. The court ruled that Loudermill, not the institution’s policies and procedures, controlled the amount of constitutional due process to which de Lano was entitled, and found that the hearings had provided de Lano with more than the required amount of due process protections. It also rejected de Lano’s First Amendment claim, ruling that his complaints were not matters of public concern and thus not constitutionally protected.

LEXIS 21197 (2d Cir. Aug. 14, 2006), the court awarded summary judgment to the university, rejecting the plaintiff’s claims of age discrimination in the university’s decision to revoke his tenure. Boise was accused of harassing colleagues, “aberrant” grading practices, and the creation of an “inappropriate and sometimes threatening workplace environment.” He had also been seen removing mail from other faculty members’ mailboxes, had not published any scholarly work for “many years,” and only gave grades of A. A faculty hearing panel found the charges against him to be supported and recommended revocation of tenure. Finding that the faculty panel followed the procedures listed in the faculty handbook and that Boise had offered no evidence of age discrimination, the court ruled for the university.

Although AAUP policies recommend that a faculty panel serve as the factfinder when an institution files tenure charges against a faculty member, and that the faculty panel recommend any sanctions, if relevant, the AAUP recognizes that the final decision-maker is the administration AAUP Statement on Government of Colleges and Universities, Redbook at 135. The AAUP statement recommends that if the president or board of trustees disagrees with either the findings of the panel or its recommended remedy, the reasons for the disagreement should be provided “in detail.” In most cases, reviewing courts will not disturb the decision of a president or board of trustees to dismiss a tenured faculty member, even if that decision contradicts the recommendation of a faculty panel. But if the institution’s policies provide that the faculty panel’s decision is binding on the institution (a policy that goes beyond what the AAUP policies contemplate), the administration will likely have to implement that decision. For example, the Pennsylvania Supreme Court ruled, in Ferrer v. Trustees of the University of Pennsylvania, 825 A.2d 591 (Pa. 2002), that a university’s failure to follow its faculty handbook provisions breached the institution’s contract with the faculty member. The university’s faculty handbook provided that, in cases of faculty dismissal, the faculty panel’s determination of guilt or innocence of the charges brought against the faculty member was binding on the administration. In this case, the professor had been accused of serious breaches of research ethics and academic misconduct. The faculty panel found in the professor’s favor, but the provost imposed sanctions because he disagreed with the panel’s findings. The court noted that its ruling against the university was deferential to academic judgment because the institution’s own policies supported the professor’s claim, and that the court’s review was limited to procedural compliance, not the merits of the decision.

A case from the same court shows the substantial deference a reviewing court will give to institutional policies if they are properly drafted and carefully followed. In Murphy v. Duquesne University of the Holy Ghost, 777 A.2d 418 (Pa. 2001), a faculty member dismissed for sexual harassment of students claimed that the dismissal breached his contract with the institution. The court refused to review the merits of the faculty member’s case because the faculty handbook reserved to the faculty and the university the determination of whether a faculty member’s conduct met the definition of “serious misconduct” such that it justified a decision to dismiss a tenured faculty member. The handbook required the faculty hearing body to determine that the university had proven, by clear and convincing evidence, that the faculty member had engaged in “serious
misconduct.” The handbook also provided that the president and the trustees could disagree with the findings of the faculty panel. Because the process was so specific and the allocation of authority was so clear, the court ruled that the plaintiff had no right to have a jury determine the merits of his dismissal. The court said:

[P]rivate parties, including religious or educational institutions, may draft employment contracts which restrict review of professional employees’ qualifications to an internal process that, if conducted in good faith, is final within the institution and precludes or prohibits review in a court of law . . . When a contract so specifies, generally applicable principles of contract law will suffice to insulate the institution’s internal, private decisions from judicial review. [777 A.2d at 428]

The court’s strong statement of deference demonstrates that institutions can craft discipline and dismissal policies that ensure that academics, rather than reviewing courts, make the substantive (and final) determination of the qualifications of faculty, whether for hiring, promotion and tenure, or dismissal.

Academic judgments about students. Reviewing courts are typically deferential to academic judgments made by qualified faculty about student academic standing. When a student is disciplined or dismissed for misconduct, however, courts are not so deferential, and apply either constitutional due process standards (at public institutions) or contract law (at both public and private institutions) to review the fairness of the institution’s action.

The U.S. Supreme Court has spoken twice on the role of courts when asked to review discipline or dismissal of students on the grounds of inadequate academic performance. In Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978), a dismissed medical student claimed that her dismissal was discriminatory. The Supreme Court said:

[A] number of lower courts have implied in dictum that academic dismissals from state institutions can be enjoined if ‘shown to be clearly arbitrary or capricious’ . . . . Courts are particularly ill equipped to evaluate academic performance. The factors discussed . . . with respect to procedural due process speak a fortiori here and warn against any such judicial intrusion into academic decision making.

435 U.S. at 91-92 (citations and footnotes omitted). In a second case, Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985), a medical student challenged his dismissal on due process grounds. The Court characterized the student’s claim as a challenge to the fairness of the university’s decision and a claim that it was incorrect. The Court said:

When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty’s professional judgment. Plainly, they may not override it unless it is such a substantial
departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

474 U.S. at 225. Since these Supreme Court rulings, reviewing courts have, for the most part, been deferential to the academic judgments of faculty committees or academic administrators when students challenge dismissals based upon inadequate academic performance. One court even upheld the dismissal of a nursing student six days before she was due to graduate, saying:

Courts should not intervene in academic decision-making where a student is dismissed unless the dismissal is clearly shown to be arbitrary and capricious . . . In this case, [the student] was dismissed because of her failing performance in the clinical portion of her Nursing 303 class . . . Thus, there is no dispute that [her] dismissal was clearly an academic decision. It being an academic decision, [the plaintiff] had the burden of proving that the decision was arbitrary and capricious.


But if a court views the faculty committee or administrator’s decision as biased, or based on inaccurate or incomplete information, it will not defer to that decision. For example, in Alcorn v. Vaksman, 877 S.W.2d 390 (Tex. Ct. App. 1994), the court determined that a student had been dismissed from a doctoral program not because of poor academic performance, but because the faculty did not like his ideas and his tendency to publicize them. Because the faculty members had not acted in good faith, the court required two faculty members to pay the student $10,000 each from their own funds.

Students have had little success challenging grades given to them by their professors unless the student can demonstrate a clear abuse of the good faith standard. In Susan M. v. New York Law School, 556 N.E.2d 1104 (N.Y. 1990), a state’s highest court rejected a law student’s challenge to grades in two final exams. The court said:

As a general rule, judicial review of grading disputes would inappropriately involve the courts in the very core of academic and educational decision making. . . . [I]n the absence of demonstrated bad faith, arbitrariness, capriciousness, irrationality or a constitutional or statutory violation, a student’s challenge to a particular grade or other academic determination relating to a genuine substantive evaluation of the student’s academic capabilities, is beyond the scope of judicial review.

556 N.E.2d at 1107. But if the court finds that a student’s grade was awarded for nonacademic reasons, or that the institution did not treat the student fairly when a grade was questioned, it will not hesitate to rule against the institution. In Sylvester v. Texas Southern University, 957 F.2d 944 (S.D. Tex. 1997), a law student challenged the final exam grade she received in a class on wills and trusts. The law school did not respond to the student’s appeal and the faculty member refused to reconsider the student’s grade, both during the appeal process and even when ordered to by the court. The court, clearly
exasperated with the professor and his colleagues on the appeal committee, finally awarded the student a “pass” in the course, and said:

Between active manipulation and sullen intransigence, the faculty, embodying arbitrary government, have mistreated a student confided to their charge. This violates their duty to conduct the public's business in a rationally purposeful manner.

957 F.2d 944 at 947. Absent some form of apparent misconduct or the blatant flouting of institutional policies and procedures, reviewing courts defer to academic judgments and refuse to second-guess the evaluations of faculty and students by qualified professionals. Clearly, both institutions and faculty benefit from this deference, and it is in their interest to ensure that “academic” judgments are based upon appropriate criteria and carried out fairly and in good faith.

Protection of Intellectual Property

Copyright. Intellectual property law is another area where general ownership laws don’t fit the understandings and academic practices of colleges and universities, leading to frequent confusion and the need for clear and collaborative policies. It is a core assumption of academic freedom and academic custom that faculty are free to produce work reflecting their own views and theories--not those of administration or trustees. Yet under basic copyright law as it is applied to the non-academic world, this ownership can be called into question because of the “work-for-hire” doctrine. The general rule is that the author of a piece of writing is the owner of the copyright to that material. However, “work for hire” is a statutory exception to this general ownership provision; it is a way of allocating ownership in the employment context, determining whether an employee or an employer is the author, and thus the copyright holder, of work performed in the course of employment. The work-for-hire provision entitles an employer to assert ownership over materials prepared by its employees acting within the “scope of their employment.” See 17 U.S.C. § 101 and § 201.

This makes sense when talking about, for example, a marketing director for an auto manufacturer who writes an advertising brochure; the copyright to that document belongs to the company. The brochure was prepared by an "employee" in the "scope of employment." Thus, copyright is owned by the employer, and the employer has the right to revise, edit and translate the brochure, release it to the public, discard it, etc. - whatever the employer chooses. But academic work covers a wide range of output, from books and articles and student papers to syllabi, class notes and course descriptions, from online courses and computer programs to grant proposals and university governance materials. Faculty ownership and control of some of these items, even though faculty are “employees” of the university, is necessary for the university to function.

This is true for a number of reasons. Few administrations want to be responsible for the content of faculty work, which they would be if they owned it. For example, it is essential that the University of Colorado not own the copyright ownership, and
responsibility, for Ward Churchill’s “little Eichmanns” essay. As the Chancellor has stated, “Professor Churchill's views are his own and do not represent the views of University of Colorado faculty, staff, students, the administration or the regents.” Statement by Interim Chancellor Phil DeStefano, January 27, 2005 (available at www.Colorado.edu).

In another example, the University of Indiana Press published a book, written by a Brandeis professor, about the composer Rebecca Clarke. After publication, the owner of unpublished papers by Clarke contacted the press, claiming the book made unauthorized use of the papers. The press withdrew the book, but the owner of the papers also wrote to Brandeis University, asking questions about the “relationship” of the faculty member to the institution. The administration responded that the work was done by the faculty member as an “independent scholar,” and that work of such scholars belongs to the scholar, and not to the institution. “A Copyright Battle Kills An Anthology of Essays About the Composer Rebecca Clarke,” The Chronicle of Higher Education, July 16, 2004. Such a response makes perfect sense in the academic world, but doesn’t fit well into the work for hire doctrine as generally applied elsewhere.

Not only do institutions not want to be responsible for the content of the scholarly work of the faculty, but they also do not want to be responsible for negotiating book contracts, publishing agreements, handling revisions and updates, and the many other logistical tasks that accompany writing and publishing. Yet lack of understanding of the academic custom and model for shared responsibilities could lead to “work for hire” being applied across the board in academia, burdening institutions with tasks few institutions have the desire or resources to assume. Of course there are also a number of grey areas where ownership might more appropriately follow the “work for hire” model, like faculty projects that are highly integrated and dependent upon the administration or outside entities. A Kansas court, charged with determining whether copyright ownership was a mandatory subject of collective bargaining, experienced the challenges inherent in attempting to set boundaries on faculty copyright ownership. On appeal, the Kansas Supreme Court ruled that intellectual property rights are not simply assumed to be work-for-hire belonging to the university, that such a presumption reasoning was “too big a leap.” Instead, the court recognized that the question of ownership of scholarly work is a complex one, depending on a careful analysis of the employment relationship and the reason for and method of creation of the work itself and “will necessarily involve not just a case-by-case evaluation, but potentially a task-by-task evaluation.” See Pittsburg State University/Kansas NEA v. Kansas Board of Regents, PSU and PERB, 280 Kan. 408 (Nov. 10, 2005).

The two leading cases in this area reflect the same dilemma. In Weinstein v. University of Illinois, 811 F.2d 1091, 1094 (7th Cir. 1987), an assistant professor sued his college and the university regarding an article he co-wrote on "Teaching Problem Solving in a Post-Graduate Clinical Pharmacy Clerkship." The district court concluded that the article was the university’s property because the university funded the clinical program that was the focus of the article. The court reasoned that because Weinstein was a clinical professor, he was required to conduct clinical programs and write about them as
part of his appointment, and thus the article was a work-for-hire. The federal appellate court reversed the decision, finding that faculty scholarly work was not work-for-hire. The court noted that “[w]hen the Dean told [the professor] to publish or perish, he was not simultaneously claiming for the University a copyright on the ground that the work had become a ‘requirement or duty.’ . . . When Saul Bellow, a professor at the University of Chicago, writes a novel, he may keep the royalties.” Id. Similarly, in *Hays v. Sony Corp*, 847 F2d 412 (7th Cir. 1988), the court noted that “[a] college or university does not supervise its faculty in the preparation of academic books or articles, and is poorly equipped to exploit their writings, whether through publication or otherwise,” and concluded that “the universal assumption and practice was that, in absence of an explicit agreement as to who had the right to copyright[,] such writing belonged to the teacher rather than to the college or university.”

Protection of the intellectual property in classrooms is also a joint concern of faculty and administrations. In *Williams v. Weisser*, 78 Cal. Rptr. 542 (Cal. App. 1969), for example, a publishing organization (known as “Class Notes”) was getting notes from particular classes and selling them for a profit. The publishing organization tried to block the professor’s copyright suit by claiming that the university rather than the professor owned the copyright to the lectures. The court concluded that it was “convinced that … the teacher, rather than the university, owns the common law copyright to his lectures.” The court noted that “[n]o custom known to us suggests that the university can prescribe [the professor’s] way of expressing the ideas he puts before his students,” and university ownership of faculty lectures would create such “undesirable consequences . . . as to compel a holding that it does not.” A Colorado court, however, reached a different conclusion in *Vanderhurst v. Colorado Mountain College District*, 16 F. Supp. 2d 1297 (D.Colo. 1998). As part of a lawsuit regarding his dismissal, a non-tenured long-time professor claimed that CMC infringed his copyright to a “Veterinary Technology Outline” that was created “in the course of teaching at CMC.” The court, noting that CMC’s policies state that a faculty member’s duties include “program and curriculum development [and] course preparations,” concluded that the outline belonged to CMC as a work-for-hire. It reached this conclusion despite recognizing that “it is undisputed that Vanderhurst prepared the Outline on his own time with his own materials. However, there is no genuine dispute that Vanderhurst’s creation of the Outline was connected directly with the work for which he was employed to do”.

In this area of law, educators have a shared interest in having clear policies in place and an agreed-upon understanding of ownership and control of different works before they are created. In 1998 and 1999, AAUP worked with a coalition of intellectual property experts to create copyright and distance education policies dealing with these issues. *Statement on Copyright*, Redbook at 214; *Statement on

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1 As one commentator has noted, “insofar as custom plays a role in determining the intent of the parties to an employment contract, it defines, at least in part, what professors are hired to do. Thus, the longstanding assumption that professors own the copyrights to their works is evidence that the parties do not consider the creation of copyrightable works of authorship to be within the scope of employment.” Laura Lape, “Ownership of Copyrightable Works of University Professors: The Interplay Between the Copyright Act and University Copyright Policies,” 37 VILL. L. Rev. 223 (1992).
Distance Education, Redbook at 211. These policies are designed not only to comply with the law on copyright, but also to suggest language and guidelines for institutional policies on some of the gray areas that often arise. Clear and realistic institutional policies, drafted in ways that work practically with the goals of the institution and activities of scholars, will go a long way toward protecting the mission and function of the institution, whether from an outside challenge trying to impose responsibility on administrations for works of faculty, or from faculty or administrations vying over ownership of the next big computer program. Further, when the rules do not work for a particular situation, contracts specifically setting out what the ownership rights will be very helpful in avoiding future lawsuits. Work up front at setting ownership and expectations, especially on lucrative projects, joint works, grants, special university driven projects, etc., before the project is completed, pays high dividends.

Confidentiality of research findings. Another intellectual property issue in which faculty and academic administrators have common interests is the protection of unpublished or unanalyzed data from compelled production by third parties. Researchers are occasionally asked to provide their findings for a lawsuit or a government investigation. In some instances the data have not been fully analyzed and the researcher is not willing to make them public at the time they are requested. In other cases, the researcher has promised confidentiality to research subjects, and disclosure of the data would violate that confidentiality. In such situations, researchers have sought to protect their data from disclosure by citing a “researcher’s privilege,” based either on the law of evidence or the First Amendment.

Although judges tend to view any information relevant to a lawsuit as appropriate for discovery (and thus not protected), scholars have addressed the potentially “devastating” effects of premature disclosure of research results.

1. The researcher loses control over how and to whom the data are reported;
2. The process of responding to a subpoena and compiling the data requested “may severely hamper the research process” by either delaying or terminating the project;
3. Compelled discovery may lead to the use or publication of unverified information;
4. If the researcher has promised confidentiality to the research subjects, this confidentiality may be compromised. (Robert M. O’Neil, “A Researcher’s Privilege: Does Any Hope Remain?” 59 Law and Contemporary Problems 35, 36 (1996)).

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In early cases, courts were willing to deny enforcement of subpoenas seeking unpublished data, using a test that balanced the parties’ need for the data against the interest of the research in maintaining the confidentiality of research results. For example, in Dow Chemical Co. v. Allen, 672 F.2d 1262 (7th Cir. 1982), the court refused to enforce a subpoena issued by an administrative law judge presiding over a hearing convened by the Environmental Protection Agency to consider canceling the registration of herbicides manufactured by Dow. The court acknowledged that premature release of the data would “make the studies an unacceptable basis for scientific papers or other research” and as such would seriously affect the researchers’ careers. In some products liability cases, in which manufacturers who were sued sought to obtain the results of research conducted on their products, courts noted that premature release of the data collected would hamper federal agencies’ abilities to protect public health in the future by making individuals reluctant to participate in “confidential” studies (Farnsworth v. The Proctor & Gamble Co., 758 F.2d 1545 (11th Cir. 1985)). But if the data have already been published, courts are less sympathetic to researchers’ claims that disclosure is inappropriate (Mt. Sinai School of Medicine v. American Tobacco Co., 880 F.2d 1520 (2d Cir. 1989)). And information sought for a criminal proceeding is unlikely to be protected by a researcher’s privilege (In re: Grand Jury Subpoena, 750 F.2d 223 (2d Cir. 1984)).

More recent cases have shown that most trial judges reject the notion of a “researcher’s privilege” in products liability cases unless the request was unduly burdensome. But researchers have had somewhat more success by claiming First Amendment protection for their unpublished data. For example, in In re: Cusumano and Yoffie [U.S. v. Microsoft], 162 F.3d 708 (1st Cir. 1998), Microsoft, which was facing antitrust charges by the U.S. Department of Justice, demanded the confidential interview notes from two professors who had interviewed executives of Netscape, a Microsoft competitor whose allegations of unfair competitive practices had led to the antitrust litigation. Microsoft insisted that it needed the professors’ notes. The professors had promised all research subjects confidentiality, and refused to turn over tapes or transcripts of the interviews. The court used a balancing test to compare Microsoft’s need for the interview notes with the researchers’ interests in keeping their promise of confidentiality. The appellate court ruled that requiring the faculty members to turn over this information would “hamstring not only [their] future research efforts but also those of other similarly situated scholars” (162 F.3d at 717). The court noted that Microsoft had a pre-publication copy of the manuscript, which identified quoted individuals by name, and that Microsoft could depose any Netscape employee to ascertain what that employee had told the researchers.

The flip side of this issue is the occasional requirement by a funding source that the research results be kept secret. One court has ruled that the First Amendment does not allow the government to prevent publication of a federally-funded research project (Board of Trustees of Leland Stanford Junior University v. Sullivan, 773 F. Supp. 472 (D.D.C. 1991)), although the provisions of the USA Patriot Act do limit the publication of certain categories of research, and the federal government could prevent the publication of classified military research. But private funding sources could prevent the publication of research findings by contract, and could refuse to fund the research at all
unless the faculty member promised to keep the results confidential, or at least to obtain the funder’s permission before publication.

Protection of faculty members’ intellectual property rights is an important aspect of academic freedom as well as intellectual property law. Both faculty and academic administrators benefit by keeping the academy open to research that is independent of influence by external entities and protecting the researcher’s ability to evaluate research findings through peer review rather than through political or economic pressures.

Additional Benefits

In addition to the many internal benefits that sound policies and the exercise of responsible self-determination can produce, institutions can benefit in a number of other ways from a forward-looking approach to the interaction between the faculty and the institution. Accrediting agencies, for example, look to the level of faculty involvement in curriculum, standards and governance, the standards in place at the institution, the success in following those standards and the level of academic freedom. The Northwest Commission on Colleges and Universities, Accreditation Standards and Eligibility Requirements requires, for example, that “the institution maintains an atmosphere in which intellectual freedom and independence exist,” that “[t]he institution fosters and protects academic freedom for faculty,” that “[t]he governing board, administrators, faculty, staff and students understand and fulfill their respective roles as set forth by the governance system’s official documents,” and that “[t]he role of faculty in institutional governance, planning, budgeting and policy development is made clear and public; faculty are supported in that role.” (available online at www.nwccu.org). See also The Middle States Commission on Higher Education Eligibility Requirements and Standards for Accreditation (setting forth similar standards). Institutions with significant problems in this area risk not meeting accreditation; more broadly, such problems lead to a diminished institutional capacity and reputation.

Institutional health and alumni giving also depend on the ability of the different constituencies to work together. Student engagement and student-professor interaction are strongly linked to retention and graduation. See, e.g., “Exploring the Role of Contingent Instructional Staff in Undergraduate Learning,” New Directions in Higher Education 85-86 (Fall 2003); Ehrenberg, Ronald G. and Liang Zhang. "Do Tenured and Tenure-Track Faculty Matter?" Journal of Human Resources 40 (Summer 2005): pp. 647-59. And, of course, students who are most engaged, and most connected with the institution, are those who give the most. Day to day, those interactions are dependent on good experiences and involvement of students and faculty, and of a sense of good procedures and policies in place to fairly govern the conflicts with in the different constituencies. The survival of these processes is essential to the public perception, and internal growth, of the institution.
Suggestions for Constructive Interaction

At certain times the interests of individual faculty conflict with what appear to be the institution’s interests in management and efficiency. But when it comes to the issues addressed in this paper—academic freedom, freedom from inappropriate interference by legislators, policy makers, and courts, deference to academic judgments, and the protection of intellectual property—the institution’s interests are virtually coterminous with the faculty’s. Constructive dialogue on these issues through appropriate faculty governance mechanisms that allow a significant role for consideration of both the faculty and institution’s concerns is critical to the protection of these interests and the reinforcement of their importance within the institution. Such shared governance and dialogue is also critical to the public perception and support for higher education. In many ways, the moral authority that higher education has comes from this collaboration. Without it, institutions risk becoming the proverbial house divided against itself, and cannot stand.