MONDAY, FEBRUARY 14, 1994
8:30 - 10:00 a.m.

CONCURRENT SESSION THREE

Academic Freedom in the Classroom: An Interview

Faculty:
William Kaplin
Gary Pavela
Daniel Schofield
ACADEMIC FREEDOM
IN THE CLASSROOM:
AN INTERVIEW

PRESENTERS:

WILLIAM A. KAPLIN
PROFESSOR OF LAW
THE CATHOLIC UNIVERSITY OF AMERICA
COLUMBUS SCHOOL OF LAW
WASHINGTON, D.C.

CO-AUTHOR:

GARY PAVELA
DIRECTOR OF JUDICIAL PROGRAMS
UNIVERSITY OF MARYLAND
COLLEGE PARK, MARYLAND

Presented by Stetson University
College of Law at the:

15th ANNUAL NATIONAL CONFERENCE ON
LAW & HIGHER EDUCATION
Clearwater Beach, Florida
February 13-16, 1994
ACADEMIC FREEDOM IN THE CLASSROOM: AN INTERVIEW

William A. Kaplin
Gary Pavela

1994 National Conference on Law and Higher Education

The Interview Format

This presentation will be in an interview format, comparable to previous interviews with Professor Kaplin, conducted by Gary Pavela for Synthesis: Law and Policy in Higher Education. An edited version of the interview is currently scheduled for publication in the Spring 1994 issue of Synthesis.

Synthesis interviews are not rehearsed. They are designed to be informal, conversational, and wide-ranging. In addition to legal analysis, special attention is paid to pertinent policy issues.

Audience participation in this presentation is encouraged. Gary Pavela will stop at various points in the interview to solicit relevant questions and comments from the audience. Please direct your questions or comments to the topic being addressed at the time.

Both Professor Kaplin and Gary Pavela will have summary remarks. Additional audience participation will be invited thereafter, as time permits. The presenters will also be available immediately after the presentation for individual questions.
INTRODUCTION

This session focuses on the academic freedom of faculty members in their teaching activities. The issues concern classroom decorum, teaching methods, teaching materials, grading, and out of class activities that adversely impact upon the capacity to instruct.

In recent years, the phenomena of hate speech, political correctness, and sexual harassment have transformed these classical issues into sensitive, and occasionally explosive, matters for administrators, faculty, and students as well as institutional counsel.

To provide background and perspective on this topic, the following materials are attached:


2. Selected recent cases on academic freedom in the classroom (listing and discussion of 7 important recent cases), pp. 5-11.


4. A Spring 1993 Synthesis: Law and Policy in Higher Education editorial "Academic Integrity and the Will-to-Power" (the influence of French philosopher Michel Foucault on American academics), pp. 31-34.
III. Background: Conceptual Distinctions Undergirding Academic Freedom

A. There are three types of academic freedom, each protecting a different class of persons or entities:

1. faculty academic freedom (see, e.g., Walter P. Metzger, "Profession and Constitution: Two Definitions of Academic Freedom in America," 66 Texas L. Rev. 1265 (1988);

2. student academic freedom (see, e.g., "Developments in the Law -- Academic Freedom," 81 Harv. L. Rev. 1045, 1128-1157 (1968); and

B. There are four functional settings in which academic freedom issues may arise:
1. in classroom activities;
2. in research and publication;
3. in institutional (intramural) affairs; and
4. in private personal life.


C. There are three basic sources of protection for faculty academic freedom:
1. faculty contracts, faculty handbooks, and institutional regulations;
2. AAUP statements and guidelines; and
3. federal and state constitutional provisions, especially the freedoms of expression and association under the federal first amendment.

See, e.g., Kaplin, supra, sec. 3.6.1.
SELECTED RECENT CASES ON ACADEMIC FREEDOM IN THE CLASSROOM

COPYRIGHT © 1994 BY WILLIAM A. KAPLIN AND BARBARA A. LEE. EXTRACTED AND ADAPTED FROM THE DRAFT MANUSCRIPT FOR THE THIRD EDITION OF KAPLIN AND LEE, THE LAW OF HIGHER EDUCATION, TO BE PUBLISHED IN 1995 BY JOSSEY-BASS, INC., PUBLISHERS. PERMISSION GRANTED FOR PERSONAL USE BY ATTENDEES AT THE 15TH ANNUAL STETSON CONFERENCE AND FOR ROUTINE SINGLE-COPY DISTRIBUTION BY THE STETSON CONTINUING LEGAL EDUCATION OFFICE. NO OTHER USE, COPYING, OR DISTRIBUTION IS PERMITTED.

1. Lovelace v. Southeastern Massachusetts University
   793 F.2d 198 (1st Cir. 1986)

In Lovelace v. Southeastern Massachusetts University, 793 F.2d 419 (1st Cir. 1986), the court rejected the free speech claim of a faculty member whose contract was not renewed after he had rejected administration requests to lower the academic standards he applied to his students. The court concluded that universities must themselves have the freedom to set their own standards on "matters such as course content, homework load, and grading policy" and that "the first amendment does not require that each nontenured professor be made a sovereign unto himself."

2. Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986)

This case involved the dismissal of an economics instructor at Midland College in Texas. The court upheld the dismissal, ruling that the instructor’s use of vulgar and profane language in a college classroom did not fall within the scope of First Amendment protection. The court held that the instructor’s language did not constitute speech on "matters of public concern." The court also accepted an alternative argument for upholding the dismissal; applying elementary/secondary education precedents (see Bethel School District v. Fraser, 478 U.S. 675 (1986)), the court held that the instructor’s use of the language was unprotected because "it was a deliberate, superfluous attack on a 'captive audience' with no academic purpose or justification." A concurring judge disagreed with this alternative analysis, arguing that the precedents the court used should not apply to higher education.
3. **Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991)**

In *Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991)*, an exercise physiology professor, as the court explained, "occasionally referred to his religious beliefs during instructional time. . . . Some of his references concerned his understanding of the creative force behind human physiology. Other statements involved brief explanations of a philosophical approach to problems and advice to students on coping with academic stresses." He also organized an optional after-class meeting to discuss "Evidences of God in Human Physiology." But "[h]e never engaged in prayer, read passages from the Bible, handed out religious tracts, or arranged for guest speakers to lecture on a religious topic during instructional time." Some students nevertheless complained about the in-class comments and the optional meeting. The university responded by sending the professor a memo requiring that he discontinue "(1) the interjection of religious beliefs and/or preferences during instructional time periods and (2) the optional classes where a 'Christian Perspective' on an academic topic is delivered." The professor challenged the university's action as violating his free speech rights, as well as his free exercise rights under the First Amendment. The district court, emphasizing that "the university has created a forum for students and their professors to engage in a free interchange of ideas," granted summary judgment for the professor (732 F.Supp. 1562 (N.D. Ala. 1990)). The U.S. Court of Appeals disagreed and upheld the university's actions.

With respect to the professor's free speech claims, the appellate court applied recent elementary/secondary education precedents displaying considerable deference to educators (see *Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988)*) and asserted that administrators "do not offend the First Amendment by exercising editorial control over style and content of student [or professor] speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." Addressing the academic freedom implications of its position, the court concluded that "we cannot supplant our discretion for that of the University. Federal judges should not be ersatz deans or educators. In this regard, we trust that the University will serve its own interests as well as those of its professors in pursuit of academic freedom."

In upholding the university's authority in matters of course content as superior to that of the professor, the court accepted the validity and applicability of two particular institutional concerns underlying the university's decision to limit the professor's instructional activities. First was the university's "concern . . . that its courses be taught without personal religious bias unnecessarily infecting the teacher or the students." Second was the concern that optional classes not be conducted under circumstances that give "the impression of official sanction, which might [unduly pressure] students into attending
and, at least for purposes of examination, into adopting the beliefs expressed" by the professor. Relying on these two concerns, against the backdrop of its general deference to the institution in curricular matters, the court determined that "the University’s conclusions about course content must be allowed to hold sway over an individual professor’s judgments. . . . [T]he University as an employer and educator can direct Dr. Bishop to refrain from expression of religious viewpoints in the classroom and like settings.

The court also rejected the professor’s free exercise of religion claim using only a single paragraph to assert that the professor "has made no true suggestion, much less demonstration, that any proscribed conduct of his impedes the practice of religion. . . . [T]he university’s restrictions of him are not directed at his efforts to practice religion, per se, but rather are directed at his practice of teaching."

4. Wirsing v. Board of Regents of the University of Colorado
739 F.Supp. 551 (D.Colo. 1990), aff’d w/o opin., 945 F.2d 412 (10th Cir. 1991)

In Wirsing v. Board of Regents of the University of Colorado, 739 F.Supp. 551 (D.Colo. 1990), affirmed, 945 F.2d 412 (10th Cir. 1991), a tenured professor of education taught her students "that teaching and learning cannot be evaluated by any standardized test." Consistent with these beliefs, the professor refused to administer the university’s standardized course evaluation forms for her classes. The professor’s teaching performance, as evaluated by a faculty committee, received the highest possible score and her department chair recommended that she be given a merit pay increase. The Dean denied the pay increase because of her refusal to administer the standardized forms.

The professor requested that the court enjoin the Regents from requiring her to use the standardized form in her classes and ordering them to award her the pay increases. To support her position, the professor argued that the forms were "contrary to her theory of education. Hence, by being forced to give her students the standardized form, the university is interfering arbitrarily with her classroom method, compelling her speech, and violating her right to academic freedom." In rejecting her argument, the court noted that "Dr. Wirsing was not denied her merit salary increase because of her teaching methods, presentation of opinions contrary to those of the university, or otherwise presenting controversial ideas to her students. Rather, she was denied her merit increase for her refusal to comply with the University’s teacher evaluation requirements [which were] imposed upon her as a condition of employment."

In this case the defendant, dean of the school in which the plaintiff was a nontenured professor, ordered the plaintiff, over his objections, to execute a grade change form raising the final grade of one of his students. The plaintiff argued that this incident, and several later incidents alleged to be in retaliation for his lack of cooperation regarding the grade change, violated his First Amendment academic freedom. Relying on the free speech clause, the court agreed that "[b]ecause the assignment of a letter grade is symbolic communication intended to send a specific message to the student, the individual professor's communicative act is entitled to some measure of First Amendment protection." The court reasoned that:

[T]he professor's evaluation of her students and assignment of their grades is central to the professor's teaching method . . . . Although the individual professor does not escape the reasonable review of university officials in the assignment of grades, she should remain free to decide, according to her own professional judgment, what grades to assign and what grades not to assign. . . . Thus, the individual professor may not be compelled, by university officials, to change a grade that the professor previously assigned to her student. Because the individual professor's assignment of a letter grade is protected speech, the university officials' action to compel the professor to alter that grade would severely burden a protected activity [868 F.2d at 828].

Thus the defendant's act of ordering the plaintiff to change the grade, contrary to the plaintiff's professional judgment, violated the First Amendment. The court indicated, however, that had university administrators changed the student's grade themselves, this action would not have violated the plaintiff's First Amendment rights.

6. *DiBona v. Matthews*


In *DiBona v. Matthews*, 220 Cal. App. 3d 1329, 269 Cal. Rptr. 882 (Cal. App. 1990), the California Court of Appeals held that San Diego Community College District administrators violated a teacher's free speech rights when they canceled a play production and a drama class in which the controversial play was to have been performed. The teacher had selected a play entitled "Split Second" for performance by students enrolled in the drama class. The play was about a black police officer who, in the course of an arrest,
shot a white suspect who had subjected him to racial slurs and epithets. The play's theme closely paralleled the facts of a criminal case that was then being tried in San Diego. The court determined that the college administrators had canceled the class because of the content of the play. While the First Amendment free speech clause did not completely prevent the college from considering the play's content in deciding to cancel the drama class, the court held that the college's particular reasons -- because the religious community opposed the play and because it involved a controversial and sensitive subject -- were not valid reasons under the First Amendment. Moreover, distinguishing the present case from those involving minors in elementary and secondary schools, the court held that the college could not cancel the drama class solely because of the vulgar language included in the play.

7. Levin v. Harleston
770 F. Supp. 895, aff'd, 966 F.2d 85 (2d Cir. 1992)

In Levin v. Harleston, 770 F. Supp. 895, aff'd, 966 F.2d 85 (2d Cir. 1992), a philosophy professor at City College of the City University of New York had advocated in certain writings and publications that blacks were less intelligent on average than whites. In addition, he had opposed all use of affirmative action quotas. As a result of these writings, he became controversial on campus. Student groups staged demonstrations; documents affixed to his door were burned; and students distributed pamphlets outside his classroom. On several occasions, groups of students created sufficient noise outside his classrooms that he could not continue the class. The college's written regulations prohibited student demonstrations that have the effect of disrupting or obstructing teaching and research activities. Despite this regulation and the professor's repeated reports regarding the disruptions, the university took no action against the student demonstrators. The College did, however, take two affirmative steps to deal with the controversy regarding the professor. First, the college dean (one defendant) created "shadow sections" (alternative sections) for the professor's required introductory philosophy course. Second, the college president (another defendant) appointed an ad hoc faculty committee "to review the question of when speech both in and outside the classroom may go beyond the protection of academic freedom or become conduct unbecoming a member of the faculty."

To implement the shadow sections, the college dean sent letters to the professor's students, informing them of the option to enroll in these sections. The dean stated in the letter, however, that he was "aware of no evidence suggesting that Professor Levin's views on controversial matters have compromised his performance as an able teacher of Philosophy who is fair in his treatment of students." After implementation of the shadow sections, enrollment in the professor's classes decreased by one-half. The college had never before used such sections to allow
students to avoid a particular professor because of his views.

To implement the ad hoc committee, the president charged the members "to specifically review information concerning Professor Michael Levin . . . and to include in its report its recommendations concerning what the response of the College should be." The language of the charge tracked certain language in college by-laws and professional contracts concerning the discipline of faculty members and the revocation of tenure. Three of the seven committee members had previously signed a faculty petition condemning the professor. Moreover, although the committee met more than ten times, it never extended the professor an opportunity to address it. The committee's report, as summarized by the district court, stated "that Professor Levin's writings constitute unprofessional and inappropriate conduct that harms the educational process at the college, and that the college has properly intervened to protect his students from his views by creating the shadow sections."

The professor sought declaratory and injunctive relief, claiming that the defendants' failure to enforce the student demonstration regulations, the creation of the shadow sections, and the operation of the ad hoc committee violated his rights under the federal Constitution's free speech and due process clauses. After trial, the district court issued a lengthy opinion agreeing with the professor. The court noted the chilling and stigmatizing effect of the ad hoc committee's activities, as demonstrated by the fact that the professor declined over twenty invitations to speak or write regarding his controversial views. The court thus determined that the professor had an objective and reasonable basis to fear losing his position, and that he was thus "forced to 'stay as far away as possible from utterances or acts which might jeopardize his living.'" The court further determined that this infringement on the professor's speech was illegitimate because his writings and statements addressed matters that were "quintessentially 'issues of public importance'", and there was thus "no question" that his speech was "protected expression." The only justification advanced by the defendants for the ad hoc committee and shadow sections was the need to protect the professor's students from harm that could accrue "if they thought, because of the expression of his views, that he might expect less of them or grade them unfairly." The court, however, rejected this justification because City College had presented no evidence at trial to support it. Consequently, the trial court granted injunctive relief compelling the defendants to investigate the alleged violations of the college's student demonstration regulations and prohibiting the defendants from any further use of the shadow sections or the ad hoc committee.

On appeal, the U.S. Court of Appeals for the Second Circuit disagreed with the district court's conclusion regarding the failure to enforce the student demonstration regulations, but generally agreed with the court regarding the shadow sections and ad hoc committee. Regarding the defendants' failure to enforce the
student demonstration regulations, the appellate court emphasized that the college generally had not enforced these regulations and there was no evidence that "the college treated student demonstrations directed at Professor Levin any differently than other student demonstrations." The defendants' inaction could thus not be considered a violation of the professor's constitutional rights.

Regarding the shadow sections, the appellate court stated that the "formation of the alternative sections would not be unlawful if done to further a legitimate educational purpose that outweighed the infringement on Professor Levin's First Amendment rights." But the defendants had presented no evidence to support their contention that the professor's expression of ideas outside the classroom harmed the educational process within the classroom. In fact, "none of Professor Levin's students had ever complained of unfair treatment on the basis of race." The court concluded that the defendants' "encouragement of the continued erosion in the size of Professor Levin's class if he does not mend his extracurricular ways is the antithesis of freedom of expression."

Regarding the ad hoc committee, the appellate court agreed that the operation of this committee had a "chilling effect" on the professor's speech and thus violated his First Amendment rights. Affirming that "governmental action which falls short of direct prohibition on speech may violate the First Amendment by chilling the free exercise of speech," the court determined that, when the president "deliberately formed the committee's inquiry into Levin's conduct to mirror the contractual standard for disciplinary action, he conveyed the threat that Levin would be dismissed if he continued voicing his racial theories."
DEFINING THE LIMITS OF ACADEMIC FREEDOM

93.135 ACADEMIC FREEDOM

Leonard Jeffries v. Bernard Harleston, et. al.

Editor's note: On August 4, 1993 Judge Kenneth Conboy of the United States District Court for the Southern District of New York upheld a jury verdict that the City College of New York (a unit of the City University of New York) violated the First Amendment rights of Professor Leonard Jeffries by removing Dr. Jeffries as Chair of the CCNY Black Studies Department.

Our law and policy discussion of this case appears in Synfax Weekly Report 93.133, p. 121. What follows is an extended excerpt from Judge Conboy's 70 page decision (92 Civ. 4180 KC).

[Facts of the case]

The relevant history of the case begins on June 5, 1991, with the unanimous reelection of Professor Jeffries as Chairman of the Black Studies Department by the faculty of the Department... On July 1, 1991, President Harleston sent a letter of congratulations to Professor Jeffries accepting plaintiff's election...

Three weeks later, on July 20, 1991, Professor Jeffries made a speech at the Empire State Black Arts and Cultural Festival [blaming the Jews for the slave trade; claiming that the Jews controlled Hollywood; and referring to the "head Jew" at CCNY...]

On September 12, 1991, President Harleston wrote to Provost Pfeffer requesting that Pfeffer "undertake a review of Dr. Leonard Jeffries' leadership of the Black Studies Department to determine whether Dr. Jeffries can continue to act effectively as departmental administrator..."

[An incomplete performance assessment]

In response to an unwritten request from Provost Pfeffer... Jeffrey Rosen, Dean of the Division of Social Sciences, wrote a memorandum on September 19, 1991, only one week after President Harleston's directive to Provost Pfeffer, which preliminarily evaluated the "recent performance" of Professor Jeffries as Chairman of the Black Studies Department... Dean Rosen's report, described as an "initial assessment," found that Professor Jeffries was fulfilling his duties adequately as Chairman of the Black Studies Department. This document of two pages makes it clear that the Dean's investigation consisted solely of his personal "observations" of Professor Jeffries' "discharge of ordinary administrative responsibilities" as Chair of the Black Studies Department...

On October 4, 1991, Provost Pfeffer came out with his review of Professor Jeffries' performance... "In the review, Provost Pfeffer found that Professor Jeffries' performance had not suffered as a result of the speech or the publicity surrounding it:... Professor Jeffries appears to be functioning this semester as least as efficiently as over the last 10 years, and probably more so."

The incomplete nature of Provost Pfeffer's "review" and Dean Rosen's "Investigation" is plainly apparent... Bearing in mind that President Harleston's charge had imprecisely attempted to define his task as determining whether Professor Jeffries' leadership as a college chairman had been compromised as a result of his speech, and whether the College had been injured by the impact of the speech, the Provost should have broadened his focus and done a more systematic analysis of Professor Jeffries' performance...

"[T]he Provost should have broadened his focus and done a more systematic analysis of Professor Jeffries' performance...

[What the assessment should have addressed]

For example, Provost Pfeffer could have addressed three critical areas that he instead chose to ignore in his review: whether Professor Jeffries could effectively interact as Chairman with faculty members, and specifically, Jewish faculty members, whether the racist and bigoted nature of Professor Jeffries' remarks would stigmatize and isolate the Black Studies Department, and make it a parochial backwater of the College, and whether the College's alumni would withdraw their financial support in light of the professional embarrassment Professor Jeffries represented as a formal leader of the College administration.
Such a vital inquiry was never made, either through ignorance or cowardice. This fundamental flaw in the University's response to the Jeffries' controversy doomed its position in federal court, when the inevitable lawsuit was filed . . .

[Dr. Jeffries' term as department chair limited]

Despite the positive review of the Provost, the Board of Trustees, upon the recommendation of President Harleston, voted on October 28, 1991, to limit Professor Jeffries' appointment as Chair to one year rather than the customary three-year term . . . There is no documentary evidence as to what motivated this decision of the Board . . . Amazingly, President Harleston expressed concerns in this letter about the impact of Professor Jeffries' conduct upon "faculty and staff recruitment, alumni fund-raising and [the college's] relationship with the business, Government and academic communities," without having required any formal investigation into such matters.

[Four new incidents involving Dr. Jeffries]

During this period, the months of October and November, Professor Jeffries was involved in four incidents that raised concern within the administration of the University. The first incident occurred on October 18, 1991, when Elliot Morgan, a student reporter from the Harvard Crimson, visited the plaintiff on the City College campus to conduct an interview . . . During the course of the interview, which was conducted with a tape recorder in plain view, plaintiff made disparaging remarks about other scholars in the field of African-American Studies as well as homosexuals . . . During the course of the interview, Professor Jeffries threatened to "kill" Morgan if the content of the interview ever became public . . .

The second incident occurred at the end of October, when Professor Jeffries learned from a student that "Professor Silver said that they were going to start an investigation of the Black Studies Department . . ." In response, Professor Jeffries wrote to Dean Rosen, declaring "war" on the faculty . . .

The third incident occurred on November 12, 1991, during a meeting with Professor Jeffries, Provost Pfeffer and Dean Rosen. At the meeting, Provost Pfeffer and Dean Rosen urged plaintiff to voluntarily step down as Chairman of the Black Studies Department . . . In response, Professor Jeffries became angry and threatened to turn City College into "Crown Heights" [a scene of prior racial disturbances in New York] . . .

The final incident occurred on November 15, 1991, when Professor Jeffries confronted President Harleston in the lobby of the administration building, as Harleston was trying to leave for an appointment . . . Angry over negative comments President Harleston had made on television the previous day about Professor Jeffries, the plaintiff confronted President Harleston and upbraided him in an angry and hostile manner.

[Dr. Jeffries replaced as Department Chair]

During the period of these incidents, the CUNY administration was continuing to review the performance of Professor Jeffries as Chair of the Black Studies Department. From the time of the Pfeffer report, on October 4, 1991 until the Spring of 1992, Provost Pfeffer and Dean Rosen, at the direction of President Harleston, periodically reviewed the performance of Professor Jeffries as Chair . . . These reviews were not written down, but were passed on orally to President Harleston during meetings . . . The reviews apparently became increasingly negative . . . and in December of 1991, President Harleston, Provost Pfeffer, and Dean Rosen came to an agreement that Professor Jeffries should be replaced as Chairman. Astonishingly, there is no written record or document of any kind that memorializes this important decision on the part of the CUNY administration, or the reasons for it.

On March 23, 1992, the Board of Trustees voted to

"Astonishingly, there is no written record or document . . . that memorializes this important decision on the part of the CUNY administration . . ."

appoint Professor Gordon as the new Chair upon the expiration of plaintiff's one-year term, effective July 1, 1992 . . . As with its October vote, there is no formal record or document of any kind that explains the reasons for the Board's actions . . .

[Jury verdict for Dr. Jeffries upheld]

We believe that the jury could reasonably have inferred from the evidence presented in this case that the July 20, 1991 speech of Professor Jeffries was a substantial or motivating factor in the decision of the defendants to deny him his full three-year term as Chairman of the Black Studies Department . . .

We are persuaded, most significantly, perhaps, by the fact that the defendants have failed to offer an alternative and credible explanation for the about-face in President Harleston's attitude toward the plaintiff that followed immediately upon the heels of the Albany speech of July 20, 1991, and for the dramatic sense of urgency throughout the administration regarding the plaintiff's status that developed immediately following the speech . . .
Defendants...argue that the evidence contradicts the jury’s finding that Leonard Jeffries’ July 20, 1991 speech did not hamper the effective and efficient operation of the Black Studies Department, the College, or the University...In support of this position, defendants cite to three “disruptive” incidents (the October 18, 1991 Elliot Morgan incident, the November 12, 1991 confrontation with Dean Rosen and Provost Pfeffer, and the November 15, 1991 confrontation with President Harleston), which, according to defendants, would not have occurred had it not been for the July 20, 1991 speech...

The defendants’ position is undermined by their own presentation at trial of broad evidence of impromptu and extremely questionable behavior on the part of Professor Jeffries well before the speech...This evidence suggests, and certainly the jury could have found, that the three incidents cited by defendants were not related to the July 20, 1991 speech, but, on the contrary, were characteristic of Professor Jeffries’ conduct throughout his tenure at the College...

Nor did the Attorney General put on the stand a single CUNY student to testify about possible negative effects of the speech on the functioning of classes or the teacher-student relationship...Nor did the Attorney General put a member of the faculty on the stand who indicated that he would have difficulty working with Professor Jeffries as a result of the July 20, 1991 speech.

[Were the defendants entitled to qualified immunity?]

Defendants contend that the jury's punitive damages award should be set aside because the defendants are entitled to qualified immunity. We disagree...

As we noted above, the legal issue this case is whether a University may deny a professor a department chairmanship because of the professor's out-of-class speech, when the professor's speech substantially involved matters of public concern and where the speech caused no actual interference with the functioning of the University. Although neither the Second Circuit nor the Supreme Court has ruled on this specific question, we believe...that at the time the defendants unconstitutionally denied Professor Jeffries a full three-year term as Chairman of the Black Studies Department, reasonable persons in defendants' positions would have understood that this denial was unlawful...

Moreover, we believe that defendants' claims of qualified immunity are especially specious in light of this Court's September 4, 1991 decision in Levin v. Harleston, 770 F. Supp. 895 (S.D.N.Y. 1991), and the fact that the defendants on notice that retaliation against a faculty member for out-of-class speech that does not interfere with the functioning of the University is unconstitutional...

[Dr. Jeffries to be reinstated]

The Court is not unmindful of the egregiously offensive and destructive nature of Professor Jeffries' statements, and the widespread dismay and alarm that they have evoked. But we as a society cannot enjoy the freedoms of the First Amendment without paying the costs and enduring the burdens of such liberty. Chief among these costs is the fact that a category of viewpoints that a large majority of this nation consider morally reprehensible and racist are also protected by the First Amendment...

Accordingly, the defendants are required to reinstate the plaintiff as Chairman of the Black Studies Department, for a period of two years effective immediately.

In awarding plaintiff permanent injunctive relief, the Court does not constrain the defendants from removing Professor Jeffries for good cause. The Black Studies Department is not, after all, the personal property or the political fiefdom of plaintiff...

"...[W]e as a society cannot enjoy the freedoms of the First Amendment without paying the costs and enduring the burdens of such liberty."

and plaintiff's reinstatement is not a permanent license for the plaintiff to hold the position of Chairman of the Black Studies Department, indeed, it must be emphasized, to hold the position of a tenured professor at CUNY. The defendants retain the full and unqualified right and the responsibility to discipline the plaintiff in response to improprieties or behavior deemed worthy of a Department Chair or a tenured professor, as long as in doing so the Defendants do not violate the...Constitution...

Indeed, there appears to have been some indication, regrettably not developed at the trial, of rather serious improprieties on the part of Professor Jeffries upon which the CUNY administrators could have constitutionally acted...[H]owever, the University inexplicably and perhaps cowardly, chose to ignore these improprieties, and only acted against the plaintiff when the public outrage over the July 20, 1991 speech in effect forced its hand...

We observe, regrettably but necessarily, that the students of CUNY and the people of New York State are entitled to a higher standard of decision-making on the part of its public officials.
We again emphasize that this Order does not preclude the defendants from disciplining Professor Jeffries in response to behavior in class that is deemed incompatible with his duties and with the mission and values of the University. Of course, the United States Constitution broadly protects academic freedom [citing *Keyishian v. Board of Regents*, 385 U.S. 589 (1967)] ... 

However, the Constitution does not prevent a University from taking disciplinary action against a professor who engages in a systematic pattern of racist, anti-Semitic, sexist, and homophobic remarks during class ... [citations omitted].

Nor does the Constitution protect the right of a professor to teach patently absurd and wholly fallacious theories in class. There is some limited evidence in the record that Professor Jeffries has engaged in both of these activities ... See Defendants' Exhibit F, Letter from Margaret Murphy to Dean Rosen, dated April 1, 1991 ( ... student dropped course in response to inadequate performance of professors, including Professor Jeffries, who among other things, "spouted the most racist line of nonsense," and "sprinkled his lectures with gratuitous sexual references."). ... This Order does not require City University to continue to diserve its own students by subjecting them in class to the bigoted statements and absurd theories of any of its professors ... 

---

"Nor does the Constitution protect the right of a professor to teach patently absurd and wholly fallacious theories in class."

Nevertheless, in his capacity as Chairman of the Department, Professor Jeffries is entitled to the constitutional protection that surrounds his speech and professional activities. While there may have been compelling and legitimate grounds upon which to discipline Professor Jeffries, the University chose to act upon illegitimate and unconstitutional grounds, specifically upon the plaintiff's off-campus July 20, 1991 speech and the publicity surrounding it.

**Practice implication**: Some faculty members may be inclined to focus on the result of this case, and ignore the reasoning. That's a mistake, since doing so will promote the erroneous view that faculty members at public institutions have an absolute right under the First Amendment to say whatever they wish, both inside and outside the classroom. (For a discussion of academic freedom at private institutions, see the comments of Contributing Editor William Kaplin in *Synfax Weekly Report* 93:56, p. 67).

It isn't possible to define the precise scope of protection accorded by the First Amendment in academic freedom cases. Still, as demonstrated by the United States Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977), federal courts will "balance" the First Amendment rights of teachers or other employees against the "legitimate educational interests" of a public school or college. For example, as Judge Conboy stated, that balance would normally be interpreted to mean that a faculty member could be subject to lawful discipline for directing an offensive epithet to a student, especially if the student is part of a "captive audience" in a classroom. (For a case involving discriminatory remarks by a university staff member outside the classroom setting, see *Synfax Weekly Report* 93:84, p. 79).

Furthermore, in the *Jeffries* case, Judge Conboy indicated that even the off-campus expression of a faculty member could be legitimate grounds for discipline by a school or college, if the expression "interfered with the functioning of the University." That's a hard standard to meet, since courts will require specific and compelling evidence of the alleged "interference." Still, CCNY might have been able to meet the test, by proving that Dr. Jeffries' statements about the "head Jew" controlling CCNY, for example, were knowingly false or reckless, and substantially damaged working relationships at the college.

This is a case your college attorney needs to keep on file. It provides a classic example of the consequences of failing to document and respond to patterns of unprofessional or unethical behavior by employees, including faculty members.

We also think you should review the *Jeffries* case at any time. We're always facing the same kinds of problems. After all, the "public demand immediate administrative action in the aftermath of some expression of unpopular views by individuals affiliated with your institution. Judge Conboy's analysis provides precisely what you need in that circumstance: an inducement to sober reflection.
Mother Jones on women's studies

A September/October 1993 Mother Jones magazine article critical of women's studies programs is going to attract widespread attention on and off college campuses (Karen Lehrman, "Of course," pgs. 46-68). Author Susan Faludi has promised to respond in the next issue, thereby assuring on-going national debate.

Ms. Lehrman visited women's studies programs at Berkeley, Iowa, Smith, and Dartmouth. She reports observing about twenty classes, talking with students and professors at those and other schools, and examining syllabi.

Her conclusions were generally unfavorable. "Many" class discussions, she found, "alternate[d] between the personal and the political, with mere pit stops in the academic" (p. 46). With the exception of classes Lehrman observed at Smith, few demands were placed on students, other than participation in various conscious-raising exercises.

Much of Lehrman's article was devoted to the unintentional stereotyping she believes women's studies programs often perpetuate, and the "group think" fostered in many of the classes she observed.

For example, after reporting on a Berkeley women's studies class that had devolved into little more than cathartic revelations about students' orgasms, Lehrman wrote that:

... the problem with therapeutic pedagogy is more than just allowing students to discuss their periods or sex lives in class. Using the emotional and subjective to "validate" woman risks validating precisely those stereotypes that feminism was supposed to eviscerate: women are irrational, women must ground all knowledge in their own experiences, etc. A hundred years ago women were fighting for the right to learn math, science, Latin ... today, many women are content to get their feelings heard ... (pgs. 48-49).

Ms. Lehrman also cited an American Association of Colleges' study in which 30 percent of students in women's studies classes at Wellesley said they "felt uneasy expressing unpopular opinions" in class (compared to 14 percent of non-women's studies majors). That result didn't surprise her, since many of the women's studies professors she encountered "rarely" solicited divergent viewpoints, and students enforced a rigid ideological orthodoxy among their peers (p. 65).

A rhetorical question summarized Ms. Lehrman's conclusion: "Women's studies students may make good polemicists," she wrote, "but do they really learn to think independently and critically?" (p. 68).

Practice implication: Portions of Ms. Lehrman's article reflect a constricted view of the educational process. Her criticism of practicums and service learning projects, for example, aren't well supported or developed.

Still, she raises a critical issue: is there a difference between educating and proselytizing?

It isn't possible or desirable for faculty members to try to remove the personal or "ideological" from their teaching. Indeed, the best teachers often catch students' attention by candidly expressing controversial views.

Still, teachers who seem to have the greatest impact on their students welcome an ideological challenge, and actively encourage students to mount one. A good example can be found in Clifford Orwin's remembrance of Allan Bloom, appearing in the Summer 1993 issue of the American Scholar ("Remembering Allan Bloom," pgs. 423-430):

Allan was a live wire, throwing off spark after spark. He thrived on objections, which was fortunate, as he provoked so many of them ... He distrusted students who agreed with him too readily, admired those who put up a fight ... [c]onservative students rarely found him attractive; there was too much Voltaire in him. He was every bit as hard on "conservatism" as on "liberalism ..." Allan flushed out students from every thicket of current opinion: his target was lazy thinking and especially ideological thinking (p. 242-245).

One of the best ways to "institutionalize" a style of teaching that discourages ideological thinking is suggested by University of Chicago English professor Gerald Graff in his book Beyond the culture wars (see Synfax Weekly Report 93.32, p. 47). Graff wrote that:

There is something unhealthy about teachers who endlessly preach to the converted, never having to encounter an opposing view from anyone of equal authority ... [A better approach might be to] encourage several teachers ... to assign a common text. ...[T]hey could then organize a transcourse symposium in order to compare different approaches, clarify disputed issues, and give students a more dramatic sense of the wider debate ... (p. 145, 169).
Ronald Reagan's genius lay in his ability to demarcate common ground on the right. Unless it learns to speak its own language of commonality, the shards of the left will be condemned to their separate sectors, sometimes glittering, sometimes smashed, and mostly marginal.

Practice implication: Campus administrators who don't devote significant efforts to helping students form coalitions across lines of race and gender are going to find others filling that gap, often in ways many academics find unappealing.

See, for example, the September 10, 1993 Philadelphia Inquirer ("Christian Coalition recruits black, Latino conservatives, p. A4):

The Rev. Pat Robertson's Christian Coalition, until now a largely white, Republican bastion, has launched a campaign to recruit black and Hispanic voters . . .

A poll commissioned by the group showed a "surprising level of support among minorities" on issues such as abortion, voluntary school prayer, homosexuality, and school choice . . . The national poll . . . showed, for example, that four out of every 10 whites and Hispanics and more than six out of every ten blacks (63 percent) consider themselves "born again Christians."

"There should be no division in the faith community" [said a Christian Coalition spokesperson]. "White believers should be united with their black and brown brothers on common issues."

Those committed to identifying "common issues" from a more liberal perspective have a powerful new ally, if they listen carefully. Consider the remarks of Associate Justice Ruth Bader Ginsburg to Washington Post reporter Amy Schwartz, during a recent press tour of the National Archives:

"I'm holding the Nineteenth Amendment to the Constitution," [Justice Ginsburg] said, with that incandescent smile again, "which made it possible for all humanity to have the benefits of this country and receive due process in this nation's courts."

by state or local political figures, or provide "race based" scholarships regardless of financial need. See Syntax Weekly Report, 93.110, p. 103: "Scholarships for politicians at Tulane" and 93.52, p. 56: "Biding war for black students").

□ 93.141 CURRICULUM

What the "great books" can teach

David Denby's article "Does Homer Have Legs" in the September 6, 1993 issue of The New Yorker (pps. 51-69) is essential reading for those interested in defining the objectives of a liberal arts education. It gives the reader the sense of being in the contemporary college classroom, in the presence of a dedicated teacher, grappling with magnificent ideas.

Mr. Denby attended Columbia University three decades ago, and returned as a journalist to take a humanities course—"Masterpieces of European Literature and Philosophy"—required as part of the core curriculum at Columbia College.

The focus of Mr. Denby's article was on one of his assigned readings: The Iliad; how it was presented and discussed in class; how he perceived it as an 18 year-old freshman, and understood it as a 48 year-old journalist.

The Iliad may be one of the earliest great works of Western literature, but it depicts what many of us would regard as an alien culture. The Greek view of the world, Denby wrote, was savage and fatalistic. It had little of the ethical humanism proclaimed—if not always practiced—in contemporary liberal society.

The Greeks and Trojans saw death in battle as inevitable, Denby wrote. Consequently, they experienced the world:

... not as pleasant or unpleasant, or as good and evil, but glorious or shameful. Homer offers us a noble rather than an ethical conception of life. You are not good or bad. You are strong or weak, beautiful or ugly, conquering or vanquished, favored by the gods or cursed (p. 62).

Denby was "dismayed" when he read the Iliad as a freshman, since he could not hope to possess the physical prowess and raw courage of Homer's heroes. Later in life, as a middle class New Yorker, his re-reading of the Iliad produced a comparable, but slightly different feeling. He now felt "diminished satisfaction" with his secure, conventional, and comfortable life, compared with "the unhoused splendor of air, feats, and fire" depicted by Homer.

Also, Denby was re-reading the Iliad under the guidance of a master teacher, Edward Taylor, professor of English. Taylor's goal was to help his students see for themselves that the Iliad was more than a story about battles and heroes. It contained something far more important, an idea Taylor kept hinting about, returning to, and trying to evoke:

... he was the kind of teacher who kept a student on the spot, trying to rattle the kid's brain until the answer, lost in the bottom drawers of sloth and forgetfulness suddenly fell out... he would take what the student had said, however minimal, and play with it, enlarging it so it made some kind of sense, and then weave it together with the three or four intelligible words that someone else had said; and soon these two half-mute students, still flushed with embarrassment, were described as building something...

What was the idea Taylor hoped Denby and the other students could "build" together?

It was to be found in the character of Achilles, the greatest of the Greek warriors, who had retired from the battle, pouting in his tent after a quarrel with the Greek leader, Agamemnon. As the tide turned against the Greeks, Achilles' friends implored him to return to the fight, and promised all sorts of gifts—Tripods, gold, women—as inducements.

Achilles' initial reply, Denby writes, is a "staggering Shakespearean speech... unlike anything else in the poem, for it shows a man struggling to say what [had not] been said... before" among the Greeks:

For as I detest the doorways of Death, I detest that man, who hides one thing in the depths of his heart, and speaks forth another.

But I will speak to you the way it seems best to me...

Fate is the same for the man who holds back, the same if he fights hard.

We are all held in a single honour, the brave and the weaklings...

Of possessions cattle and fat sheep are things to be had for the lifting, and tripods can be won, and the tawny high heads of horses, but a man's life cannot come back again, it cannot be lifted nor captured again by force, once it has crossed the teeth's barrier.

"Suddenly," in Denby's words, Achilles "is groping toward an idea of honor that doesn't depend on the bartering of women and goods or on the opinions... man have of one another's prowess." Instead, recognizing that all human beings share a common fate,
Achilles seeks to define for himself a "private, even spiritual, sense of worth" that was utterly alien to the civilization in which he lived.

In this beginning lies the seed of much that is good in Western culture: the idea that individuals have at least some capacity to determine for themselves what to think and what to believe, and that such a capacity should be protected—even fostered—both as an end in itself, and as a means to create a better society.

Practice implication—Some may see in the Iliad a poem that "oppresses women" or "glorifies war." Yet, Denby writes, "by appropriating to it some modern perception of class, power, gender—none of which much applied to Homer—you make the poem meaningless." If that's what's happening in American college classrooms (assuming works like the Iliad are read at all), our students are missing not only the majesty of a great poem, but a chance to better understand their own culture—and themselves.

Denby's article is too rich and detailed for us to do it justice here. It has many insights, not only about the history of ideas, but also about the way of teaching, and ways of learning, both for adolescents, and mature adults. It will be widely read by faculty members in the humanities, and should play an important part in the ongoing process of reviewing and revising the undergraduate curriculum.

93.142 FREEDOM OF EXPRESSION

"Penn's Cold Feet"

The University of Pennsylvania received generally unfavorable reviews in newspaper editorial pages for its decision not to punish the black students who confiscated 14,000 copies of the college newspaper last spring (see Syntax Weekly Report, 93.83, p. 78). We thought you'd be especially interested in the editorial perspective of Penn's hometown newspaper, the Philadelphia Inquirer:

...[Penn's] message is a muddle. The university has demonstrated that expediency is a core value, not that actions have consequences... It has validated the concept that ignorance of the law is a defense, saying that its campus manual may not have fully explained that running off with newspapers that give offense is a no-no. Next time, it says, it will hang tougher. Next time, it says, it will throw the book at anyone who tries to shut down speech or the exchange of ideas... For now, though, we hope Penn teaches how free speech can be a tool for social change. We hope it gets black and white students not only talking—but also writing—for the newspaper. We hope it makes the campus a more welcome place for minorities, be they non-white or politically incorrect ("Penn's Cold Feet," September 16, 1993, p. A20).

93.143 STUDENT VALUES

Training students for civility

A story in the September 23, 1993 Washington Post ("Burning 'Roast' Rolls P.C. Politics," p. B1) suggests that teaching students the importance of civility is a worthy goal—even if college administrators sometimes go about it the wrong way.

The Post reported that Hilda Pemberton, Chainwoman of the Prince George's County Council in suburban Maryland, had demanded a public apology from fellow council member Richard J. Castaldi for Castaldi's comments about her at a democratic party convention last week.

At the convention, with 600 people in the audience, Mr. Castaldi tried to interject a note of "humor" by publicly presenting Ms. Pemberton what he called "a county councilwoman's date bag." He then pulled from the bag a box of clear plastic wrap and announced:

Now you can use your own imagination on how this is going to be used... But I have attached a... brochure from the... Whitman-Walker Clinic [that provides services for people with AIDS] on oral sex for women.

It would be an understatement to say Mr. Castaldi's brand of humor has provoked considerable controversy in Prince George's county. His only expression of regret about the incident—which many think has ended his political career—was a statement that "obviously [the "joke"] missed its mark, and I apologize for that. That's it."

Practice implication—We disagree with those who advocate campus "speech codes." Still, some good has come from their efforts, since they've motivated many of us to find alternatives to censorship—like openly challenging offensive expression when we encounter it. By doing so we help students form habits of civility now that may prevent them from making fools of themselves later.
93.149 FREEDOM OF EXPRESSION

The next "freedom of expression" debate on campus

Current issues of The New Republic and The New York Review of Books contain reviews of University of Michigan law professor Catharine MacKinnon's new book Only Words (Harvard University Press, 1993). Professor MacKinnon's book is revitalizing a debate that is almost certain to be prominent on your campus: how should pornography be defined, and should its distribution and exhibition be prohibited?


Distinguishing pornography from obscenity

To understand Professor MacKinnon's argument, it's necessary to know that pornography is normally distinguished from obscenity. Publication of the latter may be punished if the publication, "taken as a whole, appeal[s] to the prurient interest ... contain[s] patently offensive depictions or descriptions of specified sexual conduct, and on the whole [has] no serious literary, artistic, political, or scientific value" Brockett v. Spokane Arcades, Inc., 86 L.Ed.2d 394 (1985), citing Miller v. California, 37 L.Ed.2d 419 (1973). "Offensiveness" will be determined in accordance with local community standards, and must reflect something more than an appeal to "normal, healthy sexual desires" (Brockett, supra, 402).

Obscenity laws are hard to enforce. Also, in Professor MacKinnon's view, they are too narrowly drawn, especially in light of the requirement that the offending material have no "serious literary, artistic, political, or scientific value." "Why should it matter that the work has other value," Professor MacKinnon has written, "if a woman is subjected?" ("Pornography, Civil Rights, and Speech," supra, p. 21).

MacKinnon's proposed law against pornography

Accordingly, Professor MacKinnon continues to argue for a new law against pornography, defined as "graphic sexually explicit materials that subordinate women through pictures or words" (Only Words, p. 22). She believes such a law is necessary because the pornography industry "forces, threatens, blackmails, pressures, tricks and cajoles women into sex for pictures" (Only Words, p. 15), and because:

Sooner or later the consumers want to live out the pornography further in three dimensions. Sooner or later they do. It makes them want to...when they believe they can get away with it...Depending upon their chosen sphere of operation, they may use whatever power they have to keep the world a pornographic place so they can continue to get hard from everyday life. As pornography consumers, teachers may become epistemically incapable of seeing their women students as their potential equals and unconsciously teach about rape from the viewpoint of the accused. Doctors may molest anesthetized women, enjoy watching and inflicting pain during childbirth, and use pornography to teach sex education in medical school. Some consumers write on bathroom walls. Some undoubtedly write judicial opinions (Just Words, p. 19).

"As pornography consumers, teachers may become epistemically incapable of seeing their women students as their potential equals"

The MacKinnon anti-pornography law declared unconstitutional

Professor MacKinnon's reference to pornography consumers who "write judicial opinions" may be a reflection of her displeasure over a 1985 decision of the United States Court of Appeals for the Seventh Circuit in American Booksellers Association v. Hudnut (771 F.2d 323, affirmed without comment by the United States Supreme Court, 89 L.Ed.2d 291, 1986), striking down a pornography ordinance she helped draft for the city of Indianapolis. What follows is an excerpt from the court's opinion, cited at length because it reflects the current state of the law on this subject:
Pornography under the [Indianapolis] ordinance is "the graphic sexually explicit subordination of women, whether in pictures or words, that also includes one or more of the following ... women are presented as sexual objects who enjoy pain or humiliation ... or women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior ... in a context that makes these conditions sexual ... or women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display ..."

The Indianapolis ordinance does not refer to the prurient interest, to offensiveness, or to the standards of the community. It demands attention to the particular depictions, not to the work judged as a whole. It is irrelevant under the ordinance whether the work has literary, artistic, political, or scientific value ...

"Civil rights groups and feminists have entered this case as amici on both sides ... Those opposing the ordinance point out that much radical feminist literature is explicit and depicts women in ways forbidden by the ordinance ..."

Professor MacKinnon's response

Professor MacKinnon's new book is an effort to challenge the 7th Circuit's reasoning in the Hudnut case. An important part of her attack is on the unwillingness of the judges in that case—and in other pertinent cases—to accept the view that First Amendment rights must be "balanced" against the right to equal protection of the laws, set forth in the Fourteenth Amendment:

"The law of equality and the law of freedom of expression are on a collision course in this country."

The law of equality and the law of freedom of expression are on a collision course in this country. Until this moment, the constitutional doctrine of free speech has developed without taking equality seriously ...

[Judges] show virtually total insensitivity to the damage done to social equality by expressive means and a substantial lack of recognition that some people get a lot more speech than others. In the
absence of these recognitions, the power of those who have speech has become more and more exclusive, coercive and violent as it has become more and more legally protected...[T]he more the speech of the dominant is protected, the more dominant they will become... (p. 72).

The Canadian courts have been more responsive to Professor MacKinnon's argument, based on the new Canadian constitution (the Charter of Rights and Freedoms), which permits the enforcement of laws against "group libel," when such libel is directed against historically disadvantaged groups. This is the direction she wants American courts to go—"projecting the law into a more equal future, rather than remaining rigidly neutral in ways that either reinforce social inequality or prohibit changing it, as the American constitutional perspective has increasingly done in recent years" (p.98).

Two critical reviews of Only Words

The reviews of Only Words in the New Republic and the New York Review of Books are unfavorable. Richard Posner, a Seventh Circuit Court of Appeals judge and Senior Lecturer at the University of Chicago Law School, wrote in the October 18, 1993 New Republic ("Obsession," p. 31) that:

The book is a verbal torrent that appeals, much like pornography itself as MacKinnon conceives it, to elemental passions (fear, disgust, anger, hatred...). There is no nuance, qualification, measure or sense of proportion...

[Given the scope of how Professor MacKinnon would define illegal pornography], much of the production of the American film and theater industry... [would have to be removed from the market]. It would require, as MacKinnon fails to mention...a law enforcement effort on the scale of Prohibition or the "war on drugs," and with the same dubious prospects of success. Would it be worth it...?

On this critical question the book is largely a blank. MacKinnon's treatment of the central issue of pornography as she herself poses it—the harm that pornography does to women—is shockingly casual... She...does not consider...such facts as that Denmark, which has no law even against hard-core pornography, and Japan, in which pornography is sold freely...have rates of rape far lower than the United States; that the rate of rape in the United States has been falling even as the amount of hard-core pornography has undoubtedly increased because of the videocassette; and that women's status tends to be lower in societies that repress pornography (such as those of Islamic nations)... Objections were also expressed by Ronald Dworkin, Professor of Jurisprudence at Oxford University and Professor of Law at New York University. He wrote in the October 21, 1993 New York Review of Books ("Women and Pornography," p. 36) that:

MacKinnon...and her followers regard freedom of speech and thought as an elitist, illegititarian ideal that has almost been of no value to women, blacks, and others without power; they say America would be better off if it demoted that ideal as many other nations have. But most of her constituents would be appalled if this denigration of freedom should escape from universities and other communities where their own values about political correctness are now popular and take root in the more general political culture. Local majorities may find homosexual art or feminist theater just as degrading to women as the kind of pornography MacKinnon hates, or radical separatist black opinion just as inimical to racial justice as crude racial epithets... This is an old liberal warning—as old as Voltaire—and many people have grown impatient with it. They are willing to take that chance, they say, to advance a program that seems overwhelmingly important now. Their impatience may prove fatal for that program rather than essential to it, however (p. 42).

"But most of [MacKinnon's] constituents would be appalled if this denigration of freedom should escape from universities... and take root in the more general political culture. Local majorities may find homosexual art or feminist theater just as degrading to women as the kind of pornography MacKinnon hates, or radical separatist black opinion just as inimical to racial justice as crude racial epithets..."

Practice implications—Professor MacKinnon's book will intensify the debate on your campus about the need to punish "offensive" expression, especially sexually explicit expression. It comes at a time when the law of "hostile environment" sexual harassment is in turmoil (although it may be clarified by the Supreme Court this term), and some courts have expanded workplace sexual harassment standards to protect students at schools and colleges (see Synax Weekly Report 93.132 "Title IX prohibits sexually hostile environment").

We have the following suggestions:
• Even if "hostile environment" sexual harassment standards apply to college students, something more than an isolated, offensive comment or off-color joke will be required. The expression must be sufficiently severe or pervasive to alter the educational environment for the victim. For comparable standards in the workplace, see Mentor Savings Bank v. Vinson, 91 L.Ed.2d 49, 60.

• Both public and private institutions can prohibit obscenity. Public institutions will almost certainly run afoul of the First Amendment, however, if they adopt provisions against display of "pornography," as Professor MacKinnon defines it.

• Women (and men) offended by pornography need not be "silenced" by it. College administrators should assist students in finding lawful ways to respond to expression perceived to be harmful. As a model, we suggest an approach at Arizona State University (published in the Winter 1991 issue of Synthesis: Law and Policy in Higher Education, p. 238), in which four African-American women used the power of publicity and candid discussion to secure a public apology for racist expressions they saw on a residence hall door—without making First Amendment martyrs of the perpetrators.

• It's important to understand that Professor MacKinnon speaks for what may be a relatively small number of feminists on the issue of relying on censorship to combat pornography. For example, in the Hudnut case, the Feminist Anti-Censorship Task Force filed a brief opposing the Indianapolis ordinance.

This is an subject we raised with Yale historian C. Vann Woodward in a March 1989 Synthesis interview (p. 20):

**Synthesis:** I take it you have some degree of optimism that the majority of people the majority of the time will choose ideas that are not destructive to society.

**Woodward:** I would trust them to do that more than I would trust the alternative, which is to permit them to discuss or entertain only those ideas that are approved by the government. I don't think either is perfect. People will always be stupid. They will be gullible and fallible. So will unrestrained authoritarian rulers, and I trust them less.

• Professor MacKinnon pays little or no attention to the possibility that Canadian style laws against group defamation will be misused by the religious or cultural right. This is an issue we explored in the 1990 Synthesis article “Canada's Anti-Hate Law: Two Views” (p. 100). Alan Borovoy, General Counsel of the Canadian Civil Liberties Association, reported that the Canadian anti-hate laws were used to detain Salman Rushdie's *The Satanic Verses* (on the ground that it offended Moslems) and a film sympathetic to Nelson Mandela (on the ground that it "promoted hatred against white South Africans"). Likewise, see *Synfax Weekly Report* 93.138, p. 131 for Professor Henry Louis Gates' observation that Canadian anti-pornography rulings have been used to seize gay and lesbian magazines, on the ground that they may be possible "hate literature."

As the Canadian example demonstrates, reliance upon institutional power to punish ideas offensive to minorities is likely to backfire. To pose a question in response to one of Professor MacKinnon's observations, if the power to censor is given to the dominant, how likely is it that the dominant will censor themselves?

---

"It's important to understand that Professor MacKinnon speaks for what may be a relatively small number of feminists on the issue of relying on censorship to combat pornography."

...on the ground that it "reinforces rather than undercuts central sexist stereotypes in our society..." The brief was endorsed by over 50 well-known feminists, including Betty Friedan and Kate Millett.

• Professor MacKinnon raises a critically important issue when she observes that there is no guarantee that "truth" will prevail in the marketplace of ideas.
93.152 CURRICULUM / ACADEMIC FREEDOM

Challenging the curriculum

New York's highest state court and a federal district court in New York have resolved cases involving curriculum challenges at a community college and a public secondary school. The outcomes suggest a clear direction: While the public may have a right to know more about what is being taught, neither the Constitution nor federal civil rights legislation are likely to be used by the courts as authority to change the curriculum.

On October 14, 1993 the Court of Appeals in New York held that the state Freedom of Information Law could be used by a group called "Citizens for a More Informed America" to view a film titled "Sexual Intercourse," used in a human sexuality class at Nassau County Community College.

The Court of Appeals, reversing a lower appellate court in New York (see Synfax Weekly Report 92.47, p.18), held that a public college is an "agency," and instructional materials used in class are agency "records." Holding otherwise, the court wrote "would frustrate the goal of liberal disclosure under [the Freedom of Information Law] and employ an extremely restricted view of what constitutes a 'record . . . .'

Knowing more information about the curriculum, of course, is not the same as having license to change it. In a federal district court case decided September 14, 1993 (Grimes v. Sable DC SAY, 90 CV 4539, 62 LW 2196), it was held that a lawsuit to require the New York public schools to teach a curriculum giving greater weight to the contributions of Africans and African Americans was not actionable under the Due Process or Equal Protection Clauses or Title IX of the Civil Rights Act of 1964. The court wrote that:

Courts have often noted the similarity in purpose and construction of Title VI and Title IX of the 1972 Education Amendments, concerning sex discrimination. Title IX regulations provide: "Nothing in this Regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials." 34 CFR 106.42. The Department of Education has thus construed Title IX as not reaching textbooks and curricular materials. The First Amendment concerns cited by the Department for its position appear to be equally applicable to Title VI claims alleging racial discrimination.

Practice implication: It's extremely rare for courts to take sides in disputes about course content. We don't see anything on the horizon likely to undermine that important aspect of academic freedom.

What the courts are increasingly willing to do, however, is apply freedom of information laws to aspects of campus life at state institutions that used to be shielded from public scrutiny (see "Georgia Supreme Court Mandates Open Disciplinary Proceedings," Synfax Weekly Report, 93.65, p. 64). That means internal debates about the curriculum are even more likely to become matters of public controversy.

Generally, in the case of books, films, displays, or other materials shared with students in the classroom, we don't think it's prudent to deny requests for public access. Doing so suggests there's something to hide. Instead, we recommend promoting open disclosure and energetic discussion.

Set aside an evening or a Saturday for members of the local community to meet the faculty and to discuss course materials. Encourage a debate, and urge students to participate. It might even be educationally desirable to invite members of local advocacy groups to attend a class and express their opinions, so long as they agree to engage in civil dialogue.

Some faculty members might regard this approach as a threat to academic freedom. We think the opposite is true. Academic freedom is most likely to thrive in an atmosphere of open disclosure and debate about what is being taught. Also—as those who have taught adult evening division classes know—considering the views of individuals who have not traditionally been a part of campus life can provide invaluable insights to those educators willing to listen.

93.153 FREEDOM OF EXPRESSION

More newspaper thefts

The November 2, 1993 Washington Post reports that the University of Maryland has become the latest institution where campus activists have removed substantial quantities of student newspapers to protest alleged racist or sexist expression ("Diamondback
 Sexual Harassment

California colleges can be liable for sexual harassment

California court cases and agency rulings continue to lead the country in applying workplace sexual harassment standards to educational institutions (see, e.g., "Title IX prohibits sexually hostile environment in schools," Synfax Weekly Report, 93.132, p. 121).

Last month, in an opinion sent to us by contributing editor Alan Kolling, the California Fair Employment and Housing Commission (FEHC) ruled that California colleges and universities are to be equated to "business establishments" for purposes of enforcing the state's civil rights act ("the Unruh Act").

This means both public and private colleges in California can be held liable for student, employee, and professor/student sexual harassment, including sexual harassment that creates an "offensive academic environment" (Department of Fair Employment and Housing [Amy L. Fortg, Complainant] v. University of California, Berkeley; Case No: FCR90-91 A8-0004s N39653 93-08; issued December 3, 1993, effective January 3, 1994; Fair Employment and Housing Commission, 1390 Market Street, Suite 410, San Francisco, CA 94102. tel: 415-557-2325).

A number of California universities, including the University of Southern California and Stanford University, filed amicus briefs in this case. Their only consolation, having lost jurisdictional and "academic freedom" arguments, was that the FEHC imposed comparatively strict standards for finding "hostile academic environment" sexual discrimination, and (by a 4 to 3 vote) dismissed the complainant's accusation.

This case has attracted national media attention (see "Colleges held liable for sex harassment," Washington Times, December 8, 1993 p. 12) and will be widely cited. What follows is an excerpted decision from the Commission's decision:

[Facts of the case]
On November 16, 1990, Amy L. Fortg (complainant) filed a ... complaint with the Department of Fair Employment and Housing (Department) alleging that the University of California (respondent) had ... denied [her] the ... advantages of a harassment-free learning environment ...

Complainant [was] pursuing her Master's degree in the Department of Near Eastern Studies ... Professor John Hayes is a lecturer specializing in the Arabic language in respondent's department ... Professor Hayes has a reputation of being readily available and open to meeting with graduate students in his Department. He dispenses with formal titles, requests that students address him on a first name-basis ...

[Sexual innuendo in the classroom]
In May 1989, while complainant was attending the class in Arabic Newspapers, Professor Hayes asked her to translate a newspaper passage which contained the Arabic word "Frj," pronounced "frouj." The intended newspaper meaning of this word ... [was] a transliteration of the English word "frog." ...

In class, Professor Hayes pressed complainant to provide all the Arabic translations of "frouj," which include the three English words "opening," "gap," and "vagina." Complainant offered the first two meanings and then, after persistent pressure from Professor Hayes to provide the third meaning, offered that it also meant vagina. Complainant felt that, thereafter, Professor Hayes appeared glib about the incident...

Professor Hayes pressed complainant to provide all the Arabic translations of "frouj," which include the three English words 'opening,' 'gap,' and 'vagina.' "

Complainant felt very embarrassed ... Complainant's embarrassment continued when Professor Hayes left a green ceramic frog in her graduate student mailbox ... [Complainant] did not feel comfortable confronting Professor Hayes to express her reaction and possibly upsetting him. Complainant felt that Hayes had control over what grades she would receive from the Department ...

[The professor's personal comments]
In September 1989 ... Professor Hayes invited complainant to join him for a coke at [an off-campus restaurant] ... Professor Hayes commented that complainant had "such nice ankles ..." [and] "I like it when you wear your hair short ..." Professor
Hayes made similar personal comments on a random and sporadic basis during 1989... Complainant was upset by Hayes' remarks but ignored them, hoping that he might stop his attentions if she were non-responsive...

In late September 1989, Professor Hayes, commenting to complainant about another graduate student known to both, let on that he was amused by this graduate student's shocked response to his telling her that "my girlfriend and I had sex on this [classroom] table"... Complainant was shocked and "flooded" that he was relating this story to her...

[Gifts from the professor]
In October 1989, complainant began to receive different items in her graduate student mailbox from Professor Hayes. They included a ceramic boar... chocolates and candies... Complainant never acknowledged receipt of these gifts except on those occasions when Hayes directly asked her if she had gotten what he had left for her. [Complainant] continued to feel that if she did not respond he would stop his attentions.

[Physical touching by the professor]
On November 17, 1989, complainant and Professor Hayes were working on a translation assignment in his office... Hayes had closed the door... It was unusual for his door to be closed. Complainant excused herself to make a telephone call. It was her desire to make the call elsewhere in private because she was somewhat nervous about contacting a professor in the history department. Professor Hayes, realizing that she was anxious about making the call, insisted she use his office telephone...

"[Complainant] continued to feel that if she did not respond... he would stop his attentions."

As complainant raised the telephone receiver to her ear, Professor Hayes came up behind her... pressing his body against hers... He put his head on her shoulder and whispered in her right ear, "It's going to be okay, Amy." At the time, he had placed his hands in the area just above her breasts... Complainant pulled his right arm away from her... after which... he removed his other arm and stepped back. Complainant was upset and physically shaking after the incident... She interpreted Hayes' actions as a sexual advance, and not those of a sympathetic friend seeking to console her... She saw them as part of a pattern, or "like a puzzle coming together..."

[Complaint; confrontation; professor's apology]
On November 21, 1989, complainant reported the incident... to Carmen McKines, the Title IX Compliance Officer for the Berkeley campus... McKines outlined the different options available to complainant, both internally and externally... Complainant opted to confront Hayes directly herself... [McKines] did not at this time give complainant a copy of the Berkeley campus sexual harassment policy.

Complainant arranged to meet Professor Hayes... near his office... She read him a statement... explaining that she felt he had taken advantage of her... that she considered it sexual harassment and that she would not tolerate such conduct in the future. Professor Hayes was apologetic and expressed... surprise at the degree of her upset. Complainant was not satisfied with his apology...

After this meeting... Professor Hayes ceased any unwelcome conduct directed toward complainant and she had no further complaints about his conduct.

[A dissatisfied complainant]
During the following week, complainant again talked to McKines and told her she had confronted Hayes... [Complainant] said she was bothered by... the fact no one in the administration had addressed Professor Hayes' behavior...

Complainant [who had also discussed the incident with Professor Ann Kilmer, Chair of the Department of Near Eastern Studies] was upset and amazed that Professor Kilmer had not, on her own initiative as Department Chair, talked to Professor Hayes herself and did not perceive it as her role to tell professors what to do. [Complainant] increasingly felt that respondent's only concern was whether the harassment had stopped and that it was unwilling to confront Hayes about the fact it had happened in the first place.

On March 9, 1990, complainant met with McKines again... [and] McKines gave complainant a copy of the interim Berkeley campus policy on sexual harassment... Complainant provided McKines with a written chronology of events [which] McKines accepted as a written complaint... McKines [then] proceeded with her own fact-finding investigation...

On March 12, 1990 complainant met with Professors Hayes, Kilmer and Brinner [former Near Eastern Studies Department Chair]... Hayes was apologetic to complainant and acknowledged touching her... Professor Brinner verbally reprimanded Professor Hayes at this meeting and told him that his behavior was inappropriate... [and] that it would not be tolerated...
Complainant felt that, at some point during the [March 12] meeting, the focus of the meeting turned toward her and that the others, particularly Kilmer, were "grilling" her on her relationship with the university on other issues, such as financial aid and office space. She became very upset, feeling that they had decided that she was overreacting to the situation with Professor Hayes because of her disgruntlement with the university on other issues and she finally walked out of the meeting.

"Professor Hayes was apologetic and expressed . . . surprise at the degree of [complainant's] upset."

Complainant called McKines to tell her how upset she had been with the meeting. Complainant then learned from McKines that it was unlikely that any record of her complaint against Professor Hayes would be maintained in any file for future access. This caused her increased upset and she cried hysterically.

[The University finds no sexual harassment]
In June 1990, McKines completed her investigation and written report, concluding that sexual harassment had not occurred based on the fact that there was only one incident of touching for which there had been an apology, and that Hayes's behavior was not sexual when viewed in context, and that complainant's degree of upset was exacerbated by other problems she was experiencing as a student. McKines also attended a Department of Near Eastern Studies staff meeting to speak on the topic of sexual harassment. Complainant was not given a copy of McKines' report.

Complainant sent [letters] to . . . Chancellor . . . Chang-Lin Tien [which prompted an investigation] by faculty administrative officer Professor Carol D'Onofrio . . . [Professor D'Onofrio prepared] a confidential 23-page report [and] found no Faculty Code of Conduct violations . . . Complainant did not know of the existence of this report and never received a copy of it until the day before the hearing in this matter.

[The complainant withdraws from school]
Complainant's upset . . . was in large part based upon her perception that respondent University . . . failed to discipline Professor Hayes in the fashion that she expected. At a minimum, complainant desired that a record of her complaint be placed in her or some other University file . . . Seeing Professor Hayes in her Spring 1990 semester classes and feeling that he had "gotten away with it . . ." made it difficult for her to concentrate and to continue her graduate studies. Complainant withdrew from graduate school in March 1990 . . .

[The University as a business establishment]
Respondent and amicus curie . . . argue that the . . . Commission's jurisdiction over claims under the Unruh Civil Rights Act . . . should exist "only to the extent that the allegations relate to employment and housing . . ." This argument is contradicted both by the plain language and by the legislative history of the . . . Act . . .

Respondent contends that the facts of this case bring it outside the scope of being a "business establishment" within the meaning of the . . . Act . . . [But] if the Unruh Act's coverage has . . . been interpreted in the broadest sense reasonably possible . . . "[T]he legislature intended for both public and private schools to be covered by the Unruh Act's anti-discrimination mandate and determined in the end that the all-inclusive phrase "all business establishments of every kind whatsoever" would achieve that goal . . .

[Respondent University has many businesslike attributes, including a complex structure, extensive publishing activities and a large staff and budget . . . Other considerations evaluated by the courts include whether the entity has recreational facilities generally open to the community, is furnishing goods or services, has major facilities and is open to generally serving the public . . . (citations omitted). Respondent clearly possesses these several attributes. We therefore determine that respondent University is a "business establishment" within the meaning of the Unruh Civil Rights Act . . .

[Sexual harassment standard]
After careful consideration, we are persuaded that it is appropriate to adopt [the following] definition of "sexual harassment:" [contained in the state Education Code]:

"Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting, under any of the following conditions: . . . (c) The conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment . . . . [As] with employment, the environment to which a student is subject in an academic program . . . is in itself an important attribute of the service a school renders. Any form of sexual harassment, then, which
has a substantial adverse impact on that environment denies the "full and equal" services guaranteed by the Unruh Act. [Also], respondent's own anti-sexual harassment policy prohibits conduct which creates an intimidating, hostile, or offensive University environment...

Finally, although we are not bound by federal law... we do note that the federal courts have applied sexual harassment employment standards to cases involving sexual harassment in education [including Lipsett v. University of Puerto Rico, 864 F. 2d 881 (1st Cir., 1988) and Jane Doe v. Petaluma City School District, 830 F. Supp. 1560 (N.D. Cal. 1993)].

We therefore hold that a violation of the Unruh Act... is proven if a preponderance of all the evidence demonstrates that unwelcome sexual conduct or other hostile or unwelcome conduct linked to sex... has occurred, and that this conduct was either sufficiently severe or... pervasive that, for a reasonable student, the conduct would create an intimidating, hostile, or offensive academic environment, or otherwise interfere with the student's emotional well-being or her ability to perform her studies...

**[The sexual conduct was not sufficiently oppressive]**

[The] incidents [alleged by complainant]... did constitute unwelcome sexual conduct toward complainant... [Accordingly], we must next decide whether they created a hostile academic environment... Factors to be considered are: the nature of the unwelcome sexual acts, with physical touchings usually being more offensive than verbal behavior; the frequency of the offensive encounters; the total time period over which the behavior takes place; and the context in which the conduct occurred... (citing Fisherv. San Pedro Peninsula Hospital, 214 Ca. App. 3d 590, 610).

Respondent argues that... the conduct complained of in this case was simply not sufficiently severe or pervasive to interfere with a reasonable woman's academic environment...

We agree. First it is undisputed that there was only one touching incident and that, as soon as complainant confronted Professor Hayes, all objectionable behavior stopped. Second we cannot call the other non-touching incidents, even when looked at in their totality, "severe" or "pervasive..." They fall, rather, in the "trivial," "isolated," "sporadic," and "occasional" category... Many of them were certainly not sexual per se and none of them, with the exception of the sexual story, was vulgar. Additionally, it seems clear from the record that complainant did not consider many of these incidents to be "sexual" at the time they occurred.

The most important factor... however, is not the incidents themselves but the context in which they occurred. A university professor-graduate student relationship carries with it expectations of a certain degree of professional and academic respect and distance. The professor has within his or her power the authority to issue grades or recommendations... [This is] especially paramount here in the context of respondent's relatively small Near Eastern Studies Department. In her last semester, complainant had two of her four scheduled classes with Professor Hayes...

"[W]e cannot call the other non-touching incidents, even when looked at in their totality, 'severe' or 'pervasive...' They fall, rather, in the 'trivial,' 'isolated,' 'sporadic,' and 'occasional' category...

Even within this context however, we find that Hayes' actions toward complainant were not sufficiently oppressive so as to create an abusive academic environment for the reasonable female graduate student... Although her distress over the touching incident was real and reasonable, [complainant's] overall distress was out of proportion to the nature of Hayes' attentions toward her. In the end, from the perspective of a reasonable woman graduate student, Hayes' conduct was not so severe or pervasive so as to create such an abusive academic environment that would cause someone to drop out of school. Additionally, and most importantly, the record is clear that much of complainant's upset was caused... not by Professor Hayes' actions, but by what she perceived were the University's inactions regarding her complaint...

**Practice implication**

- The California FEHC opinion is another indication that educational institutions cannot expect to be immune from workplace standards for "hostile environment" sexual harassment. Furthermore, while this case involved a professor and a student, the Commission's holding would also encompass "peer" sexual harassment by students.

- Given the wording of many state statutes, as well as regulations proposed by the federal Equal Employment Opportunity Commission (29 C.F.R. Part 1609.1), "hostile environment" harassment will apply to the full range of prohibited discrimination, including discrimination against individuals with disabilities.
Application of "hostile environment" theory to student-to-student harassment does not mean educational institutions across the country will be paying monetary damages in Title IX cases. Colleges may be considered "businesses" for some purposes, but the doctrine of "respondeat superior" (employer liability) isn't likely to be applied when student misconduct is involved.

This was an issue addressed by a federal district court in California last August in *Jane Doe v. Petaluma City School District*, *supra* (pertaining to the possible application of Title IX to student-to-student sexual harassment). Observing that "no court has addressed the question of whether student-to-student sexual harassment is actionable under Title IX . . ." (slip opinion, p. 28), the court held that:

Title IX does prohibit hostile environment sexual harassment but . . . to obtain damages under Title IX (as opposed to declaratory or injunctive relief), one must allege and prove intentional discrimination on the basis of sex by an employee of the educational institution. To obtain damages, it is not enough that the institution knew or should have known of the hostile environment and failed to take appropriate action to end it (slip opinion, p. 23).

The school's failure to take appropriate action, as alleged in plaintiff's complaint, could be circumstantial evidence of intent to discriminate. Thus a plaintiff student could proceed against a school district on the theory that its inaction (or insufficient action) in the face of complaints of student-to-student sexual harassment was the result of an actual intent to discriminate against the student on the basis of sex (slip opinion, p. 37, emphasis supplied).

- Coming to the merits of Ms. Forga's complaint, three of the seven FEHC commissioners would have found the University of California, Berkeley accountable for fostering a "hostile educational environment," in violation of California law. It was only a difference of one vote that prevented an assessment against the University for Ms. Forga's "out-of-pocket losses . . . loss of employment opportunities, [and] compensatory damages for emotional injury . . ." [dissenting opinion of Commissioner Phyllis W. Cheng, p. 38].

- Ms. Forga's case highlights the importance of ongoing programming for faculty members and department chairs about sexual harassment, ideally using a case study format. Furthermore, there's an undercurrent in this case that goes beyond male/female miscommunication. We also think educational programming should address the possibility of "generational" miscommunication, reflecting differences between sexual informality in the 1960s (when many faculty members were students) and the 1990s.

- Faculty members tend to overstate the scope of "academic freedom." This subject was addressed by the California Fair Employment and Housing Commission in a way we think the courts would uphold: Amicus . . . Stanford University argues that . . . academic freedom principles prohibit the Commission from considering the classroom transiliteration incident in its determination of whether complainant was subjected to sexual harassment. The Commission recognizes the potential problems inherent in evaluating a professor's teaching content . . . but declines to rule that concepts of academic freedom insulate all conduct from scrutiny under . . . the Unruh Act . . . (p. 25, n.7).

- Based on our conversations with *Synthesis* Associate Editor Susan Bayly, who has written extensively on sexual harassment issues, we suggest that special care be taken to tell sexual harassment complainants in advance about the differences between formal and informal procedures. Informal procedures normally do not result in official reprimands (or records), and should not be undertaken if such action is contemplated.

- If a formal complaint is filed, a way needs to be found to give complainants notice of the outcome. One way to address any pertinent privacy restrictions is to negotiate release of a statement of findings to the complainant, as part of any settlement agreement with the accused.

- Also, assuming appropriate due process protections have been accorded to the accused, it's reasonable for legal counsel (or some other appropriate officer) to maintain a record of the investigation. The record, which we think should also be available to accused, could be kept separate from personnel records, depending on the circumstances of the case.

- Finally, asking department chairs to resolve even "minor" sexual harassment complaints is probably a mistake. A trained person, knowledgeable about the pertinent legal issues, should be asked to undertake that responsibility.
The ACLU Board of Directors was being more cautious than the special committee, the *Daily Journal* reports, because "[b]oard members noted that the Wisconsin case pending before the Supreme Court involves a black youth who was given an enhanced sentence for leading a group of friends in an attack against a white teenager." In its final statement, the board observed that:

We are aware that the discrimination that infuses our criminal justice system . . . may well result . . . in enforcement patterns that discriminate against minorities. Therefore, we will continue to monitor the actual implementation of enhancement statutes and review our position if experience warrants.

*Editor's note*: Free speech absolutist Nat Hentoff challenged the ACLU Board decision in his February 6, 1993 *Washington Post* column (p. A23):

The [Supreme Court] is under no obligation to listen to the ACLU's nervous advice. If these hate crime laws are so susceptible to abuse, why is the ACLU on their side? Because it is the popular thing to do.

For a recent law review article supporting hate speech penalty enhancement laws, see "Fighting words and fighting freestyle: the constitutionality of penalty enhancement for bias crimes" in 93 *Columbia Law Review* 178 (1993).

**Political correctness in perspective**

The current issue of the *New York Review of Books* (February 11, 1983) has several articles we will cover during the next two weeks. One is Alan Ryan's review of three new books about "political correctness" in the higher education curriculum ("Invasion of the mind snatchers," p. 13).

Of the books reviewed (David Bromwich, *Politics by other means*; Gerald Graf, *Beyond the culture wars*; and Francis Oakley, *Community of learning*) Ryan seemed to favor Graf's perspective that "contentiousness is built into the literary profession" and—rather than trying to avoid conflicts about the curriculum— professors should teach them.

Gerald Graf is a professor of English at the University of Chicago. He is sometimes accused of "political correctness" himself, but his book offers a thoughtful, balanced perspective we think will be widely discussed in the months to come. We recently obtained his book, and share the following excerpts:

The best solution to today's conflicts over culture is to teach the conflicts themselves . . . using them as a new kind of organizing principle to give the curriculum the clarity and focus that almost all sides now agree it lacks (p. 12).

[For example] when I teach [Conrad's] *Heart of Darkness* now . . . I assign [an essay by Nigerian novelist Chinua Achebe, critical of Conrad's perspective about the inferiority of Africans]. I do not simply teach Achebe's interpretation as the correct one, however, but ask my students to weigh it against other interpretations. Nor do I discard my earlier reading of [Conrad's] novel as a contemplation of universal truth's about the human soul . . . (p. 30).

Was I really being less 'political' when [in previous years] I taught *Heart of Darkness* without mentioning the issue of race than I am now when I put the issue in the foreground? (p. 32).

... there is something unhealthy about teachers who endlessly preach to the converted, never having to encounter an opposing view from anyone of equal authority . . . [A better approach might be to] encourage several teachers . . . to assign a common text . . . they could then organize a transcourse symposium in order to compare different approaches, clarify disputed issues, and give students a more dramatic sense of the wider debate . . . (p. 146, 169).

**93.33 FINANCIAL AID / MANAGEMENT**

**The tuition advance fund**

Boston University President John Silber, writing in the February 4, 1993 *New York Times*, sought to revive a legislative proposal (introduced by Senator Edward Kennedy in 1978) to create a "tuition advance fund." The fund would advance money to students to pay at least part of their undergraduate tuition for four years. Silber writes that:

Students would repay 150 percent of the advance through a new Federal withholding tax of up to 6 percent. No repayment would be due during unemployment, and while death would erase any unpaid balance, bankruptcy would not . . . The endowment would replace our present cumbersome and ineffectual system, which assesses the financial need of families, with one in which students would finance their own higher education. For about 15 years, Congress would appropriate the funds for tuition advances. After that, repayments and investment income would make the endowment self-supporting, and it could begin to repay its government funding.

*Editor's note*: This proposal and others like it have been attracting widespread media attention. A front page story in the February 4, 1993 *Washington Post*, however, should dampen expectations. The Post reported that:
From the Editor

Academic Integrity and the Will-to-Power

Gary Pavela

Twelve years ago I interviewed a student who was being expelled from the University of Maryland for repeated acts of academic dishonesty. It was fascinating to talk with him because he was willing to say directly what other students in similar circumstances only implied.

A large portion of the interview was published in the summer 1981 Educational Record (p. 27). One question and answer has been cited by some observers as indicative of the values of many young adults in the 1980s:

Q. Is engaging in cheating fair to honest students?

A. I don’t think of it like that. I know some students do. But the attitude is generally, this is the way it is. When they work, a lot of these kids, either their fathers work in business, whatever they do, they get a shortcut—the other guy doesn’t. That’s the way I look at it. If I’m sharp enough to know the right people to get what I need, and he’s not, then that’s the point of the whole thing.

There’s more to this student’s perspective than can be encompassed in our moral development “stage” theories. He was expressing in his own language a way of looking at the world that has been a dominant force among intellectuals of both the extreme right and the extreme left in the United States and Europe.

The point of this essay is to suggest that his views may be held (although expressed opaque) by a significant number of faculty members on college campuses across the country. If that’s true, our efforts to promote academic integrity are going to be more difficult than we realize. Essentially, we’re going to have to spend more time examining, debating, and explaining our reasons for having an academic integrity policy.

"Truth is what serves the German people"

At the heart of the philosophical view held by the Maryland student is the belief that human beings and human values are governed by power. Concepts like “morality,” "virtue," and "truth" have no meaning, except to disguise and facilitate the use of power by those who have it, or seek it.

This certainly isn’t a unique perspective. In the 1930s, for example, it was succinctly stated by one of its best known proponents and practitioners, the late Professor Goebbels. "Truth," he said, "is what serves the German people."

Professor Goebbels, of course, is probably not a popular figure on your campus. Nonetheless, other intellectuals who share his basic view of the world may be having a greater impact than you realize.

Professor Goebbels, of course, is probably not a popular figure on your campus. Nonetheless, other intellectuals who share his basic view of the world may be having a greater impact than you realize.

The influence of Michel Foucault

For example, you might consider reading James Miller’s recent book The Passion of Michel Foucault. Miller’s book, along with Foucault’s Discipline and Punish and Madness and Civilization provide insights into a philosophy that seeks to affirm a "new way of being," experienced through the uninhibited exercise of each individual’s "will-to-power."

Michel Foucault is not the best known advocate of the will-to-power. That honor goes to Nietzsche. But Foucault has captured the imagination of many American academics because he brilliantly reiterated Nietzsche’s views in the guise of modern historical scholarship.

By the time of his death in 1984, Foucault’s popularity had reached the point that some academics could assert that we now live in "the century of Foucault" (Alan Ryan, "Foucault’s Life and Hard Times," April 8, 1993 New York Review of Books, p. 12). Likewise, Miller refers to Foucault
as "perhaps the single most famous intellectual in the world" (p. 13) and tells about the near-riot that ensued when hundreds of students could not be accommodated at a University of California at Berkeley lecture hall when Foucault spoke there in 1980 (p. 321). Even college newspapers continue to refer to Foucault as if his views should be common knowledge. An editorial in the May 12, 1993 Harvard Crimson, for example, argued that "Foucault and excessively correct speech" reflected a form of "false liberalism" that was widespread on the Harvard campus (p. 2).

Foucault's writing is not a model of clarity, and his views changed over time. Nonetheless, two examples of his thinking may be illuminating:

1. Foucault's views about crime and punishment were reflected by his fascination for the murderer Pierre Riviere, infamous in French history for butchering his family, and asserting thereafter that "he wanted to make some noise in the world" and that "it has always been the stronger in body who have laid down the law among themselves."

According to Miller, Foucault believed that:

Riviere's acts merited neither therapy nor confinement. Rather—in his words—they warranted "a sort of reverence." "The most intense point of lives, that which concentrates their energy," [Foucault] wrote, "is precisely where they clash with power ... Through this struggle, and through 'sacrificial and glorious murders,' a man like Riviere became a "lightening-existence,"" illuminating the ambiguity of the justifiable and the outlawed, "revealing the relationship between power and the people ..." (p. 228).

2. In a debate with French Maoists in 1971, Foucault surprised his opponents by expressing a view of government and justice that outflanked them on the left. The subject was the Maoist proposal to set up a "people's court" to judge the police. Foucault objected to their proposal on the ground that the "natural expression of popular justics" (i.e. unrestrained acts of violence) would be "strangled" by any kind of court system or legal process:

When we talk about the courts we're talking about a place where the struggle between contending forces is willy-nilly suspended: where in every case the decision arrived at is not the outcome of this struggle but of the intervention of an authority which necessarily stands above [it] ... The court implies, therefore, that there are categories which are common to the parties present ... moral categories such as honesty and dishonesty ... Now it is all this that the bourgeoisie wants to have believed in relation to justice, to its justice. All these ideas are weapons which the bourgeoisie has put to use in its exercise of power (Power Knowledge, Colin Gordon, Ed. 1980, p. 27).

It's important in this regard not to be mislead by Foucault's reference to "the bourgeoisie." He regards "categories such as honesty and dishonesty" as creations of any organized power. Like Nietzsche, he moved beyond the concept of "good and evil" altogether.

To understand Foucault's social and political views it's necessary to try to understand his belief that each of us can create a unique self. Creating such a self requires that we remain intensely alive by indulging in all of our passions, especially our will-to-power.

Moreover, sculpting an original self is done by tapping into something transcendent, a larger realm of experience. It's as if the fully developed self eventually blends with a river of experience: turbulent, fast-flowing, probably directionless.

Since experience is the goal, the concept of good and evil is irrelevant. Indeed, conventional morality is an obstacle, because—in Foucault's words—"man can and must experience himself negatively, through hate and aggression" (cited in Miller, p. 206).

The will-to-power in practice

Some of the faculty members and students who admire Foucault have missed the elements of fascism in his views. Those who see him as a dedicated "liberal," fighting for causes like prison reform, individual rights, and multiculturalism, don't appreciate that his apparent commitment to "moral" causes was a disguise—a reflection of the view that intellectuals should be "guerrilla warriors" against any restrictions on the will-to-power.

Whatever Foucault's admirers may think of the ultimate meaning of his philosophy, many on campus have wholeheartedly embraced his tactics, and his "fascination with experience."

We saw a first-hand example at the University of Maryland not long ago, in our "potential rapist" controversy. A group of women, as part of a class art project, randomly selected the names of men from a campus directory, and listed them on fliers as "potential rapists."

Some of the men named on the fliers suffered genuine harm. Those considering government careers, for example, have reason to fear that questions about possible "rape accusations" against them will arise in the future.

What seemed to surprise many observers was the indifference displayed by the women and their teacher to the moral issue involved in maligning individuals without any proof of wrongdoing. Those observers would be less surprised if they knew the extent to which Michel Foucault and thinkers like him have influenced "second-wave" feminism, and other social movements on campus.

For example, in a October 5, 1992 New Republic article ("Sister Soldiers," p. 29), Christina Hoff Sommers reported on a "model" introductory women's studies course developed at Rutgers University:

One of the stated goals of the course is to "challenge and change the social institutions and practices that create and perpetuate systems of oppression." Forty percent of the student's grade is to come from (1) performing some "outrageous" and "liberating" action outside of class and then sharing feelings and reactions with the class (2) Keeping a journal of "narratives of personal experience..."; and (3) Forming small in-class consciousness-raising groups (p. 32).

Sound familiar? The underlying perspective is that of Foucault. Notions of justice, fairness, and civility are seen as social creations designed to perpetuate power. Freedom from that power can only be found in the countervailing assertion of each individual's will-to-power. The goal is a transcending experience—beyond the categories of good and evil.

Implications for academic integrity policies

What does all this have to do with academic integrity?

The answer, stated simply, is that it's hard to imagine any form of governance Foucault's admirers would accept. Certainly they'd not be likely supporters of any effort by a college or university to enforce campus-wide standards of "honesty" or "integrity."

[continued on page 347]
From the Editor... [from p. 339]

Basically, faculty members who believe governments and institutions invent values like "honesty" as a means of oppression will not be inclined to affirm the value of honesty in their classrooms. Nor would they be inclined to refer alleged academic dishonesty violations to a "judicial" body.

If this suggestion is accurate, it would be prudent to look beyond the typical reasons faculty members give for declining to discuss academic integrity in their classrooms, or refusing to report alleged violations. For some, disagreements about how academic dishonesty should be defined, or complaints about a "bureaucratic" process for resolving contested cases, may reflect what is really philosophical ambivalence about the assertion and enforcement of any moral values.

Faculty members who believe governments and institutions invent values like "honesty" as a means of oppression will not be inclined to affirm the value of honesty in their classrooms.

Essentially, given current intellectual trends on campus, it's risky to assume a common philosophical foundation supports our academic integrity policies. We need to start laying that foundation by explaining how enforcement of academic integrity standards serves a purpose other than the maintenance of institutional power.

Community standards and individual freedom

Discussing the objectives behind our academic integrity policies should entail exploring the role that communities and institutions can play in promoting individual freedom, even when rules must be enforced to accomplish that result.

For example, at orientation and elsewhere, it might engender thoughtful discussion to ask what would be the likely impact on individuals and individual freedom if the basic social institutions we all depend upon—like sanitation or transportation—were to become utterly unreliable and untrustworthy.

John Dewey offered an answer when he observed that setting and enforcing certain basic community standards—like the obligation to travel the right way on a one way street—doesn't oppress individuals; it liberates them (e.g. by enhancing their mobility).

And so it is in countless other ways. Is our personal freedom enhanced or diminished, for example, if we find ourselves under the care of physicians who expressed their will-to-power by cheating on their medical boards?

Implicit in this discussion is the view that expanding liberty for as many people as possible means rejecting total liberty for everyone. Most Americans accept that perspective as common sense, and apply it in an on-going effort to find the right balance between individual rights and community interests. However, a fair number of European intellectuals (with considerable influence on their American counterparts) reject that effort out-of-hand. Although their views are rarely stated directly, some clearly believe the needs, impulses, and unrestrained "will-to-power" of dominant individuals should always take priority.

[continued on page 352]
Finding allies on campus

In addition to helping challenge the "will-to-power" perspective, discussing the premises of our academic integrity policies will also help us identify and attract allies who can be counted on to help promote a better moral climate on campus.

From the faculty, those allies will come from many different disciplines, but most will share a common characteristic: the conscious or unconscious belief that truth is something more than a personal or social creation.

Is our personal freedom enhanced or diminished, for example, if we find ourselves under the care of physicians who expressed their will-to-power by cheating on their medical boards?

In the humanities, for example, there will be writers and philosophers who share Vaclav Havel's sense that the world is "more than just a cluster of improbable accidents," and that "there is a great mystery above me which is the focus of all meaning and the highest moral authority" ("Beliefs," June 9, 1990 New York Times, p. 10).

Other teachers—while candidly discussing Shakespeare's class biases or racist assumptions—will still see a universal human longing, and perhaps some truth, in passages like the following, from the Merchant of Venice (Act V):

How sweet the moonlight sleeps on this bank!
Here will we sit and let the sounds of music
Creep in our ears: soft stillness and the night
Become the touches of sweet harmony.
Sit, Jessica. Look how the floor of heaven
Is thick inlaid with patines of bright gold:
There's not the smallest orb which thou beholdest
But in his motion like an angel sings,
Still quiring to the young-eyed cherubins;
Such harmony is in immortal souls;
But whilst this muddy vault of decay
Doth grossly close it in, we cannot hear it.

In the social sciences or African-American studies, there will also be faculty members willing to see and discuss the fact that it was a sense of moral and religious purpose that allowed Malcolm X to transform his life—and eventually proclaim the universal applicability of documents like the Bill of Rights and the Charter of the United Nations.

In the sciences, more than a few faculty members will share Andrei Sakharov's observation (stated on p. 4 of his Memoirs) that:

I don't believe in any dogma and I dislike official churches, especially those closely tied to the state, those of a predominant ceremonial character, or those tainted by fanaticism or violence. And yet I am unable to imagine the universe and human life without some guiding principle, without a sense of spiritual "warmth."

Other scientists on your faculty, while aware that they see the world through the distorted lenses of socially-influenced paradigms, will also agree with an observation in the June 1993 Scientific American that some sort of internally coherent reality exists; that "[quarks or their equivalents are there within, not constructed by social convention] any more than were the moons of Jupiter or the forces of gravity (Philip Morrison, "A Brief for Science," p. 146).

If academic integrity is one of your concerns, all of these faculty members, from every discipline, are your natural allies. So are most of your best students. Like most faculty members, their enthusiasm for their work reflects nothing less than enthusiasm for seeing or sensing some fragment of Truth, dim and distorted though it must be.

Summary

One of the duties (and pleasures) of college administrators is keeping abreast of important philosophical perspectives, thinking carefully about them, and considering the ways they may influence campus life. This is especially true for those administrators who help develop and administer academic integrity policies, since academic integrity is a bellwether for student and faculty attitudes on ethics.

One philosophical perspective that's probably influential on your campus is that of Michel Foucault. You need to know about it. That's good news, because considering Foucault's views will force you to examine your most fundamental beliefs, including the belief that setting and enforcing neutral standards for "honesty" and "integrity" serves a higher purpose than crushing the individuality and self-expression of your students.

At heart, the higher purpose behind enforcement of an academic integrity policy is to help protect the sense of trust and mutual obligation that makes community life possible. And it is only in properly designed communities, ironically, that individuality can have any meaning.

At heart, the higher purpose behind enforcement of an academic integrity policy is to help protect the sense of trust and mutual obligation that makes community life possible. And it is only in properly designed communities, ironically, that individuality can have any meaning.

Finally, there's another benefit that will come from examining, debating, and explaining the reason for having an academic integrity policy. Doing so will help you identify and attract kindred souls. You'll find many faculty members and students who sense that truth and power aren't synonymous, and who believe self-restraint is often more liberating than self-gratification. Unlike the student I interviewed twelve years ago at the University of Maryland, they'll challenge rather than succumb to the essential nihilism of the "will-to-power."