FEAR AND LOATHING IN THE CLASSROOM:
Faculty and Student Rights in Comparative Context

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Fear and Loathing in the Classroom: Faculty and Student Rights in Comparative Context

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This chapter, like Gaul, is divided in three parts: a restatement of the law of academic freedom, particularly the "third essential freedom" -- how classroom material shall be taught and the implication for student rights;[1] a hurried review of several developing cases that pose new challenges to teachers' autonomy in the classroom; and some unhurried thoughts on the direction this conflict is taking. Several of the examples I will draw upon derive from my own, perhaps idiosyncratic, teaching experience; nonetheless, this is not a full-blown exercise in critical race theory,[2] or even in making personal the political. Rather, I attempt to offer guideposts from the emerging case law and to suggest how good practice, derived from professional norms, is highly contextual but also, largely intuitive and commonsense. It is my experience that very few troubled teachers have pristine records, but that their problems have more often been of longstanding concern to colleagues.

But I begin with a more optimistic premise, that, despite the increasing legalization of higher education and a stealthy encroachment by disabilities legislation -- which can override professorial authority in substantial portions in order to accommodate physically or mentally disabled students[3] -- the heart of the learning enterprise is largely undisturbed today, recognizable

*No endorsement by the AAUP should be inferred from this chapter.

to its medieval university roots. Today's large labs, high technology classrooms, and interactive computer-aided instruction are not highly evolved from faculty-student interaction in Oxford, Paris, Bologna, or Salamanca classrooms. It is the legal environment that has changed, not Mark Hopkins on the log.[4]

Thus, I arrive at my formulation of this issue: discussions of academic freedom are a legal discourse; a line of developing cases threatens to politicize and legalize the classroom in ways not envisioned before; and only by forging consensus on normative behavior and by self-policing will faculty be able to retain their classroom autonomy. These three elements are essential prerequisites for developing one's own pedagogical style, including how much of an advocate for an ideological/political/partisan position one chooses to be in a given class. But evolving a position and examining that constellation of assumptions is not a theoretical nicety; it is an absolute necessity in undertaking a teaching profession.

While I do not struggle with it daily or let doubts paralyze me, I confess that I teach differently depending upon the context of subject matter material, degree of partisanship possible, level of student sophistication, and evolution of the field of study. Thus, when teaching Immigration Law, I routinely remind myself not to give short shrift to INS viewpoints on an issue; this remains a constant struggle, given government perfidy[5] and the developing spirit of nativism sweeping the land, but most important, I struggle with it consciously. On some issues, I voice my doubts on both sides, negotiate a discussion in class to elicit polarities, and use the resultant exchanges (usually sharply divided) to gain an appreciation of the legitimate governmental role in this crucial function -- the issue of constituting our political community. I have a good colleague, a more conservative Anglo who teaches Immigration and Nationality Law at an elite

Eastern law school. His major concern is that his ethnic minority students cannot rationally discuss limits upon immigration, legal or undocumented. As a Mexican American, I am assumed by most students to be pro-immigrant, while he labors under no preconceptions. Issues of advocacy in the classroom often turn upon characteristics ascribed by students to their teachers (e.g., that women teachers are feminists, favor women, and are "soft on social issues"[6] or that ck professors of color are "too sensitive" on issues of race, as in Derrick Bell's now-famous case at Stanford Law School),[7] rather than upon their professors' actual views, which many of us struggle to control or, at least, not to represent as the only truth.

But I note how little I struggle with these issues of advocacy in teaching Legal Ethics, even though the opportunity to proselytize is greater in this subject matter where proper behavior is extremely relativistic and uncharted. Here, due to the non-ethnic context of the course material, I am not perceived as a reflexively anti-government partisan. It is little wonder that race, gender, and sexuality provoke the most frequent faculty-student clashes. In Legal Ethics, I find myself trying to spark student interest, while in Immigration Law I am always trying to harness it and to channel student beliefs -- not well understood but strongly felt -- into useful discussions, once the highly technical subject matter has been examined.

A. Academic Freedom for Thee and Me

In a nutshell, expression of controversial ideas and criticism of the status quo must be protected, even at the risk of discomfort for the teacher or class, when a professor is teaching within her field. Accordingly, a graduate student who wished to discuss men's and women's spatial-reasoning skills in a class he was teaching on "comparative animal behavior" but who feared prosecution under the university' hate speech code, could convince a federal court that the

code endangered his First Amendment rights.[8] But academics still must adhere to professional standards, ones that result from training, developed expertise, and scrupulous care in presenting material. Conversely, a mathematician who insisted that 2 + 2= 5 could be fired for failing to meet professional measures of competence; an English teacher, police file clerk, or telephone operator, though, could not be fired for holding such a belief.[9] While the calculus grows more complex for interdisciplinary fields, peer-review journals and tenure committees routinely invoke the professional standard of care. Professional standards are common in academic practice.

A necessary corollary, however, is that a heightened core of professional protection need not translate into more protection for "intramural utterances" (nonprofessorial speech) than nonacademics receive. Thus, an art professor who vandalizes rare documents,[10] or a university president who makes an obscene and harassing phone call from campus,[11] should not be able to claim any more or less protection than any member of the community. To broaden protection of such intramural speech, a more principled path would be to exceed the current minimum[12] and expand everyone's political speech rights, rather than to concoct an overbroad conception of academic freedom. Faculty should be entitled to special consideration only in pursuing academic endeavors (hence "academic" freedom), such as in the laboratory, library, or classroom. Extending the protections of academic freedom to extra-academic speech, in this light, is unprincipled.

There should therefore be a permeable border between professorial speech and nonprofessorial speech. Professor David Rabban argues for a similar approach. In distinguishing between 'academic freedom' and the general free speech clause, he urges:

> The distinctive professional functions of professors provide the basis for applying

a special first amendment concept to them. But what is the first amendment justification for treating the aprofessional speech of professors differently from the speech of anyone else?

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

There are legitimate first amendment reasons for protecting the political speech of public employees generally. Indeed, the Supreme Court has done so while rejecting the "right/privilege" distinction popularized by [Justice] Holmes. But as the Supreme Court has recognized, it is the free speech clause, not the special first amendment right of academic freedom, that provides the constitutional basis for this protection.[13]

Under Rabban's attractive approach, courts would produce a "coherent and convincing specific conception of constitutional academic freedom,"[14] specifically acknowledging professorial speech by teachers and distinguishing it from other protected speech. This theory harmonizes well with the approach I advocate, where core professorial speech is broadly protected, although still subject to norms of professional practice.

Even if a more fully articulated professorial practice theory were to be accepted by the courts, difficulty might arise in accommodating students' rights in cases in which a professor arguably exceeds professorial authority in classroom instruction. It is to this narrow issue I turn, as the small number of cases in this area directly challenge the broad protection of truly professorial speech advocated above. I conclude that students should have breathing room to bring grievances when their rights as learners have been violated, but only when professorial speech is well wide of the mark, such as speech in the context of classroom instruction that is judged by peers as undeserving of protection.

In an earlier review article on this subject, I reviewed several important legal cases where faculty and student rights came into direct conflict.[15] One involved prayer in the public college classroom, where the court precluded the practice, finding that the Establishment Clause mandated the college discontinue the practice.[16] Another religion case pitted a public university against an exercise physiology professor who invited students in his class to judge him by Christian standards and to admonish him if he deviated from these tenets. The Appeals Court held that colleges exercise broad authority over pedagogical issues, and that "a teacher's speech can be taken as directly and deliberately representative of the school."[17] This troubling logic, which reaches the correct decision to admonish the professor, does so for the wrong reasons and rests upon the erroneous ground that faculty views are those of the institution. The court could have more parsimoniously and persuasively decided the same result but analyzed the peculiar role of religion injected into secular fields of study, especially when the teacher invites a particular religious scrutiny. The closest analogy to my own teaching would be to speak in Spanish half the time and to invite scrutiny and correction from my students on my "ethnic point of view." I am always

certain to translate non-English words or ideas rooted in Spanish (non-refoulment, bracero, etc). In another course, a studio art teacher was dismissed for his habit of not supervising his students; he argued that this technique taught students to act more independently.[18] The court disagreed that his behavior was a protected form of professorial speech, as did a court that considered another professor's extensive use of profanity in the classroom. In a similar vien, a basketball coach dismissed for angrily calling his players "niggers" on the court to inspire them, found an unsympathetic court, which held that the remarks were not a matter of public concern,[19] and therefore, not protected speech. A white professor also lost his position at a black college for making a remark that was interpreted by students as racist and for refusing to go back to teaching until the college administrators removed a student he considered disruptive.[20]

These and other cases made it clear that students had some rights in a classroom, while well-known cases such as Levin v. Harleston[21] and Silva v. University of New Hampshire[22] have made it clear that courts will still go a long in protecting professors' ideas--(Levin) however controversial, and teaching styles, however offensive (Silva). A proper configuration of professorial academic freedom is one that is normative and resilient enough to resist extremes from without or within, to fend off the New Hampshire legislative inquiry of Sweezy and the proselytizing of Bishop. In this view, professors have wide ranging discretion to undertake their research and to formulate teaching methods in their classroom and laboratories. However, this autonomy is, within broad limits, highly contingent upon traditional norms of peer review, codes of ethical behavior, and institutional standards. In the most favorable circumstances, these norms will be faculty-driven, subject to administrative guidelines for ensuring requisite due process and fairness. Even the highly optimistic and altruistic 1915 AAUP Declaration of Principles holds

that "individual teachers should [not] be exempt from all restraints as to the matter or manner of their utterances, either within or without the university."[23] In short, academic freedom does not give carte blanche to professors, but rather vests faculty with establishing and enforcing standards of behavior to be reasonably and appropriately applied in evaluations.

B. A Developing Strain of Cases

Although I have attempted to persuade that the academic common law is highly normative, contextual, and faculty-driven, I have not lost sight of the range of acceptable practices and extraordinary heterogeneity found in classroom styles. Additionally, persuasive research has emerged to show that persons trained in different academic disciplines view pedagogy differently. John Braxton and his colleagues have summarized how these norms operate across disciplines:

> Personal controls that induce individual conformity to teaching norms are internalized to varying degrees though the graduate school socialization process. Graduate school attendance in general and doctoral study in particular are regarded as a powerful socialization experience. The potency of this process lies not only in the development of knowledge, skills, and competencies, but also in the inculcation of norms, attitudes, and values. This socialization process entails the total learning situation ...through these interpersonal relationships with faculty, values, knowledge, and skills are inculated.[24]

Moreover, to paraphrase Tolstoy, they are all inculcated differently. To grab a student and put my hands on his chest would be extraordinarily wrong in my Immigration Law class, but it could happen regularly and appropriately in a voice class, physical education course, or acting workshop. Discussing one's religious views in an exercise physiology class may be inappropriate,

but certainly it is kosher to do so in a comparative religion course. Discussions of sexuality, salacious in a Legal Ethics course, are appropriately central to a Seminar in Human Sexuality. Each academic field has evolved its own norms and conventions.

However, courts are not in the business of contextualizing pedagogical disputes, as is evident from two current cases making their awkward way through the judicial system: Cohen v. San Bernadino Valley College[25] and Mincone v. Nassau County Community College. [26] While both of these cases have forbears in other decisions, they form a pair of bookends sufficient to make my points, that if colleges do not police themselves, others will; that disputes between teachers and pupils are on the rise; and that poor fact patterns and sloppy practices will lead to substantial external control over the classroom. One other thread is that each arose in a two year, community college, making it likely that the results will be taken by subsequent judges as directly pertinent for higher education in a way that K-12 cases (notwithstanding Hazelwood's leaching into postsecondary cases)[27] have not been held. Given the overlap with the mission of senior institutions and their usual transfer function, two year colleges will not be easily distinguished. If a K-12 case is not in my favor, I can always try and convince a judge to limit it to the elementary/secondary sector; I will not be able to muster such a fine-graded distinction in a post-compulsory world, even though two year colleges are on the average, more authoritarian and administrator-driven than are four-year colleges.[28] The widespread use of part-time and non-tenure track faculty makes academic freedom more problematic at community colleges, where faculty do not always have the security or autonomy to develop traditional protections of tenure and academic freedom, particularly the dimension of "how it shall be taught."

Cohen v. San Bernadino Valley College

Dean Cohen is a tenured English and Film Studies professor at SBVC, where, in Spring 1992, he taught a remedial English class. By his own admission, his teaching style is "confrontational" and aggressive. In order to motivate students, he sometimes uses vulgarities and profanity. He read articles from Hustler and Playboy magazines in class, and for a class assignment had his students write essays defining pornography. One of his students objected to his style and the pornography assignment, and requested an alternative assignment, which request refused. The student did not attend Cohen's class after this exchange, and she received a failing mark. After the semester ended she went to Cohen's department chair, complained he had sexually harassed her, and then filed a formal grievance complaint.

The Faculty Grievance Committee took testimony from both parties, as well as from other students who had been in the course. The Grievance Committee determined that Professor Cohen had created a "hostile learning environment," a form of sexual harassment proscribed by SBVC policy, defined as:

> unwelcome sexual advances, requests for sexual favors, and other verbal, written, or physical conduct of a sexual nature. It includes, but is not limited to circumstances in which: . . . (2) Such conduct has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment.

Under this policy, forms of sexual harassment "include but are not limited to .... (v)erbal harassment - [d]erogatory comments, jokes or slurs." The SBVC president accepted the Faculty Grievance Committee's findings, and determined that Cohen was in violation of the College's sexual harassment policy. This decision was appealed to the Board of Trustees, who sustained the

Committee and the President. The Board ordered Cohen to:

1. Provide a syllabus concerning his teaching style, purpose, content, and method to his students at the beginning of class and to the department chair by certain deadlines;
2. Attend a sexual harassment seminar within ninety days;
3. Undergo a formal evaluation procedure in accordance with the collective bargaining agreement; and
4. Become sensitive to the particular needs and backgrounds of his students, and to modify his teaching strategy when it becomes apparent that his techniques create a climate which impedes the student's ability to learn.

Cohen then filed a Section 1983 suit, seeking a declaratory judgment, a preliminary and permanent injunction, damages, and attorney fees. In April, 1995, Cohen lost on every count: the federal judge denied a declaratory judgment and preliminary injunction, and found the individual defendant to be entitled to qualified immunity; he had already ruled that the entity defendants had Eleventh Amendment immunity.[29]

On the substantive issues, Cohen also lost. The Court held that the SBVC sexual harassment policy did not violate the First Amendment, but, as had the judge in Bishop v. Aronov[30] (the case of the proselytizing exercise physiology professor), it cited Hazelwood,[31] the high school paper censorship case. Regrettably, the Court intermingled other high school curriculum cases with higher education grading and Establishment Clause cases. The court's summary held: "The parameters of academic freedom are not distinct, particularly in relation to the potential conflict with a University's duty to ensure adequate education of its students. What

is clear, however, is that invocation of the 'academic freedom' doctrine does not adequately address the complex issues presented by this case. For that reason, this Court declines to hold that SBVC' discipline of Cohen is precluded by general notions of academic freedom under the First Amendment."[32]

The Court then reviewed government-as-employer cases, Connick v. Myers,[33] Waters v. Churchill,[34] and U.S. v. National Treasury Employees Union;[35] taken together, these cases will rarely support a faculty member being punished for classroom behavior, and they did not help Cohen here: "In this case, the record is undisputed as to what speech is at issue: (1) Cohen's use of vulgarities and obscenities in the classroom; and (2) Cohen's curricular focus on sexual topics such as pornography, as well as his classroom comments on sexual subjects."[36] While the Court found the speech to be a matter of public concern, necessitating a greater showing of workplace (in this instance, the classroom) disruption, it determined that the College had brought forth "substantial, uncontroverted evidence showing that the educational process was disrupted by Cohen's focus on sexual topics and teaching style."[37]

What the Court finds here is so extraordinary that it is important to read in detail the analysis: (with all citations omitted)

> There is testimony from the complaining student and from other students in the class that Cohen's sexually suggestive remarks, use of vulgarities and obscenities, and the topics for discussion prevented them from learning.
>
> Furthermore, written evaluations of Cohen by his colleagues done in November of 1992, before [the student] filed her grievance against Cohen, show that while his colleagues respected Cohen as a teacher, several of them entertained

doubts as to the efficacy of his confrontational teaching methods. According to one peer evaluator who observed a class in which Cohen discussed and assigned a paper on the topic of consensual sex with children, Cohen's specific focus impedes academic success for some students . . . I question whether or not many of our students have the academic preparation and/or emotional maturity (stability) to cope with the nature of Mr. Cohen's assignments.

Another observer stated that Cohen's approach to the topic of "the pros or the cons of consensual sex with children" did not foster unfettered discussion by students but instead "require[d] self-censorship rather than complex analysis of an important issue." The evaluator further wrote that,

[c]ertainly the issue of what in this society is considered to be sexual abuse deserves discussion. But given the student population, it deserves sensitive, complex discussion -- not the reductionist approach that Mr. Cohen's assignment requires. Rather than fostering free inquiry, Mr. Cohen's assignment as stated undermines the crucial nature of the issue.

Lastly, Cohen himself concedes that his teaching methods do not work with every student. He has stated that he deliberately uses an "abrasive" teaching style to elicit a response from his students. He admitted during the hearing before the Board that, while his style was effective as to some students, it was not as to others: "[T]here's always a sort of ratio between success and failure. Techniques work with one student and not another . . . ." Moreover, in answer to a question as to whether he considered himself an excellent teacher, Cohen replied, "That

would depend on the student. A teacher is good with one student and not so good with another, and that has something to do with the student's perception of the teacher. One cannot be all things to all students."

In fairness, the Court must note that there is evidence in the record that Cohen's teaching style is effective for at least some students. Cohen's colleagues have stated that he is gifted and enthusiastic teacher. Furthermore, according to the chair of the English Department (who is a defendant in this action), Cohen's teaching style is within the range of acceptable academic practice. The record also contains statements from several students to the effect that Cohen's challenging classroom style contributed to their learning experience. Moreover, the record contains positive student evaluations of Cohen submitted by English 101 and English 015 classes for the Fall 1992 and Fall 1993 semesters. However, this evidence does not controvert the evidence showing that the learning process for a number of students was hampered by the hostile learning environment created by Cohen.

In applying a "hostile environment" prohibition, there is the danger that the most sensitive and the most easy offended students will be given veto power over class content and methodology. Good teaching should challenge students and at times may intimidate students or make them uncomfortable. In a different context, the Supreme Court has previously refused to ban all material which offends the sensibilities of society's most sensitive and vulnerable members. Colleges and universities, as well as the courts, must avoid a tyranny of mediocrity, in which all

discourse is made bland enough to suit the tastes of all students.

However, colleges and universities must have the power to require professors to effectively educate all segments of the student population, including those students unused to the rough and tumble of intellectual discussion. If colleges and universities lack this power, each classroom becomes a separate fiefdom in which the educational process is subject to professorial whim. Universities must be able to ensure that the more vulnerable as well as the more sophisticated students receive a suitable education. The Supreme Court has clearly stated that the public employer must be able to achieve its mission and avoid disruption of the workplace. Within the educational context, the university's mission is to effectively educate students, keeping in mind students' varying backgrounds and sensitivities. Furthermore, the university has the right to preclude disruption of this educational mission through the creation of a hostile learning environment. As the Ynigues court noted, public employers must have the authority to determine what tasks its employees perform.

The restrictions imposed by Defendants are not onerous. The College has required Cohen to issue a syllabus at the beginning of each semester of his classes. Cohen must attend a sexual harassment seminar. Cohen must be formally evaluated, and he is directed to "be sensitive" to students. These restrictions are tailored and reasonable, in light of the issues involved. The College is not directly censoring Cohen's choice of topics or teaching style. In essence, the College is requiring Cohen to warn students of his teaching style and topics so that those

students for whom this approach is ineffective may make an informed choice as to their educations.[38]

Thus, even though Cohen's speech on the topic of pornography was speech on a matter of public interest, the College's interest in effectively educating its students outweighed Cohen's interest in focussing on sexual topics in the classroom, to the extent that the university only required Cohen to warn potential students of his teaching style and topics.

> As an alternative basis for its ruling, the Court recognizes the constitutional implications of the College's substantial interest in preventing the creation of a hostile, sexually discriminatory environment which would disrupt the educational process. The Supreme Court has found that creating a "hostile environment" based on gender is a form of sexual harassment which violates Title VII. Several circuits, including the Ninth Circuit, have held that sexual harassment is a type of sexual discrimination which violates the Equal Protection Clause of the Fourteenth Amendment.[39]

Thereafter, it only remained for the Court to dismiss the issue of fair notice and to distinguish Cohen from relevant hate speech cases that would seem to favor the professor in such an instance. Having covered this terrain, Judge Lew held that,

> under Connick and Waters, the College has the authority to require Cohen to distribute a syllabus detailing his controversial teaching style, attend an anti-sexual harassment seminar, and to submit to a formal evaluation of his teaching methods. The College is entitled to issue these narrowly tailored requirements because it has

shown that its educational mission has been disrupted for some students by Cohen's teaching style. The College's substantial interest in educating all students, not just the thick-skinned ones, warrants the College's requiring Cohen to put potential students on notice of his teaching methods. The College's interest in fulfilling its educational mission is further bolstered by the constitutional implications of sexual harassment.

In so holding, the Court notes that this ruling goes only to the narrow and reasonable discipline which the College seeks to impose. A case in which a professor is terminated or directly censored presents a far different balancing question. Further, the Court notes that the College must avoid restricting creative and engaging teaching, even if some over-sensitive students object to it.[40]

The student had also accused Professor Cohen of making specific and suggestive sexual overtures toward her, claims rejected by both the Faculty Grievance Committee and the Board of Trustees in their respective. As of Summer, 1995, Professor Cohen is seeking review in the Ninth Circuit.

Mincone v. Nassau County Community College

This is the second round of a case that began as a request for public records, or in this instance, course materials for Physical Education 251 (PED 251), "Family Life and Human Sexuality."[41] The course is taught in several sections to nearly 3,000 students each year, and in Mincone, a senior citizen auditor (enrolled under terms of a free, non-credit program for adults over 65 years of age) who reviewed the course materials before he took the class (to be offered in the Summer, 1995 term), sued to enjoin the course from using the materials or from using

federal funds to "counsel abortion in the PED 251 course materials." Mincone, the representative of a co-plaintiff party, the Organization of Senior Citizens and Retailors (OSCAR), filed in May, 1995 a law suit with eight causes of action: PED 251, under these theories, violates the strict religious neutrality required of public institutions by the NY State Constitution; burdens and violates state law concerning the free exercise clause of the NY State Constitution by "disparagement" of Judeo- Christian faiths and by promoting the religious teaching of Eastern religious with regard to sexuality; violates the federal First Amendment; violates the plaintiffs' civil rights guaranteed under Sec. 1983; teaches behavior that violate Sec. 130.00 of the NYS Penal Law (sodomy statutes); violates federal law concerning religious neutrality by singling out one "correct view of human sexuality"; disregards the duty to warn students of course content so they can decide whether or not to enroll in the course; endangers minors who may be enrolled in the course; and violates federal law enjoining abortion counseling.

This broad frontal attack on the course is virtually without precedent, as the plaintiff is not even enrolled in the course for credit, enjoined the course even before the term began and before he took the course as an auditor. While in all likelihood he will be denied standing, in that he has suffered no harm and has no cognizable claim, OSCAR could simply enroll a plaintiff to get over that hurdle. But the wide ranging claims, particularly those that allege religious bias, are so vague and poorly - formulated that it is difficult to believe they will survive.

However, Mincone may have a small point in his objections concerning the materials, if his point were to ridicule. Here, as I am not a health educator or scholar of sexuality, I confess this obvious lack of credentials. But the PED 251 materials do include a home "exercise" to investigate "self-exploration," that include a picture of a man masturbating and the following

instructions:

> Set aside a block of time (at least 1 hour for the entire exercise) when you will have privacy. . . . A good way to begin is with a relaxing bath or shower. You can start the self-exploration while bathing, washing with soap-covered slippery hands in an unhurried manner. ... You may wish to experiment with using a body lotion, oil or powder. After gentle stroking try firmer, massaging pressures, paying extra attention to areas that are tense. You might like to allow yourself some pleasurable fantasies during this time. For the next step, we recommend that you return to the genital self-examination exercises in Chapters 4 and 5. Once you have completed the exploration, continue experimenting with various kinds of pressure and stroking. Pay attention to what feels good.[42]

Other materials assigned also include films and pictures of persons performing sexual acts, assignments involving cross-dressing, and other exercises in sexuality. At the conference that led to this volume, I read directly from the lawsuit several portions of the PED materials, and I inadvertently elicited substantial laughter at my characterization of the materials; in truth, I was reading only to give the audience the sense of word choices and class assignments to which Mr. Mincone had objected, and I did caution using good judgment. But when I saw my remarks in the next week's Chronicle of Higher Education, they seemed much more prudish and OSCAR-ish than I had meant them to be.[43]

Therefore, I want to elaborate a bit, within the limits of this piece, so that I not only clarify what I think about classroom materials but convey it clearly. I begin with the premise that faculty members have the absolute right, within the limits of germaneness and institutional practice, to

assign whatever text they wish. Thus, subject only to the text being appropriate for the course (e.g., not assigning Updike's The Centaur for a math course or a math workbook for a course in legal ethics) and to academic custom (for example, all the freshman composition teachers being required to draw from an approved list of available texts), professors can pick whichever texts seem best for their courses. Sometimes, this means a compromise, as in using a central text supplemented by all the extra materials you wish were in the basic text, because not everyone can or is inclined to write their own book. Therefore, there could be materials assigned for purchase that are a compromise as the best available, or even superfluous materials that are not assigned because they are dated, not your style, or otherwise inappropriate. For example, this year I have been pressed into service to teach a new course, so I have recently reviewed over a dozen readers in the subject, not a single one of which is ideal for the class approach I had in mind. However, one (with a good teachers manual and statutory supplement) had the most updated regulatory materials so I chose it over other texts better suited for a problem-solving approach, which approach I preferred. The one I thought best-suited was written in 1989, too ancient a vintage for this fast-moving area of the law. However, the PED 251 syllabus clearly assigns the "self exploration" exercise, which includes the language I already noted, so this is not an example of superfluous text content.

My objection, if that is the right word, is a little like that of Joycelyn Elders, the former U.S. Surgeon General: I don't believe you can teach college students how to masturbate, inasmuch as they have likely been doing it instinctively, well before college credit is awarded for the activity. Again, I stress that this curriculum is not my metier, but I cannot help but wonder if this is a necessary homework assignment. Surely the filmstrips and materials have been chosen

carefully for a course that is known to be a lightening rod (by the earlier suit),[44] and if sex education and physiology faculty conscientiously choose these materials, that forms the contextual and professional judgment my theory requires. As AAUP General Counsel, I would have no qualms whatsoever in defending the NCCC course materials. They were picked by professionals with considerable expertise in this field; the course is widely accepted and regularly fully-enrolled; it does what it sets out to do: expose students to wide-ranging issues of sexuality; and the materials clearly put students on notice what the course would cover. Except for the personal and moral objections of the plaintiffs concerning the materials, this course is generically like any course. Context is all, in my formulation, as is professional authority to determine how it shall be taught. This case cannot succeed, or else we are all in trouble. But do we need this trouble?

Implications and Conclusions

These cases are fraught with implications for higher education practice, especially for teacher behavior. In Cohen, the Court could have gone in the opposite direction, as it had for Professors Silva and Levin, by stressing their academic freedom primarily rather than by balancing the competing interests. However, by characterizing the issues as ones of classroom control and students' learning environment, Professor Cohen's interests are trumped, at least with the admonishment. (His orders were to do essentially as Professor Silva was ordered by UNH to do: take counseling, alter his class style, etc.) And the court did suggest that the admonishment was mild: "A case in which a professor is terminated or directly censored presents a far different balancing question."[45] But does it? Can there be any doubt that Cohen considers himself "directly censored" by the formal complaint of one student? Was Levin censored by CUNY's "shadow section"? Is reading Hustler letters a good idea for a remedial English class?

While I believe the Court went too far in accommodating one "thin-skinned" student, one who dropped the course, two things strike me: an experience from long ago, and the difficulty of a satisfactory solution. When my mother began to attend college on a part-time basis (I am the oldest of 10 children) in 1964, I used to go with her to the University of New Mexico for her evening English class. One of the assignments was to attend a movie (I believe it was Fahrenheit 451), then showing at Don Pancho's Theater, an art house that has since closed and given way to a fast food Chinese joint several years ago. Now in those days, the Legion of Decency pledge, taken annually by all Catholics to promise we would avoid proscribed movies, was a big deal, especially for my mother, raised as a Southern Baptist, but converted to Roman Catholicism. My mother, while no fanatic, was pretty strictly observant in Catholic tenets, including this movie prohibition. Mortified that she could not attend the movie (or even go into the theater, a local proscription), she sought advice from Msgr. Joseph Charewicz, our Pastor at Our Lady of Fatima Parish -- where I was enrolled in eighth grade. I remember my mother taking me with her as she asked Msgr. Charewicz, an imposing, cigar-smoking traditionalist, what she should do. He made it clear that going to Don Pancho's and seeing a forbidden movie was unacceptable. She would just have to quit the course.

My mother, though, was an early advocate of alternative dispute resolution techniques and mediation (very often, between my more disciplinarily-minded father and me, so headstrong at 12 or 13 years old). She, like the plaintiff in Cohen, offered to write a paper on why she felt she could not complete the assignment. The professor agreed. I remember to this day how hard she worked at her old typewriter on that assignment, and that she received a B for the paper. She was very proud on all fronts, and even told Msgr. Charewicz how she had negotiated the good faith

compromise. Of course, I was pleased at her achievement (although I had hoped she would also take me to this salacious movie). Professor Cohen, who conceded his style wasn't for everyone, could have been at least as flexible as my mother's UNM English instructor. Faculty do not concede autonomy by reasonable compromise with our students. Rather, we gain cooperation and involve learners otherwise not available to us. I cannot help but contrast the different approaches taken for my mother and Cohen's student.

Finally, there is the issue of a solution to the conundrum of faculty autonomy and sexual harassment jurisprudence. The difficulty is acknowledging that a classroom can be a hostile environment in some instances. In the AAUP, we have hammered out a compromise attempt to preserve faculty autonomy and to acknowledge and deal with an environment so hostile that it can stifle learning opportunities:

STATEMENT OF POLICY

It is the policy of this institution that no member of the academic community may sexually harass another. Sexual advances, requests for sexual favors, and other speech or conduct of a sexual nature constitute sexual harassment when:

1. Such advances or requests are made under circumstances implying that one's response might affect academic or personnel decisions that are subject to the influence of the person making the proposal; or

2. Such speech or conduct is directed against another and is either abusive or severely humiliating, or persists despite the objection of the person targeted by the speech or conduct; or

3. Such speech or conduct is reasonably regarded as offensive and substantially impairs the

academic or work opportunity of students, colleagues, or co-workers. If it takes place in the teaching context, it must also be persistent, pervasive, and not germane to the subject matter. The academic setting is distinct from the workplace in that wide latitude is required for professional judgment in determining the appropriate content and presentation of academic material.[46]

In our search for the perfect, clarifying epiphany -- one that will illuminate once and for all examples that can guide behavior -- this proposed policy falls short: what is "severely humiliating"? Is it more than "humiliating"? How much more? How long does harassment have to persist in order to be found "persistent"? Isn't the classroom a "workplace" for faculty? But we are all smart people, highly educated, and experienced in the ways of teaching. To me, in interpreting academic standards, it isn't surprising that things work so badly, but that they work so well.

My own experiences as a student and professor lead me to believe that any comprehensive theory of professorial authority to determine "how it shall be taught" must incorporate a feedback mechanism for students to take issue, voice complaints, and point out remarks or attitudes that may be insensitive or disparaging. At a minimum, faculty should encourage students to speak privately with them to identify uncomfortable situations. Professor Bishop asked his students to point out inconsistencies between his Christian perspectives and his lifestyle. This is excessive, and could itself provoke anxiety on the part of both Christian and non-Christian students. But a modest attempt to avoid stigmatizing words and examples is certainly in order for teachers, and schools should have in place some mechanism to address these issues and resolve problems. I

cringe when I see exam questions that consign Jose, Maria, or Rufus to criminal questions, or when in-class hypotheticals use "illegal aliens" or sexist examples and stereotypes to illustrate important legal points. Such misuse may be especially prevalent in fact patterns involving rape and consent.[47] Our students have a right to expect more thoughtful pedagogical practices.

I can imagine colleagues wincing at the perceived political correctness axe being ground and uttering dismissive remarks concerning self-censoring. I believe in self-censoring, however. Even if it sacrifices the perfect bon mot or ideally placed riposte, this seems a modest price to pay to avoid making a hurtful remark or employing an inappropriate example. After all, these prevent understanding and get in the way of learning. Nor does my highly protective notion of professorial academic freedom of necessity flatten the opportunity for self-expression among students or "dumb down" the discussion. Faculty and students have a great amount of autonomy and opportunity for self-expression in class, and a self-imposed code of professorial teaching conduct is no great loss of autonomy or essential authority. Academic freedom is one of the great glories of the higher education tradition as we know it, and we should be vigilant to see that it is not weakened, either by body blows from without, or by careless and self-inflicted wounds from within.

Endnotes

Michael A. Olivas

1. Sweezy v. New Hampshire, 354 U.S. 234, 262, 77 S.Ct. 1203, 1218 (1957). (Frankfurter, J., concurring) (quoting a statement of a conference of senior scholars from the University of Capetown and the University of Witwatersrand, South Africa): "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail `the four essential freedoms' of a university--to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."

2. *See*, for example, Richard Delgado, THE RODRIGO CHRONICLES (1995), and RICHARD DELGADO, ed. CRITICAL RACE THEORY (1995), for an explanation of this developing field of legal criticism.

3. *See, e.g.*, Laura F. Rothstein, *Students, Staff and Faculty with Disabilities: Current Isues for Colleges and Universities*, 17 J. C. & U. L. 471 (1991).

4. An early president of Williams College, Mark Hopkins, was reputed to be an extremely inspirational teacher: "The ideal college was Mark Hopkins on one end of the log and a student on the other." FREDERICK RUDOLPH, MARK HOPKINS AND THE LOG: WILLIAMS COLLEGE, 1836-1872, at 227 (1956).

5. *See*, for example, Michael A. Olivas, *Unaccompanied Refugee Children in the United States: Detention, Due Process, and Disgrace*, 2 STAN. L. AND POL. REV. 159 (1990) (review of federal policy on alien children detention).

6. *See generally*, Kimberle Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Margaret Montoya, Mascaras, Trenzas, *Grenas: Un/masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L. J. 185 (1994).

7. Derrick Bell, *The Price and Pain of Racial Perspective*, in Michael A. Olivas, THE LAW AND HIGHER EDUCATION: CASES AND MATERIALS ON COLLEGES IN COURT, 1038 (1989).

8. Doe v. University of Michigan, 721 F.Supp. 852 (E.D. Mich. 1989).

9. MIT philosophy professor Judith Thompson makes a similar point concerning belief systems in faculty hiring. In an interesting essay on the appropriate norms for considering scholarly orthodoxies, she considers the candidacy of an astrology expert and rejects the field of study as not sufficiently scientific:

"As a member of the committee, I was under a duty precisely to bring my past experience to bear on, among other questions, the question what fields are worth investing in. Given my past experience, I would have failed in that duty if I had refrained from voting against astrology."

Judith Jarvis Thompson, *Ideology and Faculty Selection*, LAW & CONTEMP. PROBS. Summer 1990, at 155, 160

10. *Ohio Professor Suspected of Theft from Vatican*, CHRON. OF HIGHER EDUC., June 9, 1995, A 6 (university professor alleged to have torn out pages from valuable text and to have tried to sell them to private collector).

11. The president of American University, Richard Berendzen, installed a private phone in his desk from which he called women and made harassing and obscene phone calls. *See* Neil Lewis, *University Chief's Ouster is Tied to Investigation of Obscene Calls*, New York Times, April 25, 1990, at A19.

12. I would agree that the minimum protection is articulated by Connick v. Myers, 461 U.S. 138 (1983).

13. David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*," LAW & CONTEM. PROBS. Summer 1990, at 244 (footnotes omitted).

14. *Id.*, at 246.

15. Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom,"* STAN. L. REV. 1835 (1993). In this chapter, I borrow from the earlier law review article.

16. Lynch v. Indiana State Univ. Bd. of Trustees, 177 Ind.App. 172, 378 N.E.2d 900, (Ct. App. 1978), *cert. denied*, 441 U.S. 946, (1979).

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

18. 153 Ariz. 461, 737 P.2d 1099 (1987).

19. Dambrot v. Cent. Mich. Univ., 839 F. Supp. 477 (E. D. Mich. 1993) (racial epithet was not a matter of concern). As an example of changing norms, a college basketball coach was dismissed for repeatedly berating his athletes. Debra E. Blum, *Abrupt Dismissal of Berkeley's Coach Stuns the College Basketball World*, CHRON. OF HIGHER EDUC., Feb. 24, 1993, at A35.

20. McConnell v. Howard Univ., Civ. A. No. 85-0298-LFO, 1988 WL 4237 (D.D.C. Jan. 5, 1988).

21. 770 F. Supp. 895 (S.D.N.Y. 1991), *aff'd in part, vacated in part*, 966 F.2d 85 (2d Cir. 1992).

22. Silva, 888 F.Supp.293(1994).

23. *General Report of the Committee on Academic Freedom and Academic Tenure* (1915), *reprinted in* LAW & CONTEMP. PROBS., Summer 1990, at 293.

24. Braxton, J., A. Bayer, and M. Finkelstein, *Teaching Performance Norms in Academia*, 33 RES IN HIGHER EDUC. 533 (1992), at 535-536.

25. Cohen v. San Bernadino Valley College et al., 883 F. Supp.1407 (1995).

26. Mincone v. Nassau County Community College, 95 F. Supp. 1879 (1995);

see also, *The Eighteenth Alexander Miekeljohn Award*, ACADEME, July/August 1993, 57-61 (report of AAUP award to President of NCCC, including his analysis of the dispute).

27. 484 U.S. 260 (1988). For example, Bishop v. Aronov turned upon Hazelwood, 926 F.2d 1066, 1073 (11th Cir. 1991).

28. *See* J. Victor Baldridge et al., *The Impact of Institutional Size and Complexity Upon Faculty Autonomy*, 44 J. HIGHER EDUC. 532 (1973); J. Victor Baldridge et al., POLICY MAKING and EFFECTIVE LEADERSHIP (1978).

29. Cohen, *supra* note 25, at 1411; slip op. at 1-6.

30. 926 F.2d 1066 (11th Cir. 1991).

31. Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

32. Cohen v. San Bernardino Valley College et al., 1411.

33. 461 U.S. 138 (1983).

34. 114 S. Ct. 1878 (1994).

35. 115 S. Ct. 1003 (1995).

36. Cohen, *supra* note 25, at 1415-16.

37. *Id., 1418.*

38. *Id.*, 1418-20.

39. *Id.*, 1420.

40. *Id.*, 1422.

41. Russo v. Nassau County Community College, 81 N.Y. 2d 690, 623 N. E. 2d 15, 603 N.Y.S. 2d 294 (1993) (college required to produce course materials).

42. Mincone, *supra* note 26, at ____; slip op. at _____.

43. Wilson, Robin. *Teacher or Advocate*? CHRON. OF HIGHER EDUC., June 16, 1995, at A 17, A 18 (report of MLA - sponsored conference on Advocacy).

44. Russo, *supra* note 26.

45. Cohen v. San Bernardino Valley College et al 1422.

46. *See*, AAUP Report, *Sexual Harassment: Suggested Policy and Procedures for Handling Complaints*, ACADEME, July/August 1995, at 62.

47. *See* James J. Tomkovicz, *On Teaching Rape: Reasons, Risks, and Rewards*, 102 YALE L.J. 481 (1992). (explaining the difficulty of teaching rape law); *see also*, Clarence Page, *Where Narrow Minds Stifle Debate*, CHIC. TRIB., Dec. 23, 1990, at 3C (citing incident in which New York University Law School withdrew--and later reinstated--a moot court problem involving a lesbian mother's custody battle because students did not want to take the father's side in the case). A new pretrial discovery text includes an entire chapter that constitutes a case-study of a woman convicted of petty theft being processed into jail for an outstanding parole violation. THEODORE BLUMOFF, MARGARET JOHNS & EDWARD IMWINKELRIED, PRETRIAL DISCOVERY: THE DEVELOPMENT OF PROFESSIONAL JUDGMENT (1993). There is a graphic scenario involving a strip search, Taser guns, leering guards, and a miscarriage from the Taser shocks. The name of the criminal, the only recognizably-ethnic name in evidence, is "Maria Garcia."

Friday, February 14, 1997
2:00 -- 3:30 p.m.

Concurrent Session

CRITICAL ISSUES INVOLVING THE UNIVERSITY AND THE FEDERAL GOVERNMENT

Faculty:

Beverly E. Ledbetter
Sheldon E. Steinbach

BEVERLY E. LEDBETTER
Vice President and General Counsel
Brown University
Providence, Rhode Island

Beverly E. Ledbetter has been Vice President and General Counsel for Brown University since 1978. Prior to her employment at Brown University, she was Legal Counsel for the University of Oklahoma and Adjunct Professor at the University of Oklahoma College of Law and at the Center for Higher Education, College of Education. She is on the faculty of the Management Development Program at Harvard University and the HERS Program at Wellesley. Ms. Ledbetter is the current Chair of the Rhode Island Rhodes Scholarship Committee. She has also served as Associate Judge, Providence Housing Court, in Rhode Island. Ms. Ledbetter was a member of the Joint HEW/Labor Committee on Equal Opportunity in Higher Education and continues to hold several national appointments. A past-president of the National Association of College & University Attorneys, she is counsel to the Educational Advancement Foundation, Chairman of the Non-Profit Section of the American Corporate Counsel Association. She is a member of the Board of Fellows, Rhode Island Bar Foundation and a Fellow of the American Bar Foundation. A member of the American, Federal, and Rhode Island Bar Associations, she has served on the Civil Justice Advisory Group to the U.S. District Court, District of Rhode Island, House of Delegates for the Rhode Island Bar Association, Board of Advisors, Institute for Educational Management, Harvard University, and the Board of Directors, Visions Foundation, Smithsonian Institute. Ms. Ledbetter received a B.S. from Howard University and a J.D. from the University of Colorado. She lectures frequently on higher education issues including employment, civil rights, sexual and racial harassment, and federal regulatory compliance.

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Sheldon Elliot Steinbach serves as Vice President and General Counsel, Office of the General Counsel, for the American Council on Education. His previous work experience includes the general practice of law as an associate in a seventeen-person law firm in Baltimore, Maryland (1967-1969); administrative assistant to the Dean of the General Extension Division, University of Minnesota (1966-1967); summer intern, Office of the New York County District Attorney (1965) and professorial lecturer in political science at The George Washington University Graduate School (1973-74). Mr. Steinbach is a member of the Maryland Bar, the District of Columbia Bar, and the American Bar Associations. He is also a member of the National Panel of the American Arbitration Association. Other activities include: reporter for the Law Enforcement Task Force of the Mayor's Advisory Commission on Crime, Baltimore, 1967-69; and the Board of Trustees, Mary Baldwin College, 1985 to 1990. His articles have appeared in numerous law reviews and professional journals. He holds a B.A. from Johns Hopkins University; an LL.B. from Columbia University Law School, and a M.A.P.A. from the Graduate School of Public Administration, University of Minnesota.