Academic Freedom and Community College Faculty

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The principle of academic freedom protects expression both inside and outside the classroom. It also protects scholarship and faculty research, which are typically not a part of any community college mission. Community college instructors generally do not conduct scholarly inquiry, and tend not to be "excessively concerned with disciplinary purity." Arthur M. Cohen and Florence B. Brawer, The American Community College 326 (3d ed. 1996). Academic freedom is most relevant to the function of community college instruction, then, when it protects what an instructor says and how she says it. Moreover, since most community colleges are public institutions, the First and Fourteenth Amendments to the U.S. Constitution will complement academic freedom's goal of shielding an instructor against wrongful institutional penalty over the content of what he says.

Court rulings and authoritative writings on the topic of academic freedom--most prominently, the various statements by the American Association of University Professors (AAUP)--do not hold that its tenets should be applied any differently in a community college than in a four-year institution. The protections that academic freedom seeks to afford are fundamental to what any postsecondary teacher does. Still, community colleges are different from four-year institutions in many ways, and some of the differences inevitably bear on academic freedom.

I. Academic Freedom

Courts have long acknowledged that both academic freedom and the First Amendment aspire to encourage the robust exchange of ideas among faculty, and between faculty and students, at public colleges and universities. Whether, owing to academic freedom, the First Amendment to the U.S. Constitution necessarily affords a uniquely strong protection over speech in the academy, however, is open to question.

A. Policy considerations

The modern history of academic freedom begins with controversy at Stanford University near the end of the nineteenth century. Having assumed leadership of the

university following the death of her husband, Mrs. Jane Lothrop Stanford ordered the dismissal of two members of the faculty, Edward Ross and H.H. Powers, over the content of public statements they had made. Ross, a renowned economics professor, had presented several speeches in support of William Jennings Bryan and his Populist campaign against the gold standard. Powers not only echoed Ross's views in a speech of his own, but also made public remarks regarding religion to which Mrs. Stanford (a devout Roman Catholic) took particular offense.

Years later, such notable academics as Arthur Lovejoy (a former colleague of Ross and Powers at Stanford), Columbia economist Edwin R.A. Seligman, and John Dewey formed the AAUP. That organization assumed as its initial major task the drafting of a Report on Academic Freedom and Tenure. Thomas I. Haskell, *Justifying the Rights of Academic Freedom, in* The Future of Academic Freedom 48-58 (Louis Menand ed. 1996).

The Report served as the basis for what has become no doubt the AAUP's most significant pronouncement: the 1940 Statement of Principles on Academic Freedom and Tenure. While the organization has issued supplemental statements on the topic of academic freedom (most recently the role of academic freedom in the use of an institution's information technology systems), the Statement has remained largely unchanged over the last sixty-four years.

In essence, the Statement of Principles details three fundamental bases of academic freedom in a college or university:

•Teachers are entitled to "full freedom in research and the publication of the results"; this entitlement, however, is subject to the "adequate performance of their other academic duties";

•Teachers are likewise entitled to freedom in the classroom "in discussing their subject," but they should not raise in the classroom issues that have "no relation to their subject"; and

•When they are writing or speaking as citizens, teachers "should be free from institutional censorship or discipline." As scholars and "educational officers," however, they should also be mindful that "the public may judge their profession and their institution by their utterances." (The 1940 Statement of Principles on Academic Freedom

and Tenure, as well as annotations and interpretive comments, can be found at www.aaup.org).

What makes the Statement significant is the extent to which American colleges and universities adhere to its contents in their own faculty employment policies. Many policies import entire portions of its language on both academic freedom and tenure; others incorporate the Statement by reference.

B. A "special concern" of the First Amendment

The two significant U.S. Supreme Court cases addressing academic freedom's link to the First Amendment arose in the anti-Communist political climate of the mid-twentieth century. *Sweezy v. New Hampshire,* 354 US 234 (1957) involved an inquiry by the state Attorney General against Sweezy, who had presented a guest lecture at the University of New Hampshire. Sweezy refused to answer the Attorney General's questions regarding the subject of his lecture, whether he had advocated Marxism during the lecture, and allegations he had opined that "Socialism was inevitable in America." Although the New Hampshire court cited Sweezy for contempt, the U.S. Supreme Court subsequently overturned the ruling and invalidated the New Hampshire statute that authorized the investigation.

Agreeing with Sweezy's claim that the state proceeding had violated his rights of expression under the First Amendment, the Court (through Chief Justice Warren) cautioned that the area of academic freedom is one "in which government should be extremely reticent to tread." 354 US at 250. Faculty and their students, said Chief Justice Warren, "must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Ibid*

More than a decade later, the Court revisited academic freedom and clarified the linkage between academic freedom and free speech under the Bill of Rights. It stopped short, however, of recognizing an independent, First Amendment right for college and university faculty. In *Keyishian v. Board of Regents of University of State of New York,* 385 US 589 (1967), several faculty faced non-renewal of their teaching contracts over their refusal to sign a loyalty oath avowing that they were not and had never been Communists.

The Court found that the state's loyalty oath requirements violated (among other things) the First Amendment. In language that would often be later quoted in affirmative action cases, Justice Brennan observed for the majority that the "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues . . . '"; and noting that academic freedom "is of transcendent value to all of us and not merely to the teachers concerned," he deemed academic freedom a "special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." 385 US at 603.

II. Academic Freedom in the Community College

No court has carved out a discrete concept of academic freedom for community colleges; faculty are afforded neither greater nor lesser academic freedom protections merely because they teach at such schools. Nevertheless, a survey of cases dealing with academic freedom in the community college setting shows the varying degrees to which that principle serves as a real factor in the courts' ultimate decisions. Those cases usually arise in either a non-retaliation context (where academic freedom is asserted more as a higher education policy consideration) or a retaliation context (in which an instructor typically claims to have been penalized over her conduct or the content of her expression). In both contexts, the importance of academic freedom in these cases' final resolutions is measured at best.

The most prominent of the non-retaliation academic freedom cases involving a community college is the U.S. Supreme Court's decision in *Minnesota State Board for Community Colleges v. Knight*, 465 US 271 (1984). Under consideration in *Knight* was the applicability of Minnesota's statutory scheme for public employees' collective bargaining to the state's community college system. The law required public employers to "meet and negotiate" regarding essential conditions of employment (*i.e.*, compensation and hours of employment) and to "meet and confer" over all other employment conditions. For both processes, the law required employees to have an exclusive representative in meeting with the public employers.

In accordance with the statute, the Minnesota community colleges in *Knight* recognized the system-wide faculty association as the exclusive representative of faculty. A group of community college faculty who were not members of the association claimed

that this exclusive recognition violated their speech and associational rights under the First and Fourteenth amendments to the US Constitution. The Court, however, upheld the colleges' recognition of the association as the exclusive bargaining agent.

Writing for the majority, Justice O'Connor acknowledged that the Court had previously "recognized that infringement of the rights of speech and association guaranteed by the First and Fourteenth Amendment 'in the case of teachers brings the safeguards of those amendments vividly into operation.'" Even if those rights assume a "special meaning in an academic setting," she concluded, "they do not require government to allow teachers employed by it to participate in institutional policymaking. Faculty involvement in academic governance has much to recommend it as a matter of academic policy, but it finds no basis in the Constitution." 465 US at 288-289.

Justice Brennan (who had authored the majority opinion in *Keyishian*) dissented, arguing that the Minnesota community colleges' practice offended academic freedom. Citing the "special concern" holding of *Keyishian*, he opined that "a direct prohibition of some identified faculty group from submitting their views concerning academic policy questions for consideration by college administrators would plainly violate the principles of academic freedom enshrined in the First Amendment." 465 US at 297.

Institutional academic freedom was the basis of the Second Circuit's recognition of a limited privilege for faculty tenure and promotion discussions in *Gray v. Board of Higher Education, City of New York*, 692 F.2d 901 (2d Cir. 1982). After several years of teaching at LaGuardia Community College, Gray applied for, but was denied, promotion to an assistant professor position (which would have accompanied a grant of tenure). College policy assigned responsibility for such decisions to a college-wide committee. Gray's lawsuit alleged a civil rights violation under 42 USC §1983, and he sought evidence in discovery of the committee deliberations. College officials, however, asserted that they could not be compelled to disclose evidence on those deliberations pursuant to a common law "academic freedom privilege."

The court in *Gray* agreed with the college's claim, but only to a point. It held that such a privilege could protect the deliberations of a tenure or promotion committee only if the applicant for tenure receives a "meaningful written statement of reasons" from the committee "and is afforded proper intramural grievance procedures." The court found

this approach to be "an appropriate balance between academic freedom and educational excellence on the one hand and individual rights to fair consideration on the other, so that courts may steer the 'careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior . . . .'" 692 F.2d at 907-908.

In retaliation cases subsequent to *Knight* and *Gray* arising out of a community college setting, academic freedom's status as a "special concern" of the First Amendment proves to be of diminishing importance. *State Board of Community Colleges and Occupational Education v. Olson*, 687 P.2d 429 (Colo. 1984) was a claim by a journalism instructor at Pikes Peak Community College. In the lawsuit, the instructor purported to represent not only herself, but also students who had served on the staff of the college's student newspaper (for which the instructor also served as faculty advisor). The newspaper was funded exclusively by mandatory student activity fees that the student senate allocated (with the approval of college administrators). When it concluded that the newspaper was not representative of the student body's views, the student senate cut off the newspaper's funding.

The instructor claimed a violation of both the students' and her own First Amendment rights; with regard to the latter, she asserted that cutting off the funds violated "her constitutional right to utilize the student newspaper as a chosen teaching method for instruction in newspaper design." The Colorado Supreme Court acknowledged that academic freedom allows teachers to "be free to engage in the exchange of diverse ideas on controversial topics, both within and outside the classroom, without risking the imposition of sanctions as a result of their ideological expressions." 687 P.2d at 438. The court noted that, at the same time, the institution must have the discretion to determine how resources can best be used to educate students. Since the student newspaper was not a part of the college's curriculum, the instructor's "freedom to choose an appropriate method for classroom presentation of the idea-content of her journalism courses remains unfettered, as does her ability to select those ideas and principles that she believes will enrich the educational experience of her students." 687 P.2d at 439-440.

In *County of Renesselaer v. Hudson Valley Community College Faculty Association*, 262 A.D. 843, 692 N.Y.S.2d 758 (1999), the college fired a tenured instructor for awarding each of the students in his electronics communication class a grade of 100% "in lieu of an exam which had been scheduled but was not given." The instructor was also alleged to have sold electronics equipment to his students "in exchange for special considerations." The New York appellate court upheld the termination, and rejected the instructor's claim that academic freedom protected his right to determine his students' grades; it agreed with the determination below that "because the grades in question were not evaluative '[t]his case is not about academic freedom'." 692 N.Y.S.2d at 761.

Finally, in *Greer v. Spartansburg Technical College*, 338 S.C. 76, 524 S.E.2d 856 (1999), the college accepted a suggestion by Greer, a prospective adjunct instructor, that it hire him to teach a history course on "the impact of economic changes on conditions in South Carolina." Greer, however, circulated his own pamphlet to advertise the course; the pamphlet included the following language: "Do you know how labor laws have been created and how they affect you? . . . Come learn the history of working people in the south." In a more dubious move, a group called the Carolina Alliance for Fair Employment (CAFE) (with whom Greer apparently enjoyed an affiliation) purported to claim responsibility for the class when, in its monthly newsletter, it referred to the course as one "we will be offering this winter at Spartansburg Tech." When the college president saw the CAFE newsletter, he decided he had had enough and cancelled the course.

Relying on *Keyishian*, Greer claimed that the college had denied him his associational rights under the First Amendment to have CAFE advertise the course. The South Carolina Court of Appeals rejected the claim, however, and agreed with the trial court's determination that Spartansburg Tech had cancelled the course "primarily because of Greer's deception rather than his affiliation with CAFE." 524 S.E.2d at 859.

No doubt the questionable tone of defenses raised in the name of academic freedom serves to weaken the value of such an all-important protection. It is indeed difficult to see how manifest grading infractions (as in *Hudson Valley*) or reckless promotional claims (as in *Greer*) can be justified seriously under academic freedom. Whatever the reason, the mere assertion of the doctrine--its status as a "special concern"

of the First Amendment notwithstanding--will likely not be enough by itself to overturn an institutional penalty that leads to litigation.

III. The First Amendment

Courts have long held that the First and Fourteenth Amendments afford public employees some level of protection for work-related speech. Since most community colleges are public institutions, it is essential, then, for community college leaders to appreciate the extent to which public employees enjoy First Amendment protection for their workplace speech--especially when those employees might also claim the protection of academic freedom under their institutional policies.

A. Matters of public concern and balancing

In *Connick v. Myers*, 461 US 138 (1983), the U.S. Supreme Court established a test to determine the extent to which the First Amendment protects workplace speech of public employees. The case involved not academics, but lawyers--specifically, lawyers employed in the office of the U.S. Attorney in New Orleans. There, an Assistant District Attorney who was unhappy about her boss's decision to transfer her to a different section of the criminal court circulated a questionnaire among her co-workers. The questionnaire solicited opinions on (among other things) the office transfer policy, office morale, and the level of confidence in supervisors. The U.S. Attorney ultimately fired the lawyer because of her refusal to accept the transfer.

The *Connick* Court developed a two-step process for determining whether an employee's workplace speech is protected by the First Amendment. That test incorporated elements of an earlier test the Court had announced in *Pickering v. Board of Ed. of Township High School Dist. 205*, 391 US 563 (1968). The first step of the process is a determination of whether the expression in question constitutes speech that is a matter of public concern. Under *Connick*, whether an employee's speech "addresses a matter of public concern must be determined by the content, form, and context of a given statement . . . ." 461 US at 147-148. This first step is a threshold inquiry; if the speech at issue does not touch upon a matter of public concern, there is no First Amendment protection and, therefore, no need for further review. If, however, the speech does bear on a matter of public concern, the test then proceeds to the next step: "'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public

concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" 461 US at 142. Whether the speech is protected by the First Amendment depends on how the balance finally tilts.

In *City of San Diego v. Roe*, 543 US ___ (2004) (which issued last December), the U.S. Supreme Court defined the public policy rationale in affording First Amendment protection for some workplace speech as a "recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public." In *City of San Diego*, the Court also defined "public concern" as "something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."

B. The Connick *test and academic freedom*

Applying the *Connick* test to a postsecondary institution raises the question of just how much of a First Amendment "special concern" is academic freedom. If the issue is whether the First Amendment protects workplace speech, does the *Connick* inquiry effectively require a special accommodation if the workplace is the community college campus, and the speaker is a member of the faculty? Three recent cases involving community colleges may shed some light on the role of academic freedom in the *Connick* process.

In *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001), Bonnell, an English Language and Literature instructor at Macomb Community College in Michigan, challenged his disciplinary suspension over alleged violations of the college sexual harassment code. The college had received repeated complaints about Bonnell's use of sexual terms in his lectures. One student complained that she had never before "encountered an English teacher who used the word f*** so openly," and who employed vulgar terms in reference to certain portions of the female anatomy and various sexual acts. Despite repeated efforts by the administration to admonish Bonnell, the complaints continued, and he even distributed to other faculty at the college a satirical essay (entitled "An Apology: Yes, Virginia, There is a Sanity Clause") which contained vulgarities of a similar vein.

The Sixth Circuit concluded that nearly all of Bonnell's expressions--particularly the contents of "An Apology"--addressed matters of public concern under the first step of the *Connick* test. The court rejected Bonnell's claim, however, that his own academic freedom interests were sufficient to outweigh the college's concerns in "promoting the efficiency of the public services it performs through its employees." Specifically, it noted that the college was "legally required to maintain a hostile-free learning environment and must strive to create policies which serve that purpose. While a professor's rights to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute to the point of compromising a student's right to learn in a hostile-free environment." 241 F.3d at 823-824.

The same year it issued *Bonnell*, however, the Sixth Circuit considered academic freedom under both prongs of the *Connick* test in a ruling favorable to the instructor. In *Hardy v. Jefferson Community College et al*., 260 F.3d 671 (6th Cir. 2001), an adjunct instructor urged students to consider "how language is used to marginalize minorities and other oppressed groups in society," and asked students to identify examples of such terms. Among the examples suggested by several students were racist and sexist epithets, and the instructor's discussion in class included use of those words. Following a complaint by one student, the instructor announced that use of any "abusive" language would be thereafter prohibited; he also apologized to the complaining student. Nevertheless, after a subsequent meeting later with an individual whom the court in its opinion described as a local "civil rights activist," the college president informed the instructor that "there were no classes" for him to teach the following semester.

The Sixth Circuit concluded that the instructor's language satisfied both elements of the *Connick* test. As to the threshold inquiry, the court acknowledged the importance of academic freedom: "Because the essence of a teacher's role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court's broad conception of 'public concern.'" 260 F.3d at 679. The court also attached importance to academic freedom in reaching the balancing stage of the *Connick* test as well: "In balancing the competing interests involved, we must take into account the robust tradition of academic freedom in our nation's post-secondary schools. .

. . The Court has long recognized that educational institutions occupy a unique place in First Amendment jurisprudence." 260 F.3d at 680.

The decision that most clearly casts doubt over the continued viability of academic freedom is *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000). While the case is not a retaliation case, and does not even concern expression, its holding undermines academic freedom's "special concern" status. At issue in *Urofsky* was a Virginia statute prohibiting public employees' use of publicly-owned or -leased computer equipment "to access, download, print or store any information . . . having sexually explicit content." The statute also defined "sexually explicit content" to include specific acts of sexuality beyond those typically considered obscene. Even though the statute permitted access to such materials "in conjunction with a bona fide, agency-approved research project," several faculty members from Virginia community colleges and universities nevertheless challenged the statute under the First Amendment, arguing that it particularly violated their academic freedom rights.

While the Fourth Circuit acknowledged that the First Amendment protects not only expression of opinion but access to information as well, the court was nothing short of skeptical over any unique significance the law might afford the principle of academic freedom. It observed that the U.S. Supreme Court "has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom . . . The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs." 216 F.3d at 412.

The court then found it virtually self-evident that the faculty's ability to access "sexually explicit content" from their office computers did not touch upon a matter of public concern, and that their claim therefore failed the threshold stage of the *Connick* test. Most significantly, however, the court concluded that "the best that can be said for the [faculty's] claim that the Constitution protects the academic freedom of an individual professor is that teachers were the first public employees to be afforded the now-universal protection against dismissal for the exercise of First Amendment rights." 216 F.3d at 415.

Many in the academy would deem the Fourth Circuit's findings almost heretical. For purposes of the First Amendment, according to *Urofsky*, all public workplaces are the same; there is nothing special about faculty speech at the public postsecondary institution. In light of such a holding, it might be difficult to find any legal importance in the concept of academic freedom.

IV. Conclusion

In decisions since *Sweezy* and *Keyishian*, the role academic freedom plays in litigation over faculty issues has depended more on each case's unique facts, rather than the inherent force of the doctrine itself. Academic freedom will figure into judgments that favor the faculty only in the presence of other compelling circumstances. For faculty, then, the strength of academic freedom will come not from its status as a "special concern" of the First Amendment, but rather from its prominence in an institution's faculty policies.