Academic Freedom – En American Viewpoint

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The Elusive and Unenforced Search for Balance

Thank you for inviting me to speak at this Conference, at which I am honored to be one of the few non-academics. I hope, despite my poor career choice, to present an informed view on academic freedom, and to comment on current American controversies as they impact on Israel, and particularly, the so-called Title VI legislation dealing with Middle East area study centers.

I.

Academic freedom is not explicitly protected by the American Constitution in terms. It is, rather, one aspect of the First Amendment's overall protection of speech. Although originally binding only on Congress, the guarantee of freedom of speech now applies to state and local governments and their institutions, including public universities.

Private universities, which are not restricted by the Constitution, are not legally bound to respect academic freedom. Indeed, a case could be made that an official policy requiring private university compliance with a policy of academic freedom would intrude on the First Amendment freedoms of institutions of higher learning—say a religiously-affiliated college—to insist on their own orthodoxies. Although this is so in theory, it is not true in practice. All, or almost all, private universities guarantee academic freedom as a matter of institutional policy.

Furthermore, all, or almost all, institutions of higher learning are accredited by private, but officially recognized, regional accrediting boards. Accreditation is necessary both to be eligible for various programs of government financial

assistance for universities and their students and to insure that the degrees issued by the institution are respected by employers and other schools. These bodies typically require that institutions protect academic freedom.

Beyond these self- or externally-imposed obligations, universities have truly assimilated the idea of academic freedom into their very identity. Academic freedom is an article of faith—one might say—in the American academy.

Universities have not always been committed to academic freedom. The growth of academic freedom into its contemporary form runs parallel to the process of secularization of American higher education. All early universities were sectarian and policed religious orthodoxy. Academic freedom emerged only as the institutions became more secular, and as they emulated 19th century German academic institutions where academic freedom was the norm.

During the World War I and the McCarthy years many universities—and especially their trustees—joined the pro-war and anti-Communist hysteria. In more recent years "political correctness" with regard to ethnic, racial and sexual minorities, has sometimes clashed with claims of academic freedom, taking the form of "student speech codes," most of which have failed to pass constitutional muster.

Today, all important institutions of higher learning in the United States are in theory committed to academic freedom. The content of that freedom is developed in judicial decisions applying the Constitution (and, in some few cases, in interpreting faculty contracts or university rule books having the force of contracts) and in the magisterial 1940 Statement of Principles on Academic Freedom issued jointly by the American Association of University Professors (AAUP) and the group now known as the Association of American Colleges and Universities.

In some measure, that Statement, and various interpretations of it issued by AAUP's famous Committee A, read like a collective bargaining agreement, but it is

far more than that. Good parts of it, as I shall discuss, have in fact been constitutionalized.

The AAUP guidelines provide in relevant part:

> (a) Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties ….
>
> (b) Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.
>
> (c) College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

(Footnotes omitted.)

To its credit, AAUP interpreted its academic freedom principles to forbid academic boycotts based on national origin. The freedom to teach must include the

right to interact with academics wherever such interaction would advance the pursuit of knowledge. Thus, it was quickly and sharply critical of the AUT boycott. That criticism was certainly important in helping create an atmosphere in which the AUT boycott quickly became unacceptable to the global academic community.

Nowhere in the AAUP statement on academic freedom is there stated any obligation on faculty to accurately reflect the state of knowledge in the field being taught, or the range of views on a particular issue. On the contrary. The AAUP (1987) Statement on Professional Ethics announces that the "primary responsibility" of professors is to seek out and state the truth "as they see it"—language that is susceptible to a reading that reporting others' views is not a professional responsibility. Nor is there any ban on a teachers indulging in polemics within their assigned field.

This is strange. A political diatribe by a physics professor is clearly understood as such by even the most naïve student. A political diatribe by a political scientist might be seen as "the truth" by students. Yet only the former is forbidden.

Just last month, one association representing a large swath of American higher education, the Association of American Colleges and Universities (AACU), responding in large part to criticism from the political right, acknowledged that "there is an additional dimension of academic freedom that was not well developed in the original principles," and "that has to do with the responsibilities of faculty … for educational progress. Those responsibilities include teaching various points of view and teaching students how to critically evaluate those differing points of view." It remains to be seen what reception this AACU statement will receive.

Another strand of the doctrine—that of institutional autonomy or university self-governance—is hardly mentioned in the 1940 statement. It is,

however, present in the antecedent 1915 statement issued upon the founding of the AAUP. This doctrine reserves to the university—acting through either its faculty collectively or its administration—the right to determine its own academic policies, including policing what is taught and when.

An obligation of "balance" raises problems of its own. How much balance? What of truly marginal or idiosyncratic positions? Must evolution be balanced with intelligent design, or holocaust studies with holocaust denial (a position that now enjoys the sponsorship of as learned as expert as the President of Iran)? Who is to enforce the norm? If these are to be excluded, can the theory that justifies exclusion be cabined so that it does not exclude any deviation from orthodoxy? Does the obligation of balance cover every point taught in the course, or only major disputes? How does one grapple with the problem of class time? It is difficult enough to teach a subject from even one point of view. Where will the time come from to ensure balance?

The AAUP statement on ethics does recognize that students are entitled to ask questions of their teachers, challenge assertions by their teachers, and be treated respectfully. In the American historical experience, students' right to freedom of inquiry was recognized before the right of faculty was established. Various AAUP documents warn against teachers using their classrooms to indoctrinate on extraneous subjects. But nowhere do they require a fair treatment of opposing points-of-view which are not extraneous, but are related to a course. How are students to know other points of view exist—say on the causes of medieval anti-Semitism—if their teachers do not tell them? Perhaps this is encompassed under general principles of competency, but nowhere that I can find is it stated explicitly by the AAUP as a component of academic freedom.

Institutional autonomy does not always further individual freedom of speech. One of Justice Felix Frankfurter's four pillars of academic freedom—which I will shortly discuss—was the right of the university to choose who will teach, making the faculty largely self-selecting. At least some anecdotal evidence suggests that professors holding politically incorrect views, such as opposition to affirmative action, have a difficult time getting hired or receiving tenure. The extent of the phenomenon is not known and is perhaps not knowable. The claim of political tilting in who is allowed to teach is strengthened by recent studies that the university professorate is far more liberal than the population as a whole. There is nothing inherently wrong with this imbalance; it may be nothing more than individual career choice at work. The fact that one person's outlook is generally liberal or conservative does not, moreover, preclude balanced instruction. But perhaps the imbalance reflects something more insidious—the natural human preference for people who think alike, or, more ominously, a conscious desire to shape the world of knowledge to exclude unwelcome ideas.

Some academic departments in hotly contested areas too often appear to reflect single points of view. Columbia's Middle East department has several sharp Arab critics of Israel, but no supporters of Israel, much a less a supporter of the Sharon government. Such persons are likely to be found, if at all, in less prestigious and less influential Jewish studies departments. Friends in academia tell me that Columbia is not alone—and that doctoral candidates with points of view hospitable to Israel would do well to avoid Middle East departments.

The problem of balance is hardly confined to Middle East studies. There are entire departments of English staffed only with post-modernists. Perhaps this, too, is

just coincidence. Likely not. Some, at least, are aware of the baleful consequences of ideological uniformity. Harvard Law School, under the leadership of a politically liberal dean, is now actively recruiting conservative scholars to balance its faculty—and the former dean of another top-ranked school once told me of his efforts to ensure the presence in his faculty of at least a token conservative scholar.

The institutional autonomy branch of the doctrine does not always sit comfortably with the individual liberty branch. For example, consider a professor of English composition who decides to deemphasize freshmen essays in favor of writing poetry, when the university (or its faculty) believes essay writing should be emphasized. On the individual rights view of academic freedom, the teacher prevails; on the institutional autonomy model, the teacher must yield.

The Constitution

American concepts of academic freedom have many roots, including the 19th century German university, secularization, internal university developments and power struggles, and the law. The modern legal roots of academic freedom date to the first decade of the last century, when the widow of the founder of Stamford University—and its sole trustee—successfully demanded the discharge of a faculty member whose views outside of the classroom on economic issues were too progressive for her tastes. That demand set off a firestorm of protest and led to the formation of the AAUP and its 1915 statement on academic freedom.

Earlier attempts to protect academic freedom through the law—mostly through contract actions brought by discharged teachers—were notably unsuccessful. Nineteenth century courts tended to regard teachers as mere employees of their institutions, who, like employees of ordinary employers, could be discharged at will.

Federal constitutional protection for academic freedom dates to the McCarthy era in the 1950's. Officially sponsored loyalty oaths were the order

of the day in public universities; beyond governmental compulsion, however, both public and private universities vigorously pursued and discharged Communists and former Communists.

The leading case is *Sweezy v. New Hampshire*. Sweezy, a professor at the public University of New Hampshire resisted an investigation into several lectures he had delivered at the university. He was charged with contempt of the legislature for his refusal to cooperate.

The U.S. Supreme Court reversing a decision of New Hampshire's highest court held that the investigation was unconstitutional. The Court's plurality opinion paid obeisance to the importance of academic freedom, but it did not rest on it. It rested instead on the fact that the legislature had failed to properly delineate and therefore limit, the scope of its investigation.

Justice Frankfurter for himself and Justice Harlan—both ever reluctant to instruct states on how to structure their governments—concurred in the result, placing their reliance squarely on academic freedom. Justice Frankfurter laid out in a passage often quoted since as authoritative the four pillars of academic freedom:

> 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."

334 U.S. at 263.

Note that Justice Frankfurter's formulation (a quote from the then Chief Justice of South Africa) focuses on the autonomy of the university, <u>not</u>

the rights of individual instructors. Although it has subsequently had little opportunity to actually apply these principles to any concrete dispute, the Court has reaffirmed them on several occasions, including when it did an about-face and outlawed loyalty oaths.

The institutional autonomy aspect of academic freedom has made an important, although often indirect, impact on constitutional law. In upholding racial preferences in college and graduate school admissions, the Supreme Court rested in part on notions of academic freedom ("who should be admitted"). In a case in which faculty sought the right to unionize, the Court held that they could not, because, as a group, they had a say in the management of the university and hence were not "labor." One court of appeals invoked the doctrine to quash a subpoena for the production of reports containing tentative experimental results of scientific research. Most importantly, courts have almost always refused to intervene in grading disputes, including one memorable case when an otherwise acceptable Ph.D. thesis was rejected because the introduction sharply criticized, indeed parodied, various academic figures.

The Stamford crisis which spawned the AAUP was the result of the golden rule—that is, he who has the gold rules. The problem received much public attention about 10 years ago when the Yale faculty clashed with a wealthy donor who desired to have the university emphasize American culture and the faculty thought this wrong, apparently preferring ethnic studies instead. Yale ultimately returned the gift, preserving its autonomy (or its political correctness) but depriving students of exposure to a point of view perhaps not sufficiently heard at Yale. The "golden rule" challenge to

academic freedom is raised anew by recent massive gifts from a Saudi prince to two major universities.

Several years ago, my colleagues at AJCongress and I joined with others concerned that universities were reportedly taking money for studies relating to Islam and the Middle East from overseas interests, particularly in Arab countries, with who knows what strings—spelled out or not—attached. We proposed that universities be required to disclose gifts from overseas.

The university community reacted strongly, opposing the bill as an interference with their academic freedom, that is, their institutional autonomy. A diluted version did pass. Enforcement is spotty apparently because government officials are reluctant to police universities, a reluctance that is eloquent testimony to the vitality of academic freedom. QUERY: Which better protects academic freedom—allowing the university to police itself and trusting it to reject funding which carries strings that would impede the free exchange of ideas or having government police these conditions through disclosure?

But let us return to *Sweezy*. The legislative inquiry itself did not bar Sweezy from teaching or from articulating any particular view. The Court's strictures about academic freedom came in a context where the threat came most directly from public exposure and criticism, not from the inquiry itself. And, indeed, it is a tenet of academic freedom that academics should be judged by their academic peers, not by government and not by the public

In the McCarthy era, public criticism was no mild threat. The *Sweezy* court was undoubtedly aware that acknowledging that a lecture had endorsed communism would have a chilling effect on a teacher's freedom of speech. So limited, *Sweezy* is an unobjectionable application of a constitutional principle to a particular historical moment.

Consider a New York Court of Appeals case. An instructor at Nassau Community College taught a course on sexuality. Invoking the Freedom of Information law, a conservative community group concerned with preserving 'public decency' sought the release of a supposedly raunchy film shown as part of the course, a copy of which was in possession of the College. The school resisted on the ground that the release of classroom materials to public scrutiny would threaten academic freedom. The AAUP filed an *amicus* brief urging this view. Citing *Sweezy* it said:

> [The college] has explained how its faculty members, as a result of this case, have been more reluctant to entertain controversial materials or subjects in the classroom. This reluctance is understandable, as the trial court's decision opens the classroom to public scrutiny in minute detail. In *Sweezy*, a government investigation into classroom content chilled academic freedom. In this case, a statute authorizing citizen investigations which potentially can be even more intrusive than governmental investigations is being applied to investigate classroom content.

Without much elaboration, the Court of Appeals rejected this submission. I think it is fair to say that the predictions of a chill in New York's public universities and colleges have failed to materialize. But the academics' fear of public scrutiny persists. Academics have the idea that academic freedom means—as one influential Harvard academic once told me in all seriousness, that the government should send money and ask no questions. Democracies don't work that way.

Several months ago, the president of Columbia University protested, and I quote, "the persecution" of a professor at his university. The president

was deluged with emails and phone calls complaining about a professor at his university, who, commenting on the war on Iraq expressed a wish for "a million Mogadhishus." The criticism was tainted by some violent threats—unfortunately—but all this hardly amounts to persecution. More to the point, why should such nonsense be immune from public criticism?

Public controversy can, admittedly, chill adventurous teaching. The public and school administration must resist the temptation to yield to criticism and public hostility. But taken seriously, a constitutionally rooted ban on public exposure of what goes on in the classroom (and, therefore, criticism) creates a privileged enclave, free from informed criticism, an anomaly in a democratic society. I can be criticized *ad hominem* for the content of this speech, and I could be criticized *ad hominem* if I published it in a newspaper. No one would think such a criticism had a cognizable chilling effect on my right to speak. Why, then, should faculty members—tenured faculty members—be immune from such criticism, even for what they teach in the classroom, particularly if the First Amendment and principles of academic freedom protect both the teacher's employment and right to continue to teach? What happens in the classroom is of concern not only to teachers and students, but to the larger society.

Given time restraints, I cannot address all the issues raised by academic freedom. Several of these are difficult and contentious. Does academic freedom mean that universities must invite and pay for speakers who preach hate? May university officials criticize those who purvey hate—even if they do not attempt to silence the speech? How should freedom of speech be reconciled with full access for unpopular minorities?

What is important to note is the constitutionalization of two important aspects of academic freedom in the context of public higher education. First, the Supreme Court has held that tenure—itself an important guarantor of

academic freedom—has aspects of "property" for purposes of the Fourteenth Amendment. Hence, a professor enjoying tenure cannot be dismissed by a public university without extensive procedural safeguards ("due process"), including notice and the right to be heard.

Second, it has held that any instructor, even one without tenure, could not be dismissed as punishment for expressing unpopular ideas. The scope of this protection has varied over the years, as the Supreme Court and the lower courts have struggled to balance the free speech rights of public employees with the government's interest as employer in maintaining order, morale and discipline in the public workplace. The courts must balance the employer's interest in these against the public's interest in knowing what the employee has to say about the operation of public institutions. Consider a fire department whose ordinary firemen regularly criticize the fire chief as an incompetent buffoon in the local newspaper. In recent years, the balance has tipped far in the direction of the prerogatives of the public employer.

Three cases from the 1990's illustrate the protection afforded academic freedom for faculty members who express controversial views, both inside and outside the classroom. Two involved anti-white and anti-Semitic black nationalist professors; the third, a Jewish professor of philosophy who espoused the view that blacks were genetically disposed to be less intelligent than whites. All three cases arose in New York, one at the State University and two at the City College of New York.

The first case involved a South African psychologist, Dr. Ernst Dube, who taught a political science course on racism at SUNY. During the course, and in the classroom, Professor Dube assigned an essay on the proposition that Zionism was a form of racism, a view then held by the United Nations.

(At about this time English student groups banned Zionist speakers from the university on this ground.) A fellow professor, echoed by Jewish organizations, raised a furor. As luck would have it, the stories broke in the midst of the university's consideration of Dube's application for tenure. The faculty, with some hesitancy because Dube's writing record was weak, recommended tenure. The university president, denying that he was responding to outside pressure, denied tenure. Dube sued. The U.S. Court of Appeals held that if it could be shown that the denial was influenced by outside criticism of Dube's views, the denial violated Dube's right to academic freedom protected by guarantee of freedom of speech. Citing the dicta in the *Sweezy* plurality opinion it said:

> Thus, while we recognize that courts should accord deference to academic decisions … for decades it has been clearly established that the First Amendment tolerates neither laws nor other means of coercion, persuasion or intimidation "that cast a pall of orthodoxy" over the free exchange of ideas in the classroom. *Keyishian v. Board of Regents* …. We therefore conclude that, assuming the defendants retaliated against Dube based on the content of his classroom discourse, such conduct was, as a matter of law, objectively unreasonable.

The second case was that of Leonard Jeffries, whose bizarre theories divided the world into mud-people (white) and others. He gave a speech on these theories outside of the university. He was billed as the chair of the African studies department at the City University of New York, a description that lent special weight to his views. The speech was replete with anti-Semitic invective, including the charge that rich Jews financed the slave trade and

that Jewish Hollywood officials were attempting to destroy black people. Jeffries did not, as the AAUP academic freedom statement requires, make clear that he was not speaking for the university, as if such a disclaimer would have meant much. CUNY responded by depriving Jeffries of his post as department chair, but not otherwise touching his teaching responsibilities. It was clear enough that the university was responding to public pressure; indeed the university told Jeffries that "the speech threatened recruitment, fundraising and CUNY's relationship with the community."

The U.S. Court of Appeals for the Second Circuit initially upheld a jury verdict for Jeffries on the ground that he was punished for his speech. The U.S. Supreme Court then returned the case to the Court of Appeals for reconsideration in light of an intervening Supreme Court case which held that public employers could discipline, even discharge, public employees for out of office speech on the mere possibility that it would prove disruptive. The Court of Appeals issued a short opinion ordering the District Court to apply this far too weak standard to Jeffries. Nowhere in its various opinions did the Court comment on the fact that Jeffries had not, in his original speech, noted that he was speaking personally, and not as chair of CUNY's African-American studies department. It goes without saying that the CUNY faculty, which generally supported Jeffries, did not protest this violation of the 1940 AAUP statement.

The third case—roughly contemporaneous with the *Jeffries* case—involved one Professor Michael Levin, a philosopher who in a series of published articles raised the mirror image claim of Jeffries: that black people were genetically disadvantaged with regard to intelligence. The university responded by (1) setting up a shadow-class of Professor Levin's introduction

to philosophy class for those who felt ill-at-ease being taught by him. (There was no evidence that Levin's views influenced his teaching or his grading); (2) setting up a disciplinary panel to see if he should be disciplined or dismissed (the faculty said no, but the issue was not closed by the administration); and (3) failing to stop intruders from disrupting his classes.

The Second Circuit found that the first two actions impinged on Levin's academic freedom but not the third, on the disquieting theory that the university's policy was not to interfere (except with verbal criticism) of students who disrupted classes. I would think this wrong—if academic freedom is the right to teach, then that right is disrupted at least as much by disruptive listeners, as it is by public disclosure of course materials. On the other hand, regulation of speech must be even-handed. It would have been an odd result to require protection for Dr. Levin, but no other professor.

Taken together, these cases leave the impression that faculty speech in the classroom enjoys substantial protection, but speech outside the classroom enjoys much less legal protection if it can reasonable be expected to disrupt university operations, *e.g.*, by discouraging donors. Nevertheless, the ultimate *Jeffries* decision notwithstanding, universities continue to protect professors who say the most outlandish things—including a professor who has advanced the theory outside the classroom that the September 11 attacks were a justified response to American foreign policy.

…

As we convene, the Supreme Court is considering the constitutional impact of the intersection of the Golden Rule with academic freedom. Most law schools ban recruiters from employers who discriminate against gays. This includes the military Judge Advocate General with its "don't ask, don't

tell" policy. Congress passed a series of escalating statutes (the Solomon Amendments) which demanded access for military recruiters on penalty of a loss of all federal funds to an entire university (and not just the law schools). The universities have challenged this requirement, asserting, *inter alia*, that it violates their constitutional rights.

The Court heard argument in November. Observers predict a government victory. I prefer to wait for a decision.

The Solomon Amendment litigation raises interesting hypothetical questions about the AUT boycott. As far as I know, no college or university in the United States expressed the slightest support for that boycott. But say one had—could the United States government (or any state) condition its financial support on a refusal to participate (or, for that matter, a demand for full participation) in the AUT boycott? One of the arguments made by the universities was that the Solomon Amendment forced the universities to associate with an institution—the United States military—with which it wanted nothing to do. The same could theoretically be said of American universities and Israeli universities. Perhaps the cases could be distinguished, but I am not sure I know how.

II

For several years now, conservative activist David Horowitz—a *ba'al t'shuva* from 1960's campus leftism—has been pushing a student bill of rights to guarantee, *inter alia*, that "students have access to a broad range of serious scholarly opinion pertaining to the subjects they study." It would also guarantee that students would not be penalized in grading or otherwise because they expressed disagreement with a professor. I turn to the latter question first. Leaving aside the important question of who would enforce

this latter norm, it is hardly revolutionary, as it protects a right guaranteed by the 1940 AAUP policy itself.

I suppose many of us encountered at least a few teachers whose grading was influenced by their political views, and far more who tolerated, even encouraged, dissent. It is hard to know how large the problem is, as there is, apparently, no objective research on the subject. Frequency matters. If the problem is occasional, the value of preserving institutional autonomy might caution leaving the occasional injustice unremedied at law, in the probably unjustified expectation that universities will correct the occasional violation. If the problem is systematic and if universities are not in fact policing the problem, then the case for outside intervention is far stronger.

Such matters would surely not merit legislative intervention if universities had robust procedures in place to allow students to gain a fair hearing on complaints of improper grading. There are thousands of colleges and universities in the United States. It is hard to know with certainty, but it does not seem to be the case that students can readily and effectively complain about politically motivated grading (or for that matter, improper in-class indoctrination).

After a recent series of clashes at Columbia University's Middle East studies department over allegedly improper in-class statements made by teachers, directed at either Israelis or pro-Israel students, an internal faculty committee, after criticizing the Jewish chaplain for helping students file complaints, admitted that it was not clear to members of the committee, much less to students, how to file a complaint about teacher excess. And I am skeptical about the willingness of faculty to label colleagues as abusers of their positions. Here, as elsewhere, it seems that the academy is not policing

itself as academic freedom—understood as institutional autonomy—requires. Instead, it treats academic freedom as an impregnable immunity both for teachers and the university, but not for students or the larger community. That sort of vacuum invites outside regulation.

What about balance, the other important prong of Horowitz's "academic bill of rights"? The AAUP and the academic community generally, have vigorously opposed the effort everywhere, and so far blocked its enactment into law. In Colorado, however, legislative leaders and the heads of the state's public universities did agree as a matter of policy to implement the provision of the bill.

From the available public materials, it is difficult to tell whether the academics' objection is to the need for a requirement when in fact "balance" is already the order of the day; to an outside body imposing these principles on the university; that an outside body might be called upon to judge whether a faculty member has provided the required balance; or to the very idea of balance as a *desiradatum*. Remember the professor's ethical duty is said by the AAUP to be to teach the truth as he sees it. Designating responsibility for policing the requirement to an outside party would be a serious breach of the autonomy principle, to say nothing of the individual teacher's right to teach the truth as he sees it, and would pose the specter of a "big brother" inside every classroom.

In fact, some supporters of the bill of rights encouraged students to report supposed faculty excesses. These efforts—which smack of Stalinism—no doubt reflect in part a reluctance of students to complain about their teachers to other teachers, compounded by a sense of futility if they did so. The effort generated

particularly sharp faculty objection so strong that the project had to be substantially recast.

To this occasional adjunct professor, a requirement to avoid what President Lee Bollinger of Columbia University labels “intellectual self-indulgence”—that is, the view that only my perspective is worth teaching—seems to simply be the most basic requirement of good teaching. Over the last few years, for example, the world of medieval Jewish has been gripped in a debate over the nature of medieval Christian-Jewish relations, the extent to which the Crusades were at their core anti-Semitic—the traditional Jewish view—and the like. Some of the positions call for a fundamental recasting of our understanding of that period.

I think it is at least academic malpractice for an instructor in the subject—even if a protagonist of one or the other point of view—not to let students know of the debate. In more advanced courses or seminars it may be permissible for a faculty member to teach her view alone.

How large a problem is the absence of balance? Again, there are no studies of which I am aware. The question is what is going on in classrooms around the country; and what are university administrations are doing to correct whatever abuse exists. President Bollinger avers that “every faculty member he has known”—a quote—has adhered to this requirement. We must have inhabited different educational universes.

In some areas it is possible to readily conceive of agreed upon indications of balance. In constitutional law, balance would require, for example, that an instructor teach something about originalism and competing methods of interpretation, or different views of the meaning of the Commerce or Establishment Clauses. Some areas, however, are radioactive, and it is far harder to agree on what constitutes balance. The Middle East, including the war on Iraq, is one such area. Could the government do much better at striking the balance? Quite possibly not. But some

cases appear so egregious that it is hard to believe government intervention necessarily makes thing worse. Not surprisingly, it is the Middle East that has generated much of the current debate over balance in the academy.

The Title VI Controversy

The government of the United States has for more than forty years sponsored, that is to say, paid for, area studies at American colleges and universities. The purpose of these is unobjectionable—to encourage the study of language, cultures and nations not well known in the U.S.

These programs are designed not only to fund study by graduate students, but to help the public and teachers in the public schools to understand foreign countries better, and to improve the quality of instruction those teachers offer their own students. Universities accepting funds for such programs act in a dual role. They are collectors and disseminators of knowledge in the traditional sense, and they are government contractors hired to transmit a prescribed body of knowledge on behalf of the government, albeit one described only in general terms, to the public at large.

In 2003, AJCongress became concerned that some of the outreach programs for public school teachers were substantially unbalanced, favoring Palestinian viewpoints and ignoring mainstream Israeli ones. These concerns followed on Martin Kramer's 2002 book, Ivory Towers on Sand, describing the narrow vision prevalent in Middle East studies departments.

We began by filing a Freedom of Information Act request with the departments responsible for administering the programs, and, in come cases, under state freedom of information laws. We were doubly shocked with what we found.

First, we found that the Department of Education did not know what was being taught with federal funds—that is, schools were not required to file with the government the materials they prepared for their seminars. Applications were mostly highly generalized descriptions of what would be taught and budgetary statements. As a practical matter, the government knew nothing about how its money was being spent. Second, what materials we did obtain, including those from the University of California at Santa Barbara, displayed a pattern of appalling highly ideological one-sidedness—much directed against the United States—that was disturbing.

We therefore filed a formal rule-making petition with the United States Department of Education, which administered part of the program, requesting that it amend the regulations governing grants so that they provided that a factor to be considered in dispensing grants was whether the program would provide a balanced set of viewpoints. I note that this requirement would require that programs include Palestinian and Arab viewpoints, not just Israeli ones. In every public statement about the bill, we have been at pains to stress that we did not seek to suppress any point of view, including pro-Palestinian ones. And balance was simply to be a factor in the formula for assessing competing applications.

For months, we heard nothing from the Department of Education. Several members of Congress then introduced legislation to impose a balance requirement. Suddenly, we heard from the Department of Education, asking for a meeting. My colleagues met with the relevant under-secretary and her career people. The under-secretary was prepared to make some concessions, but the career people were adamantly opposed to any balance requirement, grounding this opposition in academic freedom.

In the end, nothing came of the petition and nothing came of promises for more careful scrutiny of the applicants. Attention then turned to the bill which not only would have required grantees to provide balance, but would have also created an independent advisory committee to study the workings of the programs. The committee would have had <u>no</u> authority over what would be taught, or who would be awarded grants, but it would have had the power to investigate actual programs.

The entire proposal generated substantial opposition from the academic community. The objections were threefold:

(1) There was no real problem of a lack of balance. Here, we simply disagree;

(2) The proposal to tie funds to government approved teaching was a violation of institutional autonomy—though there was not much evidence that universities in fact did anything with their autonomy to insure balance; and

(3) The proposed advisory committee's power to investigate actual teaching was the subject of particularly sharp attacks, especially the proposed power to actually investigate what goes on in the centers. This of course, is a reprise of the *Sweezy* holding. But how else could a committee make relevant suggestions?

The committee idea passed easily in the Republican controlled House, but ran into a stone wall in the Senate, where liberal Democrats, led by Senator Edward Kennedy, blocked passage. The opposition centered particularly on the authority of the advisory committee to investigate the actual operation of the centers. The opposition came even though by law the committee would not have made grants and would have been barred from affecting the teaching at universities.

A revised House bill embodies the requirement of balance by requiring that an applicant state “how activities funded by the grant will reflect diverse perspectives and generate debate on world regions and international affairs, where applicable.”

The Senate bill provides only for unspecified review activities, but the House Bill (H.R. 609) creates an advisory committee (International Higher Education Advisory Board), a majority of whose members would be appointed by the congressional leadership. They are charged with, *inter alia*, ensuring that federal programs “reflect diverse perspectives and the full range of views on world regions … and international affairs.” The revised bill weakens the authority of the advisory committee so that it can only make recommendations about the programs to the Secretary of education, but could not investigate the actual program. I am at something of a loss to explain what the point is of a committee which can learn nothing of the subject about which it is to make recommendations.

One or the other, or a combination of the revised bills will likely pass later this session of Congress. These seem entirely reasonable steps, not impinging on academic freedom.

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Where is the American Jewish community on academic freedom? In theory, no one significant in the Jewish community opposes academic freedom. It would in any event do no good to be opposed because the idea is so solidly grounded in the university community that it will not be dislodged.

However, and it is an important however, some of Israel’s supporters, and not only on the fringes, sometimes act as if there were an exception to academic freedom for criticism of Israel, particularly from quarters hostile to the very

existence of Israel. Thus, we have seen Jews campaign against even letting the infamous Palestinian Solidarity movement meet on a public university campus, or allowing teachers highly critical of Israel to teach at funded Middle East centers even if they are balanced by pro-Israel teachers or even if their particular topic is not particularly controversial.

The opposition is wrong because (1) it is doomed to failure; (2) efforts at silencing criticism inevitably backfire and change the discussion from the merits of Israel or Palestinian policy or practice to one of free speech and suggests that critics have something to hide; (3) it is short-sighted, endangering the position of pro-Israel teachers and students whose right to speak is often challenged by anti-Israeli groups; (4) it is simply wrong—preservation of democracy depends in large part on academic freedom; and (5) criticism is healthy, leading at a minimum to sharper defenses of Israel, and sometimes better policies.

Freedom often comes at painful costs. Academics don't always use their freedom wisely. The often ill-informed, often knee-jerk hard-line criticism of Israel, subjecting it to standards no other nation is held to, pervasive in some corners of academia, is painful to listen to. It is not without consequences for the future well-being of Israel. It should not be dismissed as inconsequential, and simply ignored. It is incumbent on friends of Israel to expose and combat irrational, hardcore anti-Israel sentiment—some of it anti-Semitic—where it exists. But jettisoning academic freedom is not a sound way to deal with a problem that is not yet out-of-control, and can be remedied in other ways.

The onus, however, is not only on friends of Israel. Academics have a responsibility to use their freedom and autonomy wisely. Academic freedom

does not exist for the sake of those fortunate enough to be entrusted with a classroom so that they may use it as a soapbox for narrow ideological tirades. There is enough abuse and little enough in the way of official response, to be of great concern. If universities and faculties do not address these abuses, then at some point—not yet, and not on the limited record of abuse now extant—the government will of necessity intervene.