

Academic Freedom on the Internet:
The Uncharted Course of Intellectual Freedom in the Information Age

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Abstract

In this interconnected age, interpretations of academic freedom have been legally contentious for virtual environments being established in such forums as the World Wide Web and electronic mail on the Internet. This paper addresses the legal issues that arise from the conflict between the concept of academic freedom in higher education and its scope and application in cyberspace. Challenges to academic freedom are discussed by examining legal cases with a particular focus on a case involving legislation in the state of Virginia that restrained network access by professors. This paper concludes that the tension between institutional control and individual academic freedom has yet to be resolved.

INTRODUCTION

Tremendous attention has been paid to varying mechanisms for ensuring academic freedom of university professors and students in the recent history of American higher education. The origin of academic freedom is rooted in the concept of the German educational philosophy of “*Lehrfreiheit*, or freedom to teach, with a following result of *Lernfreiheit*, freedom to learn” (O’Neil, 1999, p. 89). In efforts to refine the core doctrines of academic freedom in the higher education community, several key issues have arisen over the past decades regarding the scope and concept of academic freedom beyond the classroom and alternative methods for protecting this right. Since the emergence and widespread adoption of the Internet, the issues of First Amendment rights, such as free speech and free press, and copyright principles have brought complexity in its interpretation for the courts. This paper explores legal aspects of academic freedom on the Internet by examining a recent legal case pertinent to the need for redefining the scope and extent of academic freedom and individual freedom of faculty, administrators, and students in light of the expansion of virtual spaces in the 21st century.

HISTORICAL PERSPECTIVES ON ACADEMIC FREEDOM

Despite the current centrality of academic freedom in American higher education, the concept has evolved rapidly from its relatively recent inception. As O’Neil (1999) noted, the

formal creation of academic freedom in the US was a result of the collective reaction of professors to institutions that discharged professors who had radical or opposing viewpoints on social and political issues. Subsequently, the American Association of University Professors (AAUP) established the concept of academic freedom with the issuance of the *Declaration of Principles* in 1915.

In addition, due to tumultuous events at the onset of the 20th century such as World War I and the Great Depression, American higher education faced challenges from social and economic changes. In particular, universities professors collectively transformed themselves into a professional group and began engaging in robust scientific research (Cohen, 1998). After the formation of these professional groups, universities professors became more voluble about their profession and rights. In effect, the American Council on Education and the AAUP collaborated to create and generate support for the principles of academic freedom and tenure in 1925 (O'Neil, 1999). Their joint efforts resulted in the issuance of the *Statement of Principles on Academic Freedom and Tenure* in 1940. This declaration has lasted until today with only a few notable modifications such as the removal of gender based language in 1990.

However, the pronouncement of the *Statement of Principles* in 1940 did not grant absolute safeguards for higher education faculty because of external pressures and the influence of political manipulators. For example, during the McCarthy era of the early to mid 1950s, academic freedom was at risk when a number of professors struggled for their right to free speech (O'Neil, 1999). Originally, the doctrine of academic freedom was conceived from a utilitarian perspective; universities were regarded as an agreeable arena for experimentation and development of new ideas, since any generated knowledge might be offensive to the outside world. In that regard, along the line of First Amendment and human rights in the 1960s, the concept of academic

freedom was developed from community engagement and public service in disseminating new knowledge, which eventually furnished intellectual capital beneficial for the community and society at large (O'Neil, 1998).

The grave tension between governments and purportedly radical or subversive faculty opposed to federal and state policies drew fervent and intense reactions from many higher education institutions during that era. In managing the situation, some institutions required faculty to attest to loyalty oaths, which in some cases resulted in recalcitrance. By the early 1970s, these tumultuous controversies had wound down and the higher education community became relatively tranquil due to the massive expansion of faculties and facilities, an intensified competition among young scholars, and the improved condition of faculty rights (O'Neil, 1998).

According to the AAUP, "academic freedom is defined as a provision to protect professional autonomy that professors exercise with respect to curricula, research agendas, and use of expertise and knowledge" (as cited in Slaughter, 1988, p. 241). However, O'Neil (1999) acknowledged that universities were not always receptive to the controversial views of some faculty. Consequently, unease at the institutions was generated by disharmony between the internal constituencies of administrators and faculty.

There are two distinctly different sorts of academic freedom: (1) *individual academic freedom*, which protects professors and students from institutional and governmental intervention, and (2) *institutional academic freedom*, which protects universities from interference by the government. Since the late 19th century, institutions of higher education in the US have been deemed as centers of research and scholarship in addition to being viewed as vehicles for passing collected wisdom to future generations.

In particular, the AAUP outlined individual academic freedom in its 1940 Statement of Principles, which publicly advocating the protection of individual faculty scholarship through academic autonomy and tenure. With minor variations, all major colleges and universities incorporated this statement into their faculty employment contracts and code of ethics manuals (Olivas, 1997). The AAUP conceived its stance on academic freedom as a professional norm as a means of advancing the search for knowledge, but did not define it in terms of its possible legal effects or as a manifestation of First Amendment rights.

THE NEBULOUS BOUNDARY OF ACADEMIC FREEDOM ON THE INTERNET

Since the onset of widespread enhancement of communication provided by digital technologies in the late 20th century, the notion and practice of academic freedom have confronted new challenges and brought about controversial claims about the scope of academic freedom in cyberspace (O'Neil, 1998). This intense dispute remains unsettled and yet it is noteworthy to touch upon how these advances affect the current state of academic freedom.

In particular, the concept of academic freedom is interpreted differently in cyberspace from its traditional understanding in written and spoken language. Courts face challenges in delineating clear boundaries of its scope and meaning in virtual environments. Similarly, a rising concern in the higher education community is the extent to which universities regulate electronic mail, web sites, and other electronic communications used by their employees and students, and the degree to which colleges are responsible for monitoring misuse of their information systems.

Traditionally, colleges were controllers and suppliers of information, so faculty and librarians served as guides to determine what information was important and provided students access to it. Although their controlled selections were very broad, certain restrictions did exist. However, compared to printed text, information on the Internet is virtually without restriction and

largely uncontrolled. Students, administrators, and faculty can access nearly any sort of data and opinion, whether illegal/legal, passive/inflammatory, true/false, or misleading/informative, via web browsers. Such conditions have led to a heated debate about the extent to which an institution can intervene in its faculty's freedom to conduct research or engage in other activities in cyberspace. Further, in contrast to private institutions with their greater means of control, the extent to which public university faculty are obligated to broaden their service into cyberspace is questionable.

Even though both tenured and non-tenured faculty are by rule entitled to academic autonomy, it is much more likely that those faculty involved in litigation regarding the issue of academic freedom are tenured professors, due in part to their privilege of guaranteed job security. Thus, the endorsement of tenure and its capacity is often criticized in that faculty may misuse their privilege of tenure in teaching, research, and publication. Indeed, tenured faculty's engagement in research and publication through electronic media is much more vigorous in recent years. The complexity of academic freedom issues has begun to emerge in the electronic age and public higher education policies and regulations have yet to censure or to redefine its scope and significance. Therefore, the concept of academic freedom needs to be reexamined in response to the rapidly changing technological environment through such intriguing and inevitable issues as the legitimacy of academic freedom and protection of privacy in the virtual world.

A LEGAL CASE: ACADEMIC FREEDOM OF FACULTY ON THE INTERNET

Review of the Facts

In recent years, the courts have seen a growing number of legal cases involving academic freedom and the Internet. Among many such legal cases, the *Urofsky v. Gilmore* (1999) is notable because it deals primarily with the implications of the extent to which state governments can

regulate the practice of faculty autonomy in virtual spaces and the ensuing conflict between a state's and its employees' interests. Before the issuance of the lawsuit, the commonwealth of Virginia had voted in the summer of 1996 to prohibit commonwealth employees, except the state police, from using computers owned or leased by the state to access, download, print, or store any communications having sexually explicit content. Legislators enacted the regulation in response to the furor generated by similar federal legislation and to political concerns created by the apparently uncontrolled new medium of the Internet. The law applied to all of the commonwealth's approximately 101,000 employees, including thousands of professors, instructors, librarians, and research assistants at Virginia's 39 public colleges and universities.

The plaintiffs, six professors¹ employed by various public colleges and universities in Virginia, brought a lawsuit alleging the unconstitutionality of the law. The district court granted summary judgment in favor of the plaintiffs on the grounds that the law was unconstitutional because it infringed upon state employees' First Amendment rights (*Ufrosky v. Allen*², 1998). By contrast, the circuit court reversed the district court decision, holding a statute titled "Restrictions on State Employee Access to Information Infrastructure," (Va. Code Ann. § 2.1-804 et seq.) did not violate the First Amendment of the US Constitution because the law regulated only state employees' capacity as state employees, as opposed to free speech as citizens on matters of public concerns (*Ufrosky v. Gilmore*, 167 F.3d 191, 1999).

The Virginia law had an important caveat; the act restricted access by state employees to lascivious sexually explicit content on computers owned or leased by the state. However, the law did not prohibit all access by state employees to such materials. State employees remained free to access sexually explicit content from their own computers or other computers not owned or leased

¹ Melvin I. Urofsky; Paul Smith; Brian J. Delaney; Dana Heller; Bernard H. Levin; Terry L. Meyers.

² The plaintiffs named George Allen, then Governor of Virginia, as defendant. Subsequently, James S. Gilmore was elected Governor and was substituted as a party.

by the state. Further, any employee could seek administrative approval to access or publish sexual information in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking. However, it was unspecified as to how such approval was to be sought and obtained, who the decision-makers were to be, what standards were to be used to decide which projects were bona fide, or whether there would be an appeal process for denied requests. None of the plaintiffs has requested or been denied permission to access sexually explicit content³ pursuant to the legislation in question. Indeed, the record indicated that no request for access to sexually explicit materials on computers owned or leased by the state had ever been declined.

The plaintiffs claimed that the law interfered with the performance of their duties by preventing them from using state owned computers to access sexually explicit content on the Internet, contending that the restriction violated their First Amendment rights. For example, one professor claimed that the law prevented him from assigning an online research project on indecency laws because he was afraid he would be in violation if he attempted to verify his students' work on the Internet. Another professor claimed that the law prevented him from accessing sexually explicit poetry in connection with his study of Victorian poets.

The plaintiffs did not assert that state employees possessed a First Amendment right to access sexually explicit materials on state computers for personal use, but challenged such restrictions for work-related purposes. Their arguments were multi-faceted. They contended that the legislation was unconstitutional towards all state employees and they argued more particularly that the legislation violated faculty's right to academic freedom. They asserted that academic freedom demanded that intellectual inquiries, writings, and communications with colleagues,

³ The law defined "sexually explicit content" to include (i) any lascivious description of or (ii) any lascivious picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a lewd exhibition of nudity (Va. Code Ann. §2.1-804).

which were largely taking place online, not be subject to prior administrative review and possible disapproval. The infringement of intellectual autonomy would be obvious if prior approval were required before books with sexually explicit content could be read in the university library, and they claimed that the World Wide Web (Web hereafter) was indeed a vast global library.

Moreover, they pointed to the threat that political pressures might be brought to bear on university administrators by politicians hostile to certain scholarly viewpoints. Finally, the plaintiffs pointed out that it was not even possible in many instances to predict when one might have an academic need for sexually explicit art, literature, social science data, or health information, or when one might receive a sexually explicit electronic-mail message from a colleague containing, perhaps, a newly discovered masterpiece of erotic poetry, a reproduction of a sumptuous Titian nude, or excerpts from a new psychological study of sexual dysfunction.

Framing the Legal Issue: A Balance of Conflicting Interests

The principal legal issue in this case is whether the law regulates free speech by Virginia state employees in their capacity as citizens upon matters of public concern. If a public employee's speech does not touch on a matter of public concern, Virginia as an employer may regulate it without infringing on any First Amendment protection. In general, legal protections for the academic autonomy of individual professors who are state colleges or universities employees are ascribed to the First Amendment of the US Constitution. The US Supreme Court has frequently held that academic freedom is a right of professors, recognizing that the First Amendment protects the academic freedom of state-employed professors.

The US Supreme Court embraced the concept of academic freedom in *Sweezy v. New Hampshire* (1957). The notion of academic freedom in this case arose from an investigation of subversive activities by the New Hampshire Attorney General. Sweezy, a Marxist journalist but

not a professor, gave one guest lecture at the University of New Hampshire and was summoned to appear before the Attorney of General to testify about his past conduct and associations. He denied that he had ever been a member of the Communist Party or that he had ever been part of any program to overthrow the government by force or violence. He refused to answer certain questions regarding a guest lecture he had given at the University of New Hampshire. His refusal to answer these and other questions ultimately resulted in his incarceration for contempt of court. He maintained that the questions were not pertinent to the matter under inquiry and that they infringed upon his First Amendment rights.

It is difficult to understand how that case can be viewed as clearly adopting any right of academic freedom, much less a right of the type claimed by the plaintiffs in *Urofsky v. Gilmore*. The Supreme Court recognized that even if *Sweezy v. New Hampshire* could be construed as creating an individual First Amendment right of academic freedom, such a holding would not advance such a claim pertaining to their work as scholars and teachers, because the case involved only the right of an individual to speak in his capacity as a private citizen. The Court pointed out that the sole basis for the inquiry was to scrutinize Sweezy as a citizen, not as a public employee. It is a critical point that he was not a faculty member of the University of New Hampshire. Therefore, *Sweezy v. New Hampshire* was quite different from the *Urofsky* case because the latter involved tenured faculty members hired by state universities, so the scope of academic freedom would be applied differently.

The Supreme Court referred to *Connick v. Myers* (1983) and *Pickering v. Board of Education* (1968), by noting that citizens do not relinquish all of their First Amendment rights by virtue of accepting public employment. However, the majority justices wrote that the state as an employer undoubtedly possessed greater authority to restrict the speech of its employees than it

had to restrict the speech of ordinary citizens. A determination of whether a restriction imposed on a public employee's speech violates the First Amendment requires a balancing act between the interests of the employee in commenting upon matters of public concern as a citizen and the interest of the state in promoting the efficiency of the public services it provides as an employer. This focus on the capacity of the speaker recognizes the basic reality that speech by public employees undertaken in the course of their jobs frequently involves matters of crucial concern to the public, without giving those employees a First Amendment right to dictate to the state how they would do their jobs.

For example, suppose an assistant district attorney, at the District Attorney's direction, makes a formal statement to the press regarding an upcoming murder trial, a matter that is unquestionably of public concern. There is little doubt that the assistant does not possess a First Amendment right to challenge her or his employer's instructions about the content of the formal statement. In contrast, when the same assistant district attorney writes a letter to the editor of the local newspaper to expose a pattern of prosecutorial malfeasance, the speech may be entitled to constitutional protection because it is made in the employee's capacity as a private citizen and addresses matters of public concern. This balancing interest involves an inquiry first into whether the speech at issue is that of a private citizen speaking on a matter of public concern. If so, the court must next consider whether the employee's interest in First Amendment expression outweighs the public employer's interest in what the employer has determined to be the appropriate operation of the workplace. The speech at issue in *Ufrosky v. Allen*, access to certain materials using computers owned or leased by the state for the purpose of carrying out employment duties, is clearly made in the employee's role as an employee. Therefore, the challenged aspect of the Virginia law does not regulate the speech of the citizenry in general, but

rather the speech of state employees in their capacity as employees. Thus, the Fourth Circuit overlooked the Supreme Court's acceptance of individual academic freedom as a special concern of the First Amendment.

The norm of academic independence grants faculty members considerable autonomy from administrators in their teaching, research, and writing. However, the Circuit Court disagreed that the plaintiffs' insistence that the Virginia law violated their right of academic freedom amounted to a claim that the academic freedom of professors is not only a professional norm but also a constitutional right. Although several Supreme Court opinions paid much attention to the ideal of academic freedom, often with reference to the First Amendment, the justices have never set aside a state regulation on the basis that it infringed the First Amendment right of academic freedom. Moreover, a close examination of the case's outcome indicates that the right praised by the Court is not the same right plaintiffs sought to establish. They asked the court to recognize a First Amendment right to academic freedom for a professor as an individual.

In order to pursue its legitimate goals effectively, the court held that the state must retain the ability to control the manner in which its employees discharge their duties and to direct its employees to undertake the responsibilities of their positions in a specified way. The government claimed that the provision for agency approval eliminated any possible First Amendment difficulties. From the state agency point of view, asking permission in advance to speak, write, read, or conduct research on state computers was virtually no different than seeking other types of administrative approval, for example, to use a government vehicle.

The Legal Interpretation of the First Amendment and Academic Freedom

The proposition that the First Amendment protects academic freedom is evident in judiciary opinions of numerous legal cases (Byrne, 1989). However, the scope and foundation of a

constitutional guarantee of academic freedom is vague, resulting in inadequate analysis of what academic freedom the Constitution protects and what systematic and methodical principles underlie it. As Standler (1999) acknowledged, the definition and justification of academic freedom from legal principles are contentious. Thus, academic freedom is a term that is often used, but inadequately explained and inconsistently interpreted by federal courts.

The Supreme Court, to the extent that it has found in the constitution a right of academic freedom, has recognized only an institutional right of self-governance in academic affairs. Although the US Supreme Court identified academic freedom as a form of speech that the First Amendment protects against restriction by the states, the emphasis on institutional rights is particularly evident in the court's more recent decisions. For example, in *Keyishian v. Board of Regents* (1967), the plaintiffs were member of the faculty of the privately owned and operated University of Buffalo who became state employees when that university was merged into the State University of New York (SUNY) system in 1962. As faculty members of SUNY, their continued employment was conditioned upon their compliance with the New York plan, formulated partly in statutes and partly in administrative regulations, which the state utilized to prevent the appointment or retention of *subversive* persons. The plaintiffs refused to sign certificates stating that they were neither communists, or if they had ever been communists they had communicated that fact to the president of SUNY. Each plaintiff was notified that his failure to sign the certificate would require his dismissal, so Keyishian's one-year contract was not renewed because of his failure to sign the certificate.

The US Supreme Court held that New York's Civil Service Law and Education Law were invalid insofar as they proscribed merely being a member without demonstrating specific intent to further any unlawful aims of the Communist Party. Justice Brennan expressed for the majority in

the case that academic freedom was a special concern of the First Amendment. Frequently, the Supreme Court has been wary of recognizing that professors *possess* the First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship, despite opportunities to do so. For example, in *Epperson v. Arkansas*, (1968), the Supreme Court considered a challenge to a state law that prohibited the teaching of evolution. It repeated its admonition ala *Keyishian* that the First Amendment does not tolerate laws that cast a pall of orthodoxy over classrooms but nevertheless declined to invalidate the statute on the basis that it infringed the teacher's right of academic freedom.

Taking all of these cases together, the best that can be said for the plaintiffs' claim that the Constitution protects the academic freedom of an individual professor is that faculty were the first public employees to be afforded the now-universal protection against dismissal for the exercise of First Amendment rights. Previous Supreme Court decisions did not suggest that the right claimed by plaintiffs extended any further, rather declared that public employees, including teachers, do not forfeit First Amendment rights upon accepting public employment. The court instead has focused its discussions of academic freedom solely on issues of institutional autonomy. Therefore the court concluded that because the Virginia law did not infringe the constitutional rights of public employees in general, it also did not violate the rights of professors.

The Virginia circuit court rejected the conclusion of the district court that Va. Code Ann. §§ 2.1-804 to 806, prohibiting state employees from accessing sexually explicit material on computers owned or leased by the state, infringed upon the First Amendment rights of state employees. They further rejected the plaintiffs' contention that even if the legislation were constitutionally valid as to the majority of state employees, it was invalid to the extent it infringed on the academic freedom rights of university faculty. Accordingly, the judgment of the district

court was reversed⁴. Despite previous Supreme Court and other federal appellate decisions to the contrary, the Fourth Circuit ruled in *Urofsky v. Gilmore* that “any right of academic freedom ... inheres in the University, not in individual professors” and that the court has focused its discussions of academic freedom solely on issues of institutional autonomy. Chief Judge Wilkinson, who concurred in the *en banc Urofsky* judgment, but dissented from the majority’s reasoning, wrote:

The majority accords the speech and research of state employees, including those in universities, no First Amendment protection whatsoever. I offer no apology for believing, along with the Supreme Court ... in the significant contribution made to society by our colleges and universities ... I fear the court forgets that freedom of speech belongs to all Americans and that the threat to the expression of one sector of society will soon enough become a danger to the liberty of all. *Id.* at 426 (Wilkinson, C. J., concurring).

DISCUSSION OF CASE ARGUMENTS

The format of the plaintiffs’ speech, whether Web or electronic mail, makes the speech of special public significance. In the information age, electronic communications are likely the most important forum for accessing and discussing topics of concern to the academic community. The court was careful to allow the states to regulate this important communication medium without requiring a legitimate justification for the regulation. The court balanced the plaintiffs’ interests in speaking on a matter of public concern against the interest of the state as an employer in promoting the efficiency of the public services it performs via its employees. Virginia’s burden in justifying its statutory restrictions on speech is therefore greater than in an isolated disciplinary action. Drawing upon *Pickering v. Board of Education* (1968), the state must establish that the interests of both potential audiences and a vast group of present and future employees in a broad range of present or future expressions are outweighed by the impact on the actual operation of the government. Virginia advanced two interests in support of its law’s broad restrictions on

⁴ The US Supreme Court declined to review a lower-court decision in the case of *Urofsky v. Gilmore*, leaving intact the Fourth Circuit’s assertion that individual professors lack a constitutional right to academic freedom.

employee speech, maintaining operational efficiency in the workplace and preventing a sexually hostile work environment. While the law may marginally serve the state's asserted interests, its under- and over-inclusiveness were fatal to its constitutionality.

Virginia argued that the law furthers its interest in workplace efficiency by arguing "[a] state employee who is reading sexually explicit material unrelated to his work is not doing the job he was hired to do." (Appellant's Br. at 35). A state's general interest in workplace efficiency, however, cannot be the basis for the Act's specific prohibition on accessing sexually explicit material on state-owned computers. First, employee efficiency is undermined by any activities that distract employees from their job-related duties, not just unauthorized Internet use. Reading newspapers, listening to the radio, chatting with coworkers, or talking on the telephone with friends are examples of activities that detract from employee performance on the job. Virginia, however, did not attempt to regulate these activities, nor did it cite any evidence that accessing sexually explicit material undermined workplace efficiency any more than these other activities.

Second, Virginia argued that the statute furthered its interest in preventing sexual harassment in the workplace. Again, the Act was not tailored to combat this ill in any material way. It targets only access to sexually explicit material on the Internet, and ignored books, calendars, pictures, and other sexually explicit materials that demean women and create a sexually hostile work environment. A professor therefore would violate the law by accessing the Internet to complete research on Victorian poetry, yet he would not violate it by leaving copies of *Hustler Magazine* lying around his office.

In addition, the statute only prohibits the accessing of sexually explicit material on state-owned computers, but does not impose a ban on accessing any sexually explicit material on other computers in the workplace. Thus, a state employee might use his own computer to access

blatantly pornographic pictures around his students or colleagues without violating the law.

Virginia did not provide any justification for why sexually explicit images were any less likely to create a hostile work environment if those images came from an employees' personal computer rather than from a state-owned computer.

The statute was also deemed impermissibly over-inclusive. It prohibited research and commentary by state employees who accessed such material to advance public discourse, awareness, treatment, and commentary for a variety of disciplines and social problems. The law thus denied the legitimate work-related uses of sexually explicit material, uses wholly unrelated to the narrower category of gratuitous sampling of pornographic material it was intended to address. Virginia appeared to concede this point, but argued that prior approval process written into the law ensured that employees who had a legitimate need to access sexual explicit material would be able to do so.

The Act's prior approval provision allowed state employees to access sexually explicit material to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking. The prior approval process, however, had no check on the discretionary authority of state agencies. The Supreme Court, in a related context, has found that such grants of unbridled discretion to government agents invite arbitrary enforcement. In *Lakewood v. Plain Dealer Publishing Co.* (1988), the Court held that the determination of who may speak and who may not is left to the uncontrolled discretion of a government official. The Courts have often and uniformly held that such laws or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may or may not speak based upon the content of the speech or viewpoint of the speaker. The danger of arbitrary censorship is particularly relevant

in the *Urofsky* case, given the differing views on the merits of research and discussion on sexually-related topics.

The prior approval process does not redeem the statute even if approvals would not be arbitrarily withheld, because in part the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused (*Lakewood v. Plain Dealer Publishing Co.*, 1988). Thus, even those employees who receive permission to speak would be inclined to engage in self-censorship, ultimately to the detriment of the public in the form of a banal and lifeless discourse on issues of public concern.

The under- and over-inclusiveness of the Act demonstrated the obvious lack of fit between the government's purported interest and the sweep of its restrictions. The Court asserted that the lack of fit between the law's broad restrictions and the interests it allegedly was intended to serve casts serious doubt on the state's claim that employees' access to sexually explicit material has a necessary impact on the actual operation of the government. Consequently, the law did not survive the heightened scrutiny applied to statutory restrictions on employee speech.

IMPLICATION OF THE CASE

The Complexity of Academic Freedom in Cyberspace

The Fourth Circuit's academic freedom analysis in *Urofsky* has been criticized outright as profoundly wrong. For instance, in the article of "Constitutional Academic Freedom in Scholarship and in Court", Byrne (*The Chronicle of Higher Education*, January 5, 2001) was largely concerned with the court's misinterpretation of that case and its negative impact on the freedom of higher education. The court's rationale largely strips First Amendment protection prohibiting state regulation of faculty member's research. The implication of the court ruling is

that not only is it legitimate for the state to ban the use of state-owned or leased computers from accessing sexually explicit material, but that it is also lawful for the state to control the teaching, research, and scholarship of professors at state colleges and universities.

Rabban (2001) also argued that the Fourth Circuit misinterpreted the First Amendment by denying First Amendment protection to individual academic autonomy, which highlights the conflict between individual professors and higher education institutions over academic freedom. It seems likely that state lawmakers thought to avoid controversy by granting permission to faculty members to view sexually explicit material for the purposes of research. The court viewed that state statutes prohibiting individual faculty members' access to sexually explicit content were not unconstitutional because any restriction on faculty members would be imposed by the universities and not by the state. Consequently, it is not a conflicting issue of institutional academic freedom that are interfered with by state government.

However, the circuit court's decision might endanger the security of individual faculty members' academic licensure in public institutions. How would the university administrators distinguish between sexually explicit materials that a faculty member might look at for pleasure from the ones for the purpose of research? This question raises the concern as to whether administrators are capable of making a judgment of what constitutes bona fide research (Bryne, 2001). Would the court be well- or ill-equipped to judge academic matters such as faculty members' scholarship? What needs to be done to ensure faculty freedom to carry out research and at the same time discourage academic misuse of the Internet? Restricting access to sexually explicit material on computers owned by the state would not ultimately reduce exposure to obscene material from the Web.

The *Urofsky* case addressed both the tremendous intellectual and scholarship issues associated with the use of the Internet, and the threat to academic liberty posed by governmental attempts to regulate it. Even before the Web emerged as a global library, computer communications through e-mail, discussion groups, bulletin boards, faxes, and subscription mailing lists enabled scholars to communicate about their work not only with students and members of the public, but also with colleagues around the world. Meanwhile, technologies such as gopher and file-transfer protocols, precursors to the Web, made large quantities of research material available in a manner that just a decade before would have been inconceivable to all but the most prophetic of computer wizards. By the mid 1990s, with the widespread adoption of hypertext markup language and Web browsers, the Internet had grown so rapidly that no company, organization, government agency, research library, or academic institution could afford to be without an online presence. Scholarly databases also proliferated through virtual libraries, emails news groups, and online discussions.

The rights that flow from the professional concept of academic freedom are not coextensive with First Amendment rights, although some courts have recognized a relationship between the two. The First Amendment safeguards expression from regulation by public institutions, including public colleges and universities, on various topics and in a wide range of settings (Olivas, 1997). The professional definition of academic freedom, on the other hand, addresses rights within the educational contexts of teaching, learning, and research both in and outside the classroom for individuals at private as well as at public institutions. Although the US Supreme Court has consistently recognized that academic freedom is a First Amendment right, its scope for faculty, researchers, and students remains disputable (Kaplan & Lee, 1995). The interpretation of the nature of rights related to academic freedom is vague and depends on the

context. Although the Web, like online newsgroups and bulletin boards, has from the start contained plenty of useless chattering and misinformation, as well as bad art and prurient sexual material, it has also made readily available an enormous quantity of valuable research information, much of it previously obscure, unavailable, or difficult to locate. For scholars, the Internet has revolutionized both research and intellectual exchange within a few short years. Indeed, libraries have cut back on their hard-copy collections to save money because journals have become available online.

To impose restrictions upon the intellectual leaders in our colleges and universities would imperil future research because scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students should remain free to inquire, study, evaluate, and gain new knowledge and maturity of their understanding. But what happens when academic institutions themselves decide to censor speech on computers and networks? To what extent are faculty and students entitled to exercise their right to research, inquiry, and study under the protection of academic freedom despite state or federal legislation? Most threats to academic freedom online have in fact come from university administrations through often vaguely worded and expansively interpreted acceptable-use or sexual harassment policies. For the most part, these policies are not problematic. Acceptable-use rules generally address such delinquent and constitutionally unprotected behavior as entering unauthorized databases and spreading viruses, while sexual harassment codes properly ban pervasively hostile environments and demands for sexual favors. Both types of policies, however, are often loosely worded to prohibit any obscene, sexually oriented, or offensive online content. The danger of such restrictions is not only that they may invade intellectual freedom, but also that their vague wording leaves the nature of the prohibited speech ill defined. The policies thus invite administrators to censor based on their own subjective

sense of offensiveness, and pressure professors and students, borrowing the words of the court decision in the *Ufrosky* case, to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.

The essentiality of freedom in American universities is nearly self-evident. No one should undermine the vital role in a democracy that is played by those who guide and train our citizens. To impose unwarranted restraint upon the intellectual leaders in our colleges and universities would put the future of the American higher education in danger, because no field of learning is so thoroughly comprehended that new discoveries cannot be made. Particularly that is true in the social sciences, where few, if any, principles are accepted as absolutes. As illustrated in the court decision on *Urofsky* case, federal courts' legal doctrine has become alarmingly conservative in the past decades in discounting the significance of academic enterprise (Byrne, 2001). The distinctive needs and values of intellectual inquiry, scholarship, teaching, and the learning of academics should be no less important than other legal points.

CONCLUSION

Academic freedom is one of the fundamental concepts of contemporary American higher education. Unlike the religious-doctrine based governing system of colonial colleges, the concept of modern academic freedom commenced in the late 19th century. Its establishment resulted from the confluence of Germanic intellectualism and a political and collective response to external pressures to eliminate dissident faculty (Dey & Hurtado, 1996). With respect to its importance and critical role in the American academic community, the idea of academic autonomy has been manifested in differing forms and has proved malleable in modern American higher education.

With the burgeoning of information accommodated by technological advancements, the notion of academic freedom faces a serious and intricate challenge in the cyber world that exists

beyond traditional physical locations such as classrooms and the campus. Especially, the potential difficulty for refining the scope and meaning of academic freedom in virtual worlds remains unanswered (Foster, 2003). It is too soon to draw definite conclusions about the extent to which courts will allow legislatures, or universities themselves, to restrict faculty, researchers, and students' access to internet communication. The debate on censorship of the use of the Internet in the academic community in coming years will provide ample opportunities for the courts and the public to interpret and observe the legitimacy and importance of the concept of academic freedom in virtual environments. Does absolute freedom of expression exist on the Internet? To what extent should sexual, indecent, or obscene materials be banned? Should universities and colleges be held liable for publicly posted information on the Internet because they are responsible for operating the computers and the distribution system? To what extent does the threat to censorship on the Internet endanger our freedom to teach, learn, and research?

More clearly defining the relationship and relieving the conflict between individual and institutional academic freedoms involving Internet use will be a challenge for higher education communities as well as the courts. Not only institutions, but also individuals who are connected to the Internet, cannot circumvent the inevitable challenges to academic freedom in this interconnected era. The scope of institutional and individual academic freedom in cyberspace for those in private and public institutions is yet to be well defined.

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