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This chapter provides an overview of academic freedom and tenure as applied to the community college.

Academic Freedom and Tenure

Richard Fossey, R. Craig Wood

Academic freedom and tenure are two concepts that go to the very heart of higher education in the United States. Public or private, secular or religious, most American colleges and universities affirm the principles of academic freedom and tenure. Although a few higher education institutions have experimented with various types of nontenured employment arrangements (Gappa, 1996), the vast majority of postsecondary institutions continue to maintain tenure status for faculty members who meet institutional criteria.

Indeed, the concepts of academic freedom and tenure are closely linked. Academic freedom can be defined as the freedom of faculty members to research, write, teach, and publish without fear of retribution based on the unpopularity of their ideas (American Association of University Professors, [1970] 2002). Tenure is generally defined as the right of a faculty member to continuous employment, which cannot be terminated without adequate cause (generally including financial exigency) or without due process.

Both concepts are designed to enable scholars to pursue their academic work without fear of arbitrary dismissal or retribution. Nevertheless—although both concepts greatly benefit American faculty members—their purpose is not simply to provide job security for professors. Rather, as one court noted with regard to the concept of tenure, the "general welfare" of our society is promoted by the pursuit and free distribution of uninhibited scholarship (*AAUP v. Bloomfield College,* 1974, pp. 853–854).

Over the years, the concepts of academic freedom and tenure have been the subject of litigation, and a body of law has developed that shows how these terms are recognized and understood in higher education. The following discussion summarizes how these two important principles have been articulated by American courts.

Tenure: What Is It?

A commonly accepted understanding of tenure is as follows: "At the expiration of a period of probation, commonly not to exceed six years of full-time service, a faculty member is either to be accorded 'tenure' or to be given a terminal appointment for the ensuing academic year. Thereafter, the professor can be discharged only for 'just cause' or other permissible circumstances and only after a hearing before a body of his or her academic peers" (Finkin, 1996, p. 3).

In the absence of tenure, an instructor's contract is typically a generic document in which the instructor agrees to teach for a certain period of time (normally a semester or an academic year) for an agreed sum of money. Generally, the commencement date and the termination date are stated in the contract. Thus nontenured instructors have no expectation of employment beyond the term of their contracts, although in some instances their contract rights may give them extensive job protection (Gappa, 1996).

Tenure Rights and the Constitution: Due Process

Public institutions are bound by constitutional constraints in their relationships with employees, and the courts have ruled that at least some forms of public employment constitute a constitutionally protected property interest that a public institution may not take away without affording due process. Tenured faculty members at public institutions definitely have property interests in continued employment and cannot be discharged prior to receiving due process. At minimum, due process would include notice of the grounds for termination, a hearing in which the instructor would have the opportunity to rebut the stated charges, and an unbiased tribunal.

Formal policy that ensures due process for tenured faculty facing dismissal may be set forth in state laws, in a state governing board policy, in the policies of individual institutions, or in collective bargaining agreements. Nevertheless, in nearly all cases, grounds for dismissing a tenured faculty member fall within the following broad categories (Smith and Fossey, 1995):

- Incompetence—generally defined as a deficiency in physical, intellectual, or moral ability or the failure or inability to perform the requirements of the job.
- Insubordination—refusal to abide by reasonable rules and regulations or refusal to follow reasonable directives of a superior.
- Immorality—sexual or financial misconduct, use or sale of illegal drugs, or an act that constitutes a serious crime, whether or not the act results in a criminal conviction.
- Neglect of duty—failure to carry out job responsibilities or carelessness in performing job duties. Usually, a tenured faculty member can be dismissed

for neglect of duty only when it is shown that the faculty member's neglect was knowing, intentional, or deliberate.

Published court cases reveal that tenured faculty members are rarely dismissed or even sanctioned for anything less than very serious misconduct such as soliciting sex in a public restroom (*Corstvet v. Boger,* 1985), exploitation of graduate students (*San Filippo v. Bongiovanni,* 1992), or serious sexual harassment (*Levitt v. University of Texas at El Paso,* 1985). There are very few published court cases involving the dismissal of a tenured faculty member for poor-quality scholarship, lack of scholarship, poor teaching, or inadequate performance as a student adviser.

Is it possible for a college or university to have a tenure policy in place even though no formal tenure system had been adopted? In *Perry v. Sindermann* (1972), the U.S. Supreme Court ruled on a case in which a junior college teacher's contract was not renewed and the teacher was given no opportunity for a hearing. The Court said that the institution may have created a de facto tenure system if it had policies and practices in place that gave the teacher a reasonable and objective belief that he enjoyed the benefits of tenure.

In fact, the college's faculty guide contained the following language that Sindermann relied on to support his argument that the college had a de facto tenure policy:

> Teacher Tenure. Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.

If a de facto tenure system existed, the Court concluded, the teacher could not be discharged without being afforded the right to procedural due process.

Although tenure is not constitutionally protected at private institutions, most have tenure structures similar to those that exist in public colleges and universities and that include the right to due process whenever a faculty member's tenure is threatened.

Do nontenured instructors have a right to a due process hearing if their term contracts are nonrenewed? The Supreme Court has said no. In *Board of Regents v. Roth* (1972), the court ruled that procedural due process was not required when a public university elected not to renew a nontenured professor's contract. According to the court, the nontenured professor had no constitutionally protected interest in continued employment; and thus, the Court ruled, the university could simply choose not to rehire the professor when his term contract expired.

Roth's holding does not mean that nontenured instructors are never entitled to a due process hearing when faced with termination. Even nontenured employees are entitled to due process if they are terminated on the basis of allegations that besmirch their reputations or impose a stigma on them. Furthermore, they are entitled to a hearing if they allege that their nonrenewal was based on some unconstitutional motive—retaliation against an instructor for engaging in protected speech, for example, or a termination based on racial prejudice.

Moreover, many public institutions go beyond what the Constitution requires when terminating nontenured instructors, even though they are not obligated to do so. Often state law or university policy provides for at least an informal hearing in which nontenured instructors may request some explanation for their nonrenewal. Obviously, an institution should adhere to applicable state laws and its own policy requirements.

Academic Freedom

At its essence, academic freedom encompasses two notions. First, academic freedom asserts the principle that faculty members in higher education are free to research, write, teach, and publish without fear of retribution based on the unpopularity of their ideas (American Association of University Professors, [1970] 2002). Second, postsecondary institutions have the freedom to conduct the academic enterprise free from unreasonable governmental intrusion. At a minimum, the institution's right to academic freedom includes the right to determine on academic grounds "who may teach, what may be taught, how it shall be taught, and who may be admitted to study" (*Sweezy v. New Hampshire,* 1957, p. 263).

The Supreme Court has identified academic freedom as a concept that is closely associated with the constitutional right to free speech under the First Amendment, holding that a governmental investigation into the subject matter of a university teacher's lectures "was an invasion [of the teacher's] liberties in the areas of academic freedom and political expression," areas in which government should be extremely reticent to intrude" (*Sweezy v. New Hampshire,* 1957, p. 250). Kaplin and Lee (1995) confirm that courts have been reluctant to involve themselves in disputes concerning "course content, teaching methods, grading, or classroom behavior" (p. 305). Furthermore, in *Keyishian v. Board of Regents of the State University of New York* (1967), the Supreme Court said that academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom" and described the college classroom as a "marketplace of ideas" where the nation's future leaders would be trained through exposure to a robust exchange of opinions, rather than some authoritative prescription of information (p. 603).

Although the Supreme Court has recognized academic freedom as an important principle in higher education, scholars agree that it has not

arly defined the contours of the concept—particularly the academic free-
m rights of faculty members (Chang, 2001; DeMitchell, 2002; Zirkel,
88). Nor has the Supreme Court clarified how the academic freedom
hts of colleges and universities should be balanced against the rights of
lividual scholars. Based on a series of published cases that have been
ued by the lower federal courts, the courts examine a scholar's academic
edom claims almost exactly the way they examine free speech claims by
nacademic public employees. In other words, the courts have not carved
t a constitutional niche for academic freedom that is separate and apart
)m the constitutional rights of all public employees to engage in free
eech (*Urofsky v. Gilmore*, 2000).

In general, the Supreme Court's analytical framework requires courts
ask two questions. First, does the public employee's disputed speech
volve a matter of public concern? In other words, does the speech touch
some social or political issue that is of interest to the public, or is it
erely speech that pertains solely to an employment dispute and has little
erest to anyone other than the affected employee? If the speech does not
uch on a matter of public concern, as the Supreme Court instructed in
mnick v. Myers (1983), the speech does not implicate the First Amend-
ent and has no constitutional significance. If a court finds that a public
ıployee's challenged speech does in fact involve a matter of public con-
rn, the Supreme Court requires a second question to be asked: Does the
nstitutional right of the public employee to speak on a particular topic
tweigh the public institution's interest as an employer in maintaining the
iciency of the workplace? (*Pickering v. Board of Education*, 1968). In other
)rds, a public employee's right to speak in a public agency workplace must
balanced against the negative impact the speech might have in detract-
g from the agency's effective operations, including its impact on employee
)rale, workplace harmony, or the employee's relationship with a superior
lexander and Alexander, 2001).

When one examines the body of federal case law on claims of academic
edom, it is clear that the courts have not always acted with total consis-
ncy. Nevertheless, when taken together, the decisions articulate a com-
onsense understanding of a faculty member's academic freedom rights,
ıe that is generally consistent with the norms of the mainstream academic
mmunity.

)wer Court Rulings on Faculty Academic Freedom

ver the years, the federal courts have addressed a college faculty member's
ght to academic freedom on many occasions. In general, these cases can
divided into four categories: academic freedom rights outside the class-
om, academic freedom rights inside the classroom, the academic freedom
ght to assign grades and assess students, and academic rights concerning
stitutional evaluations of a faculty member.

Academic Freedom Rights Outside the Classroom. Most faculty members in American colleges and universities enjoy an academic freedom right to write, publish, and speak in the public arena without the fear of retribution. This right is so well understood that there are few recorded cases in this area. A 1992 opinion out of the Second Circuit Court of Appeals (*Levin v. Harleston*, 1992) illustrates the concept. Michael Levin, a tenured philosophy professor at City University of New York, became the subject of student protests based on his published writings that criticized affirmative action and suggested that the average black person was less intelligent than the average white person. The university responded to student complaints by creating an alternate section of Levin's philosophy class and allowing students who were disaffected with Levin to transfer to the alternate section. None of Levin's students had ever complained of unfair treatment because of race. In addition, the university created an ad hoc committee charged with determining whether Levin's racial views affected his teaching ability.

Levin sued, claiming that the creation of an alternative class section stigmatized him solely because of the ideas he had expressed and that the formation of a special committee to investigate him had a chilling effect on his constitutional right to free speech. Although the university argued that Levin's out-of-classroom expressions harmed students and the educational process within the classroom, the Second Circuit disagreed. In the court's opinion, the creation of a "shadow section" of Levin's class, which encouraged the size of his class to shrink, was a First Amendment violation. The court also said that the commencement of disciplinary proceedings or the threat of commencing them, based solely on Levin's off-campus statements, violated his First Amendment rights.

Note that the *Levin* case was decided on constitutional grounds without reliance on any separately articulated academic freedom right. But the decision makes clear that a faculty member at a public institution enjoys a First Amendment right to speak and write on controversial subjects, a right consistent with the higher education community's generally held definition of academic freedom. On the other hand, as the Seventh Circuit recently stated, a professor's boorish barroom prattle is not constitutionally protected.

In *Trejo v. Shoben* (2003), a state university terminated a nontenured professor's employment after an investigation concluded that the professor had behaved inappropriately at a hotel bar during an academic conference and had engaged in other boorish behavior toward women. The professor sued, alleging a violation of his right to free speech, arguing, among other things, that his barroom discussion about the sexual behavior of nonhuman primates was an "academic and intellectual debate" that was protected by the First Amendment. The Seventh Circuit rejected this argument, saying:

> We hold that Trejo's statements in Toronto regarding the sexual behavior of non-human primates. . . . failed to address an issue of public concern under

> *Connick* and *Pickering*. The statements were simply parts of a calculated type of speech designed to further Trejo's private interests in attempting to solicit female companionship. . . . The record before us makes clear that Trejo was prattling on before a table of acquaintances. . . . drinking alcoholic beverages in a . . . . bar rather than lecturing to students in a classroom setting on a topic relevant to their field of study. . . . The record is barren of any evidence. . . . [that Trejo's] remarks were designed to serve any truly pedagogic purpose [p. 887].

Together, *Levin* and *Trejo* sketch the broad boundaries of a public college or university professor's First Amendment rights concerning off-campus speech. As *Levin* illustrates, a professor's off-campus speech on matters of public concern is constitutionally protected, even if offensive. On the other hand, as *Trejo* shows, a professor's off-color comments, vulgarities, and sexual innuendo do not touch on matters of public concern and are not sheltered under the First Amendment or any reasonable notion of academic freedom.

Academic Freedom Rights Inside the Classroom. A faculty member's academic freedom rights are more circumscribed when the faculty member's speech occurs inside the college classroom. In the classic case of *Martin v. Parrish* (1986), the Fifth Circuit Court of Appeals ruled that an economics instructor could be discharged for barraging his students with profanity. Students complained, and the community college fired him. The instructor sued, claiming that the college violated his right to freedom of speech and his right to academic freedom.

In ruling for the college, the Fifth Circuit relied on a Supreme Court decision that had upheld a school district's right to censor a high school student's lewd and vulgar speech (*Bethel School District No. 403 v. Fraser*, 1986). Admittedly, the Court said, the *Bethel* decision had involved a high school audience, not college students. "Nevertheless," the court continued, "we view the role of higher education as no less pivotal to our national interest" (p. 585). The Fifth Circuit characterized Martin's speech as a superfluous attack on a "captive audience" (p. 586), which had no academic purpose. Such speech, the court concluded, enjoyed no constitutional protection.

Since *Martin v. Parrish*, a number of courts have addressed the constitutional limitations on college instructors' classroom speech. In a 1995 case, for example, the Sixth Circuit Court of Appeals (*Dambrot v. Central Michigan University*, 1995), relying in part on *Martin*, upheld a Michigan university that fired a basketball coach for using an offensive racial slur in the presence of student athletes. The coach argued that he used the word as a motivational tool and claimed an academic freedom privilege, but the Sixth Circuit was not persuaded. In the court's view, the coach's statement did not involve a matter of public concern and hence was not entitled to constitutional protection. Moreover, the court said the university had a right

to disapprove of his use of the slur as a motivational strategy. Using the term had nothing to do with "the marketplace of ideas" or the realm of academic freedom.

In *Bishop v. Aronov* (1991), the Eleventh Circuit ruled that a university could prohibit a professor from discussing his religious views in his physiology classes. The court ruled that classroom time was reserved for instruction on the topic of the course, and the university had the prerogative to regulate the professor's classroom speech. Likewise, in *Rubin v. Ikenberry* (1996), a federal district court ruled that a professor's sexual remarks in an education methods class had nothing to do with the subject matter he was teaching, did not address issues of public concern, and so were not protected by the First Amendment or principles of academic freedom.

On the other hand, in *Hardy v. Jefferson Community College* (2001), the Sixth Circuit upheld the right of a part-time instructor to use several inflammatory words because the use of the words in a course on interpersonal relations was appropriate to the topic of the course. A Kentucky community college had declined to renew the instructor's contract after receiving complaints about his use of the words. The college's action, in the Sixth Circuit's view, violated the instructor's constitutional right to free speech.

Finally, the 1994 case of *Silva v. University of New Hampshire* (cited in Fossey and Roberts, 2002) stands outside the mainstream of federal jurisprudence on academic freedom and deserves mention. In that case, a university attempted to sanction a tenured professor who used sexual metaphors to students in a freshman writing class. Eight students submitted written complaints, describing the professor's language as "vulgar," "inappropriate," and "demeaning." The university created another section of the professor's course for students who preferred another instructor, and twenty-six students transferred out of the professor's class. After administrative proceedings, the university sanctioned the professor for engaging in sexual harassment and put him on a one-year leave without pay. Silva sued in federal court, where he won an injunction against the university and reinstatement to his job with full pay and tenure. In its opinion, the court ruled that the professor's remarks related to a matter of public concern. Specifically, the court said his expressions were related to the issue of whether speech that offends a particular group should be permitted in the nation's schools. In addition, the court ruled that the university had breached the academic freedom provision in its collective bargaining agreement with faculty.

In the opinion of several commentators, the *Silva* ruling is unfortunate (Woodward, 1999; DeMitchell and Fossey, 1996; Fossey and Roberts, 2002). Sexual harassment in the classroom "has nothing to do with academic freedom" (Dziech and Weiner, 1990, p. 179). It hinders the learning environment, violates federal sex discrimination law, and can subject a college to civil liability. Fortunately, *Silva* stands virtually alone in protecting offensive language in the classroom. As noted, other courts have supported

igher education institutions that have sanctioned instructors for uncivil lassroom language.

Right to Assign Grades and Make Curricular Decisions. Faculty nembers might assume that they have an unfettered right to choose curiculum materials for their courses and to assign grades. Federal case law ndicates that this right is far from absolute.

Perhaps the most strongly worded court opinion in this area is a 1998 ase, *Edwards v. California University of Pennsylvania* (1998). Edwards, a enured professor, was disciplined for using an unapproved syllabus in an ntroductory course on educational media after a student complained that ıe was using the course to advance religious ideas (p. 489). Edwards sued, laiming a violation of his First Amendment rights.

Edwards lost his case at the trial court level, and the Third Circuit .ffirmed the trial court's decision. "As a threshold matter," the Third Cir-:uit said, "we conclude that a public university professor does not have a 'irst Amendment right to decide what will be taught in the classroom" (p. ;91). The university, the court said, has the right to make content-based lecisions when shaping its curriculum; and a professor has no constitutional ight to choose course materials that are contrary to the university's orders.

Nor do professors have the final say with regard to students' grades. In *'arate v. Isibor* (1989), a university chose not to renew a professor's appointnent because he refused to change a student's grade from a B to an A. The ;ixth Circuit ruled that the assignment of a grade is a symbolic communi-:ation and that the university had violated the professor's First Amendment ights by seeking to compel him to change a grade. Nevertheless, the court ılso said that a professor "has no constitutional interest in the grades which ıis students ultimately receive" (p. 829). Therefore, as a constitutional mat-er, the university can change a professor's grade even though it could not :ompel the professor himself to do so.

In 2001, the Third Circuit went even further. In *Brown v. Armenti* 2001), the Third Circuit rejected the Sixth Circuit view that a professor's grade is constitutionally protected expression. "A public university professor loes not have a First Amendment right to expression via the school's grade ıssignment procedures," the Third Circuit ruled. On the contrary, grading is ı pedagogic activity, "subsumed under the university's freedom to decide ıow a course is to be taught" (p. 75).

Parate and *Brown* are in harmony with an earlier case in which James .ovelace, a nontenured teacher, claimed that the university had violated his 'ight to academic freedom when it failed to renew his teaching contract due o his rigorous grading standards (*Lovelace v. Southeastern Massachusetts Jniversity,* 1986). According to Lovelace, the university acted in response o student complaints that his course was too hard and his homework ıssignments were too demanding.

The First Circuit Court of Appeals rejected Lovelace's arguments, saying, "Whether a school sets itself up to attract and serve only the best and

brightest students or whether it instead gears its standards to a broader, more average population is a policy decision which, we think, universities must be allowed to set. And matters such as course content, homework load, and grading policy are core university concerns, integral to implementation of this policy decision" (p. 425). In the court's view, Lovelace's claim that his grading policy is constitutionally protected would unduly restrict the university in defining and performing its educational mission. The First Amendment, the court observed, "does not require that each non-tenured professor be made a sovereign unto himself" (p. 426).

Although the Lovelace case involved a nontenured professor, the court's decision did not turn on that point. Thus the court's reasoning would seem to apply to tenured as well as nontenured faculty members.

Taken together, these cases indicate that higher education institutions have the final say on curriculum content, choice of curriculum materials, grading policies, and assignment of student grades. A faculty member's grading decision may be constitutionally protected expressive speech (although the courts disagree on that proposition), but the final decision about what grade should be assigned rests with the institution, not the instructor.

Rights Regarding Teaching Evaluations. In at least two cases, professors sued their institutions on constitutional grounds because they objected to outside evaluation of their instructional methods. In both cases, the universities prevailed.

In *Wirsing v. Board of Regents* (1990), a tenured professor at the University of Colorado refused to administer a standardized faculty evaluation form to her students, based on her position that the evaluation process was contrary to her theory of education. In response, the university withheld her merit pay increase. Wirsing sued, arguing that the university had violated her right to academic freedom. A federal trial court dismissed the professor's suit, saying, "Academic freedom is not a license for activity at variance with job-related procedures and requirements" (p. 553, citing *Stastney* v. *Board of Trustees,* 1982). Dr. Wirsing may have a constitutionally protected right to disagree with the university's evaluation policy, the court said, but "she has no right to evidence her disagreement by failing to perform the duty imposed upon her as a condition of employment" (p. 553).

Wirsing is in harmony with an older Sixth Circuit opinion in which the court upheld a university's decision not to renew an untenured professor's contract based on institutional concerns about her pedagogical style and teaching methods (*Hetrick v. Martin,* 1973). The professor had argued that her teaching methods were constitutionally protected under the First Amendment, but the Sixth Circuit disagreed. "Whatever may be the ultimate scope of the amorphous 'academic freedom' guaranteed to our Nation's teachers and students, . . . it does not encompass the right of a non-tenured teacher to have her teaching style insulated from review by

her superiors when they determine whether she has merited tenured status just because her methods and philosophy are considered acceptable somewhere within the teaching profession" (p. 709).

Wirsing and *Hetrick* emphasize that college and university faculty members have no constitutional right to avoid institutional evaluation of their teaching performance. However, in both cases, the courts concluded that the evaluation processes were objective and not a subterfuge to punish an instructor for expressing unpopular ideas in the classroom. As the Supreme Court has said in the *Keyishian* case, the college classroom is a "marketplace of ideas." A court might well intervene if it were convinced that an institution that had sanctioned an instructor for unsatisfactory performance had done so for the real purpose of casting "a pall of orthodoxy" over the classroom.

Conclusion

As we have seen, tenure and academic freedom are closely connected, and both concepts serve the function of preserving the right of higher education scholars to teach, research, and publish without fear of retribution. Moreover, both concepts have strong links to the U.S. Constitution. A faculty member's right to academic freedom is akin to a public employee's right to free speech under the First Amendment, and tenure—at least in the public sector—is a property right, which under the Fourteenth Amendment cannot be taken away without affording due process.

In the private sector, of course, institutions do not operate under constitutional constraints with regard to their relationships with faculty members. Professors at private colleges have no First Amendment protection from institutional censor based on their speech, and they enjoy no constitutional right to demand due process in disciplinary or termination proceedings. Nevertheless, reputable private institutions honor the concepts of academic freedom and due process in their policies, procedures, and contracts. As a practical matter, colleges and universities view academic freedom and tenure very much alike, whether they are public or private.

A review of published case law reveals that neither concept is in danger of erosion in American higher education. Very few cases have involved efforts by institutions to sanction a faculty member based on the offensiveness of the faculty member's ideas. Instead, most of the published legal disputes between faculty members and institutions have involved more mundane issues—classroom deportment, sexual harassment, and various allegations of professional misconduct. On the broad issue of a scholar's right to speak out on important social and political questions or to propound controversial positions on scholarly topics, instructors, courts, and institutions are in broad agreement—academic freedom and tenure are alive and well in the nation's colleges and universities.

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RICHARD FOSSEY, J.D., is Fondren Research Fellow at the Center for Reform of School Systems in Houston, Texas, and a professor in the College of Education at the University of Houston.

R. CRAIG WOOD is the B. O. Smith Research Professor in the College of Education, University of Florida, Gainesville.