

2010

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Recommended Citation

Rapoport, Nancy B., "Academic Freedom and Academic Responsibility" (2010). *Scholarly Works*. Paper 128.
<http://scholars.law.unlv.edu/facpub/128>

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Research Paper 10-09
February 1, 2010

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13 Green Bag 2d 189 (2010)

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ACADEMIC FREEDOM AND ACADEMIC RESPONSIBILITY

Nancy B. Rapoport

Reviewing

MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON
GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM
(Yale University Press 2009)

WE ARE LIVING IN INTERESTING TIMES. As the economy worsens and traditional sources of revenue dry up, businesses everywhere are scrounging for ways to stay afloat. Higher education isn't immune from these fiscal pressures. At most universities, tuition continues to rise geometrically,¹ and presidents face increased pressure to keep costs down and increase efficiency. Many universities are using higher ratios of adjunct faculty to tenured and tenure-track

Nancy Rapoport is the Gordon Silver Professor of Law at the William S. Boyd School of Law, University of Nevada, Las Vegas. Copyright © Nancy B. Rapoport 2009. All rights reserved. Professor Rapoport has just published, with co-editors Jeffrey D. Van Niel and Bala G. Dharan, ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL READER, 2D (Foundation Press 2009).

¹ See *The \$50K Club: 58 Private Colleges Pass a Pricing Milestone*, CHRON. HIGHER ED., Nov. 1, 2009, available at chronicle.com/article/The-50K-Club-58-Private/48989/ (58 private colleges are charging \$50,000 for tuition, room, and board this year, up from five such colleges the year before); cf. en.wikipedia.org/wiki/Geometric_progression.

faculty than ever before, and various constituencies are clamoring for better measures of student outcomes to capture whether an educational institution is, in fact, educating its students.²

Into these interesting times returns the traditional debate about whether tenure continues to make sense.³ In the “real world,” people are losing their jobs left and right – so why should professors have a lifetime guarantee of job security? Linked to tenure, of course, is the concept of academic freedom. According to the American Association of University Professors’ classic 1940 *Statement of Principles on Academic Freedom and Tenure*,⁴

Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.

Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.⁵

² See, e.g., Commission appointed by Secretary of Education Margaret Spellings, *A Test of Leadership[:] Charting the Future of U.S. Higher Education*, available at www.ed.gov/about/bdscomm/list/hiedfuture/reports/final-report.pdf; cf. *AAUP Statement on Spellings Commission Report*, available at www.aaup.org/AAUP/GR/federal/FutureofHigherEd/spellrep.htm.

³ See, e.g., Roger Bowen, *A Faustian Bargain for Higher Education*, CHRON. HIGHER ED., Oct. 3, 2008, available at chronicle.com/article/A-Faustian-Bargain-for-Acad/8041/.

⁴ Available at www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm [hereinafter 1940 *Statement of Principles*].

⁵ *Id.* (footnotes omitted).

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Finkin and Post's book, *For the Common Good*, provides a valuable exposition of the development of academic freedom in the United States. Tracing the history of academic freedom from its roots in German higher education to the modern-day version,⁶ the authors note a key distinction between the governance of German universities – governed by the faculty itself – and the early American universities, which were governed more like other businesses, with a president chosen by a board composed of non-professors.⁷

That difference in governance was more than mere window-dressing. For universities governed by non-professors, the governing board could consider the entire faculty to be employees, not management; therefore, the decisions about what those employees could research and teach would be left to the president, not to the faculty-employees themselves. Such an allocation of duties would, of course, be anathema to the modern American university faculty.

As academic freedom developed in the United States, then,

American professors sought a version of academic freedom that reflected the influence of “a stronger social and constitutional commitment to the idea of freedom of speech,” as well as a more pragmatic commitment to the social utility of professional scholarship. But these differences [from the German model], critical as they are, should not obscure the essential fact that the American vision of academic freedom, like the German *akademische Freiheit*, derives almost entirely from an understanding of the vocation of scholarship.⁸

We don't talk much about the vocation of scholarship – that driving force that causes professors to research and to disseminate their research. For that matter, we don't talk about what drives people to work in academia, rather than in the private sector. Private-sector researchers perform many of the same functions that

⁶ MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* 23 (Yale University Press 2009) [hereinafter *COMMON GOOD*].

⁷ *Id.* at 24-25.

⁸ *Id.* at 30 (footnote omitted).

professors do (and often get paid much more, to boot). But the difference between private-sector researchers and academic researchers is that the latter have the ability to set their own research agendas, separate and apart from the interests of the entity issuing their paychecks. It is that separation of salary from research agenda that sets academics apart from private-sector researchers and, in turn, creates a strange breed of “employee.”

Faculty members are not “employees” of the university in the same sense that other university workers are “employees” (or that private-sector researchers are “employees”). Faculty members look like employees, to be sure: they get paid by the university; they have certain responsibilities in terms of teaching, research, and service; they have workspace allocated to them by the university.⁹ But Finkin and Post argue that faculty members have duties that extend beyond a particular university to the larger obligation of academics generally.¹⁰ As they explain,

The core principle of American academic freedom may be found in this remarkable passage [from the 1915 *Declaration of Principles on Academic Freedom and Academic Tenure*]. It argues that faculty are not “employees” answerable to the will of their employers but instead “appointees” responsible “to

⁹ To those who argue that faculty members are employees because of the similarities they have to other university employees, and who tend to use the hoary old saw, “if it walks like a duck, quacks like a duck, and swims like a duck, it’s a duck,” I have to respond: if someone dresses like a surgeon and carries a scalpel, that doesn’t reassure me that the person is necessarily a surgeon. Before that person sliced into me, I’d want a little more proof. Cf. en.wikipedia.org/wiki/Duck_test (describing the origins of the “duck test”).

¹⁰ My dad was a private-sector research scientist for his entire career, and he’s happy to note that he, too, believed that he had a duty to conduct research that was honest and capable of being replicated. To the extent that Finkin and Post are trying to separate private-sector researchers from academic ones on the grounds that the latter have some special duty to their profession, they might be painting too broad a picture. All researchers have a responsibility to their profession. I think that the distinction really is between for-profit research and not-for-profit research (even though some academics can make quite a good living with the results of their research).

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the wider public” for the fulfillment of the social function of universities. The 1915 Declaration justifies the transformation of faculty from employees to appointees on the basis of two key conceptual premises. The first concerns the purpose of the university as an institution; the second concerns the professional expertise of faculty. . . .

Because faculty are professional experts trained in the mastery of these disciplinary practices [that enable the acquisition of knowledge], they are “appointed” to discharge the essential university function of producing knowledge. In this task they are answerable to the public at large rather than to the particular desires of employers.¹¹

It’s not the nature of research itself, then, that makes academics more than mere employees. It’s the nature of universities, where the academics work, that give academics that “employee-plus” characteristic. If professors are not actually “appointees” for a greater good, then at least they’re something more than mere cogs in a research-producing machine.¹² Finkin and Post link academic freedom to the *raison d’être* of the academy itself.

One of the most useful parts of the book debunks the traditional argument that academic freedom in the U.S. is unnecessary because of the overarching protection of the First Amendment’s guarantee of freedom of speech. Finkin and Post develop a credible argument that freedom of speech is too broad a notion to supplant the concept of academic freedom.

Freedom of speech allows anyone to say anything – even stupid and wrongheaded things, even outrageous things – free from government censorship. Academic freedom, on the other hand, carries

¹¹ COMMON GOOD at 34-35 (footnote omitted). Of course, I’ve always wondered if – assuming that faculty members are “answerable to the public at large” – there could be something akin to a shareholders’ derivative suit against faculty members whose research is scanty, fraudulent, or flat-out wrong.

¹² My dad tells the story of a friend of his who wanted to research something that the company wasn’t interested in having him research. Because that friend insisted on pursuing his own research goals, rather than the company’s research goals, he was eventually laid off. The ability to pursue one’s own goals, rather than one’s employer’s goals, is the hallmark of academia.

constraints borne from the strictures of professional disciplines. This point is important: too many academics assume that academic freedom provides them the right to say anything, at any time, or to do anything, at any time. Far from it:

Academic freedom, therefore, does not protect the autonomy of professors to pursue their own individual work free from all university restraints. Instead academic freedom establishes the liberty necessary to advance knowledge, which is the liberty to practice the scholarly profession. This point is fundamental. Although the First Amendment may prohibit the state from penalizing the *New York Times* for misunderstanding the distinction between astronomy and astrology, no astronomy professor can insulate himself or herself from the adverse consequences of such a conflation. If the First Amendment protects the interests of individual persons to speak as they wish, academic freedom protects the interests of society in having a professoriate that can accomplish its mission. The *Declaration* advances a theory of academic freedom that invokes “not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion and of teaching, of the academic profession.”¹³

Oh, do I wish I had been armed with this understanding of academic freedom when a professor once told me that no dean could ever tell him what to do. He was correct in terms of understanding

¹³ *Id.* at 39 (footnote omitted). The 1940 *Statement of Principles* is equally clear. The first point under the heading “Academic Freedom” states that “[t]eachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties.” 1940 *Statement of Principles*, *supra* n. 4. The second point, under the same heading, provides a limit on what professors can teach: “[t]eachers are entitled to freedom in the classroom in discussing their subject, but *they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.*” *Id.* (emphasis added). Unlike freedom of speech, then, academic freedom is a relational freedom: faculty members are free to explore and to teach that in which they have particular expertise, but their freedom has limits that relate to their expertise and to the public trust that they enjoy as faculty members.

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that no dean could choose his body of research for him¹⁴ or dictate how he taught his courses; but he was woefully misinformed when he argued that deans couldn't tell him to do anything at all. Academic freedom has never protected the dereliction of duty. It is a tradeoff: the freedom to inquire and to explain as a tradeoff for the privilege of being engaged in the academy as a professional scholar.¹⁵

For the Common Good takes us through the history of the development of academic freedom to the understanding of the principles of freedom of research and freedom of teaching, while illustrating the necessity of academic freedom with some key examples.¹⁶ The

¹⁴ I took this component of academic freedom to heart when, during my sabbatical year after stepping down as dean, the Provost wanted the interim dean to dictate what my research agenda should be. Had the Provost really tried to push the issue, I would have relied on the 1940 *Statement of Principles* (and the wonderful lawyer who represented me at the time) to fight back.

¹⁵ The tradition of academic freedom, with its twin commitments to freedom of research and to compliance with professional norms, nicely balances these negative and affirmative dimensions. This balance would be lost if academic freedom were reformulated as an individual right that insulates scholars from professional regulation. Reformulated in this way, academic freedom would regard the communication of each scholar as equally protected and thus enforce the premise, explicit within First Amendment doctrine, that there is an "equality of status in the field of ideas." It is clear that this premise is inconsistent with the advancement of knowledge, which requires precisely that ideas be treated unequally, that they be assessed and weighed, accepted and rejected. The kind of individual freedom that underlies the structure of First Amendment rights is for this reason ill-suited to the production of knowledge. It instead expresses the postulate of equal, intrinsic, individual dignity that lies at the foundation of legitimacy in a democratic state.

COMMON GOOD, *supra* n. 6, at 43 (footnotes omitted).

¹⁶ One of my favorite passages in the book details the claims of "hostile educational environment" that various pundits have lobbed at higher education:

The idea of a "hostile environment" derives from anti-discrimination law. Employers violate the civil rights of employees if they permit the workplace to become a hostile environment for women or minorities. Critics of higher education wish to appropriate this idea and apply it to the context of university teaching. As with the ideal of "balance," there is a sense in which the idea is appropriately deployed. Professional ethics require faculty to "demonstrate respect for students" and to avoid "any exploitation, harassment, or discriminatory treatment." Freedom of teaching would thus not protect a professor from disciplinary action if he were to harass, ridicule, or discriminate against students for their political or religious beliefs.

strength of this book – and it is a superb book – lies in the cogency of its arguments and the lyricism of its prose. What’s not to love, for example, about a passage that explains how tricky it is to distinguish an expansion of knowledge that differs from accepted canons of belief from the quackery of a sham scholar?

The difficulty is that independence of thought and utterance cannot be so easily cabined. Critical inquiry can turn on the very framework of “accepted intellectual standards” that is supposed to distinguish true knowledge from false belief. An individual scholar can always claim that he or she is developing new and different intellectual standards, and this claim can be justified on the incontestable ground that such standards are themselves forms of knowledge that must be open to critique and development. We are thus led to a paradox. Intellectual standards are required to connect the exercise of academic freedom to the production of knowledge, yet intellectual standards are also themselves forms of knowledge whose evaluation requires academic freedom. Academic freedom thus appears to be dependent on, yet independent of, intellectual standards.

This paradox lies coiled at the core of the traditional justification for freedom of research and publication.¹⁷

It is important, however, to distinguish between respect for persons and respect for ideas. Faculty must respect students as persons, but they needn’t respect ideas, even ideas held by students. In higher education no idea is immune from potentially scathing criticism. If a student identifies with his own ideas, he might well experience ruthless critique of those ideas as a personal assault. But it is precisely the pedagogical purpose of higher education to introduce critical distance between students and their own ideas.

Id. at 105 (footnote omitted). We’ve developed a generation of emotionally fragile students who not only are uncomfortable with professors who challenge their deeply held ideas but who also cannot seem to understand that universities are not supposed to invite to campus only those speakers with whom the students agree. Academic freedom protects faculty members who challenge students’ ideas (as well as the ideas of their own colleagues), so that teachers can eventually demonstrate that the best response to a poorly developed thought isn’t censorship or avoidance; it’s debunking the idea through analysis and debate.

¹⁷ *Id.* at 54.

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And with that paradox lies the rub:¹⁸ when academic freedom intersects with the governance of a university, how do we distinguish those arenas that should clearly be within the prerogative of the faculty from those arenas in which the expertise of the faculty adds little, if anything, to the debate? I speak, of course, of the issue of shared governance.¹⁹

Academic freedom addresses the parameters within which a professional scholar may use his or her training to pursue “the free search for truth and its free exposition.”²⁰ The reason that, as a part of university governance, academic departments – and not “the administration” – should set and enforce their own standards regarding hiring, promotion, and tenure, and to set their own curricula and admissions standards, is that the academic departments are in the best position to know quality from mediocrity (or worse). Administrators who do not come from an academic discipline just don’t have the bona fides to be entrusted with the ability to tell wheat from chaff.

The problem, however, is that not all academic departments can be entrusted to tell wheat from chaff, either. I’ve seen two different problems with giving academic departments jurisdiction over even those activities particularly within their purview. First, because the establishment of high academic standards only works when a department pursues those standards, academic departments that are less than purely motivated can engage in a race to the bottom. (Think of those departments that refrain from hiring candidates with “better” resumes than those of the current faculty, because the department doesn’t want to “show up” its current members.) Laziness or insecurity can easily pervade a dysfunctional department, and dysfunctional departments will tolerate shoddy research, poor teaching, and a complete failure to perform the basic professorial

¹⁸ Cf. William Shakespeare, *HAMLET*, Act III, Scene 1, available at www.online-literature.com/shakespeare/hamlet/9/.

¹⁹ For a nice discussion of shared governance, see Gary A. Olson, *Exactly What Is ‘Shared Governance’?*, *CHRON. HIGHER ED.*, July 23, 2009, available at chronicle.com/article/Exactly-What-Is-Shared-Gov/47065/.

²⁰ 1940 *Statement of Principles*, *supra* n. 4.

functions. Post-tenure review policies in dysfunctional departments are completely toothless, as long as they depend on the department's faculty to enforce any standards.²¹ The faculty that shucks responsibility together will decline together. I've seen it happen.²²

The second failure of shared governance occurs because there is no clear line of demarcation between purely academic areas and those issues of governance more commonly left to the administration – e.g., budget issues, issues of allocation of space or other resources, and issues of compliance with the myriad regulations that every university faces. The lines of authority not only blur but become tangled, sometimes irretrievably.

I've had the benefit of seeing these blurred lines at four different institutions: as a faculty member at all four and as an administrator at three out of those four. For example, when Tropical Storm Allison wiped out a significant portion of the University of Houston Law Center in the summer of 2001, most of the professors were away from Houston. The school somehow had to figure out how to function during those summer months and during the renovation and repair of the facilities afterwards. Thanks to some dedicated staffers, we had email up and running even though we had only limited access to our buildings, no electricity or phone service, and significant damage caused by fourteen feet of water coursing through our facilities. That email functionality let the administration run some "faculty decisions" by the faculty: for example, should we require laptops, given that our library had been wiped out? But the issue of whether the faculty or the administration had jurisdiction

²¹ And don't get me started on detenurization. One almost has to be willing to kill a trustee to face detenurization.

²² I've been at one institution that prevented the dean from putting a professor into a post-tenure review rehabilitative program, even when that professor taught poorly, hadn't published in years, and performed very little service. Post-tenure review at that institution required a faculty vote, and that faculty refused to vote to put any of its members into a rehabilitative program, on the "there but for the grace of God go I" theory. No professor was willing to pull the trigger on nonfeasance, so the end result of the faculty's refusal was that the most productive members of the faculty bore a disproportionate share of the school's work.

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over particular decisions bogged down other pressing issues. What should we do about redesigning a building that had lost one-and-a-half usable floors?²³ How could we teach law students without a functioning library?²⁴ What if we couldn't rehab the facilities before classes resumed in the fall?²⁵ How could we run a functioning school during the summer without any functioning buildings?²⁶

Faculty decision-making tends to move at glacial speed for precisely the reason that people become professors: the need to consider all aspects of a question before deciding what to do about it. My favorite provost²⁷ used to remind deans that what made faculty members so good – the ability to focus on an issue and see all sides of a question – could occasionally make them very frustrating when decisions had to be made posthaste. Moreover, faculty members are extremely smart people, as a rule. They assume that they know, or can learn, all about an issue so as to be able to talk intelligently about it. The corollary to that assumption is that, because faculty members are quick studies, they believe that they can opine intelligently, say, about budgets and facilities and other decisions that traditionally fall within the jurisdiction of administrators.

²³ Answer: we formed a committee composed of faculty and administration to redesign the space.

²⁴ Answer: because we'd already installed a wireless system before Tropical Storm Allison, we were able to give students access to research tools electronically – hence, the laptop requirement.

²⁵ Answer: we worried about this issue every single day between the end of the storm and the beginning of classes. Every single day. Thanks, however, to the generosity of our community and the willingness of our summer-school faculty to teach off campus, we taught summer school in law firm conference rooms and professors' homes, missing only one week of classes because of the storm.

²⁶ Answer: the university moved our "offices" to the basketball arena. Our accounting and other functions were in the luxury boxes, which weren't particularly luxurious. Our career services office was based in a concession stand. (The aftermath of the disruption of Career Services was the largest cause of the school's *U.S. News* ranking dip a few years later. One lesson that I learned is that Career Services is one of the top three functions that a dean should preserve during a crisis, right behind payroll and communications.)

²⁷ My favorite provost worked at the University of Nebraska.

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Perhaps it's true that those blurred lines of shared governance would benefit from more faculty input. Nothing prevents an English professor or an economist or a nuclear physicist from learning about a university's budget or deferred maintenance schedule and then providing the administration with wise counsel about holes in the budget or where best to spend building repair funds. But the problem with most blurred areas of shared governance is that the faculty often wants to provide input without knowing all of the facts – an activity that no professor should tolerate in his or her own research area but which often occurs in, say, departmental or faculty senate discussions. There's just no *SparkNotes* version of budgets and space allocation decisions for faculty members to use. There's no good way to study these types of issues superficially and be able to understand how all of the moving parts work together; and yet I've seen too many professors insist on giving the type of input that bears no relationship to administrative reality – and then insist that the administrators follow that input to the letter.

Moreover, once professors venture beyond their legitimate areas of responsibility – beyond furthering their discipline's research, teaching their students, admitting new students, and hiring new faculty members – the real problem of shared governance is the lack of shared consequences for actions. If a faculty sets a budget and then overspends it, the faculty members don't get fired; but the administrators might. If a faculty allocates portions of a building to particular activities and the allocation doesn't "work" for all of the department's constituencies, the faculty doesn't get called on the carpet;²⁸ the department chair or dean does. If a faculty votes to cut the size of the entering class or eliminate a program beloved by the alumni, the faculty suffers no consequences (at least not directly),²⁹ but the department chair or dean certainly does.

Ultimately, the problem with shared governance is that a good working model of governance includes both clear hierarchies and

²⁸ No pun intended. Really.

²⁹ Eventually, of course, the budget or donations may suffer.

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consequences for irresponsible actions.³⁰ Shared governance in universities has neither. The administrators in universities have a clear hierarchy that (mostly) fits consequences to decisions (eventually). But the hierarchy of faculty is fairly flat. Deans and chairs are “first among equals,” with very little power to force professors to do their bidding. There’s really not much that an administrator can do to a tenured faculty member who isn’t pulling his weight, even in these financially difficult times.

Really, the whole point of academic freedom is that it should be tied to the responsibility of serving a good that’s larger than the individual professor’s needs. Academic freedom, especially as Finkin and Post explain it, is inexorably linked to the highest goals of the academy: it’s freedom of inquiry, not freedom from professional standards or job duties. Academic freedom is like any great power: with it comes great responsibility.³¹ Humility can’t hurt, either.



³⁰ Want to see evidence of why consequences for irresponsible actions are important? Check out the bailout. *See, e.g.*, David Stout, *The Wall Street Bailout Plan, Explained*, NEW YORK TIMES, September 20, 2009, available at www.nytimes.com/2008/09/21/business/21qanda.html.

³¹ SPIDER-MAN (Columbia Pictures 2002) (www.imdb.com/title/tt0145487/quotes).