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February 16, 2007

JOHN OAKLEY
CHAIR, ACADEMIC COUNCIL

Re: Academic Freedom: Its Privilege and Responsibility within the University of California

Dear John,

Members of the University Committee on Academic Freedom (UCAF) share a concern that three years after the passage of APM 010, many faculty in the UC community still lack a clear understanding of the history, meaning, and importance of academic freedom. We believe an ongoing, institutional effort is needed to promote awareness and engage both new and senior faculty in a discussion about the central issues.

In 2003, UCAF sponsored a systemwide forum to facilitate a dialogue among Senate committees about academic freedom in order to promote greater understanding of its meaning, challenges, extent, limits, and future within the current academic environment. The forum was one step in what we felt should be a continuing effort to inform the faculty and encourage discussion and debate. UCAF wants to extend its commitment to that effort and has developed an educational document for the consideration of Academic Council.

The attached paper, "Academic Freedom: Its Privilege and Responsibility within the University of California," presents a legal history of academic freedom in the United States, California, and the University of California, including foundational Supreme Court cases and opinions. The paper outlines the responsibilities of the professoriate within the academic freedom privilege and clarifies the difference between faculty freedoms within the classroom and their First Amendment rights as private citizens.

UCAF believes it would be useful to have this paper distributed widely to UC faculty and made available on the Internet along with other academic freedom resources. UCAF asks for your assistance first in requesting that Academic Council endorse the document as a recommended educational tool. Second, UCAF requests that a copy of the document be distributed to each divisional Senate along with a recommendation that divisions post the document on academic freedom committee websites and/or campus websites as educational tools to promote more understanding and awareness of academic freedom. We also ask that divisional chairs call the attention of their respective faculty to its existence.

In addition, as new faculty will particularly benefit from the information, UCAF asks Council to recommend to divisions that the document be included in the start-up materials new professors receive at training seminars or elsewhere.

Finally, considering the Board of Regents impending vote on the ban of funding from tobacco companies, we request that each Regent be supplied with a copy of this document.

Sincerely,

Jerold Theis
Chair, UCAF

cc: Director Bertero-Barceló

Academic Freedom: Its Privilege and Responsibility
Within the University of California

The American professoriate has not always enjoyed autonomy in teaching, research and intra and extramural speech. Indeed academic freedom has often been challenged, especially between 1870 and 1970, by religious fundamentalists, university trustees and regents, patriotic groups, anti-communists including Senator Joseph McCarthy, and student activists.[1] Even today, there continue to be efforts by religious groups, student protesters, faculty members, and university trustees to limit the speech of the professoriate.[2]

1. *Constitutional autonomy of the University of California from legislative interference*. The California Constitution protects the University from the California Legislature. Article IX, Section 9 delegates to the Regents "full powers of organization and government of the University" and declares the University independent of all political influence.[3] The University's autonomy does not extend to the budget and appropriations process. However, the governor and the legislature cannot place conditions on the use of appropriated funds that would impair the Regents' governance powers.[4] The California Supreme Court has indicated that the Legislature lacks power to interfere with matters that are "exclusively University affairs."[5]

The central functions of the University that make up the "university affairs" and are protected from legislative interference encompass at least the following nine areas: [6]

1. Determination of course content
2. Determination of curriculum
3. Requirements for degrees
4. Conduct of research
5. Conditions determining selection, retention and conditions of employment of academic personnel
6. Internal allocation of resources
7. Commencing, administering, revising and terminating academic programs
8. Patterns of internal governance
9. Admissions criteria

2. *AAUP declaration*. The protection of the professoriate from interference in academic issues by the officers and Regents of the University derives from several

[1] Hamilton, Neil. Zealotry and Academic Freedom a Legal and Historical Perspective. Transaction Publishers. New Brunswick, USA, 1995.
[2] J. Dee Kille, Academic Freedom Imperiled: The McCarthy Era at the University of Nevada. University of Nevada Press. Reno, Las Vegas, 2004.
[3] Horowitz, Harold W. The Autonomy of the University of California Under the State Constitution. UCLA Law Review 25:23-45, 1978.
[4] Under Art. XVI, paragraph 8, once the Legislature has set aside the amount of money it will appropriate to the University, it cannot dictate how the money shall be allocated.
[5] See Toney v. Underhill, 39 Cal.2d 708, 249 P.2d 280 (1952).
[6] See Horowitz, note 3.

sources.

The American Association of University Professors (AAUP) 1915 Declaration listed three elements of academic freedom: Freedom of inquiry and research, freedom of teaching within the university or college, and freedom of extramural utterance and action. According to the Declaration, "proper fulfillment of the work of the professoriate requires that our universities shall be so free that no fair minded person shall find any excuse for even a suspicion that the utterance of university teachers are shaped or restricted by the judgment, not of professional scholars, but of inexpert and possibly not wholly disinterested persons outside their ranks." [7]

Thus it is essential to society that the conclusions of trained experts in their field of study, whose quest for and dedication to the pursuit of truth is paramount in their professional life, be in fact the conclusions of such experts and not the opinions of the lay public or those who support or manage the universities.[8] The obligations of the professoriate to society are thus the pursuit and dissemination of the truth as their expertise allows them to discover it and to the extent that their utterances or motivations deviate from or are modified by lay opinion they have failed to discharge their obligation to the society at large.

The Declaration also covers the relationship between university trustees and member of the faculty. The faculties are the appointees but are not in any sense the employees of the trustees. Once appointed, scholars should perform their professional duties and the trustees have neither the competency nor moral right to intervene in or attempt to control those duties.

The 1915 Declaration also pointed out that it is "Not only the character of the instruction but also the character of the instructor that counts and if the student has reason to believe that the instructor is not true to himself the virtue of the instruction as an educative force is incalculably diminished. . . The instructor should also remember that it is not his or her business to provide the student with conclusions but rather to train them to think for themselves."[9]

3. *APM 010.* The AAUP's 1915 Declaration is reflected in the current APM 010 of the University of California, which was revised and ratified by the Academic Assembly in July 2003:

The University of California is committed to upholding and preserving principles of academic freedom. These principles reflect the University's fundamental mission, which is to discover knowledge and to disseminate it to its students and to society at large. The principles of academic freedom guarantee freedom of inquiry and research, freedom of teaching, and freedom of expression and publication. These freedoms enable

[7] American Association of University Professors. Academic Freedom and Tenure. Louis Joughin-Editor. The 1915 Declaration of Principles, pg 155-176.
[8] Id.
[9] Id.

the University to advance knowledge and to transmit it inside and beyond the classroom. The University also seeks to foster in its students a mature independence of mind, and this purpose cannot be achieved unless students and faculty are free within the classroom to express the widest range of viewpoints within the standards of scholarly inquiry and professional ethics. The exercise of academic freedom entails correlative duties of professional care when teaching, conducting research, or otherwise acting as a member of the faculty. The contours of these duties are more fully set forth in The Faculty Code of Conduct (APM 015).

Academic freedom requires that teaching and scholarship be assessed only by reference to the professional standards that sustain the University's pursuit and achievement of knowledge. The substance and nature of these standards properly lie within the expertise and authority of the faculty as a body. The competence of the faculty to apply these standards of assessment is recognized in the Standing Orders of the Regents, which establish a system of shared governance between the Administration and the Academic Senate. Academic freedom requires that the Academic Senate be given primary responsibility for applying academic standards and that the Academic Senate exercise its responsibility in full compliance with applicable standards of professional care.

4. *Constitutional protections of academic freedom.* Public universities are bound by the First Amendment. Thus, both public university students and public university teachers are entitled to some protection from discipline, firing, and other retaliation for their speech. In some areas, this protection is clear and broad. In others, it is relatively vague.

a. Student speech outside the classroom and outside academic assignments. Most clearly, students generally may not be expelled, suspended, or otherwise disciplined for what they say in student newspapers, at demonstrations, in out-of-class conversations, and the like. The Supreme Court made this clear in *Papish v. Board of Curators*, 410 U.S. 667 (1973), and *Healy v. James*, 408 U.S. 169 (1972). Lower courts have followed suit, especially in the late 1980s and 1990s cases that have struck down student speech codes. *See, e.g.*, *Dambrot v. Central Michigan Univ.*, 55 F.3d 1177 (6th Cir. 1995); *Iota Xi v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993); *UWM Post v. Univ. of Wisc.*, 74 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

Of course, student speech may be restricted if it falls within the narrow categories of speech that is generally unprotected (e.g., threats of violence, personal face-to-face insults likely to cause a fight, or intentional incitement of imminent and likely unlawful conduct). Likewise, the university may impose a substantial range of content-neutral time, place, and manner restrictions, such as bans on the use of sound amplification that would be audible from classrooms. And the university may impose reasonable and viewpoint-neutral limits on student speech on "nonpublic forum" property, such as building corridors and the like.

Still, generally speaking, student speech outside the classroom and outside academic assignments is protected from university punishment, even if it is offensive, wrongheaded, racist, contemptuous, anti-government, or anti-administration. Of course, it is not protected from university criticism. The university is itself free to publicly speak to condemn student statements that university officials find to be unsound or improper.

b. Student speech within the classroom. The Supreme Court has never faced this question expressly, but the logic of the Court's cases strongly suggests that university professors have broad authority to refuse to call on students, to punish students for talking out of turn, and to stop calling on students who insult other students. Purely passive speech, such as speech on T-shirts, may still be protected, see *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969). But oral statements, which can easily disrupt the class discussion, are within the professor's authority.

*c. Student speech in academic assignments***.** Evaluating students' academic performance necessarily involves making content-based, and often even viewpoint-based, judgments. Did the student give the correct answer? Do the student's arguments make sense? Is a student essay well-written, well-reasoned, calm, and rhetorically effective?

There are no Supreme Court cases squarely on the subject, and very few lower court cases, but First Amendment principles generally suggest that universities must have very broad authority to judge such student speech. This is especially so because judges often lack the competence to evaluate the quality of work in various disciplines; they therefore rightly defer to the judgments of academics who are better able to distinguish good from bad student work.

Naturally, academic freedom requires tolerance of a broad range of student viewpoints, so long as they are thoughtfully argued and pay attention to counterarguments. But judges generally stay out of such grading decisions, and leave their limits to professional ethics rather than to First Amendment law.

d. Faculty speech outside teaching and scholarship. Government employers have considerable authority over the speech of their employees, much more than public universities have over the speech of their students. Generally speaking, an employer may fire an employee for the employee's speech when (1) the speech is on a matter of private concern, such as general small-talk, or the employee's concern about his own job conditions, *or* (2) the speech is so likely to disrupt the employer's functioning that the likely disruption outweighs the value of the speech to the employee and his listeners, *or* (3) the speech is made as part of the employee's official duties. *See Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Ed.*, 391 U.S. 563 (1968); *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

Nonetheless, the Supreme Court has repeatedly stressed, including in university professor speech cases, that "our Nation is deeply committed to safeguarding academic

freedom, which is of transcendent value to all of us and not merely to the teachers concerned," *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). The Court may well ultimately conclude that the role of university professors is such that the normal government employee speech rules do not quite apply to them. As the Court pointed out in *Garcetti* (which held that speech made as part of an employee's duties is not constitutionally protected), "There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence;" the Court therefore expressly declined to decide whether the *Garcetti* limitation on employee speech "would apply in the same manner to a case involving speech related to scholarship or teaching." *See also Jeffries v. Harleston*, 52 F.3d 9, 14 (2nd Cir. 1995) (likewise leaving open the possibility that a faculty member in a public university deserves greater protection from state interference with his speech than [do other government employees).

Lower court cases have generally concluded that faculty speech outside teaching and scholarship is indeed quite broadly protected by the First Amendment from employer retaliation, so long as it is on matters of public concern. *See, e.g.*, *Levin v. Harleston*, 966 F.2d 85 (2nd Cir. 1992). The courts seem to take the view that a considerable degree of debate, controversy, and even disruption caused by offensive ideas is an inherent part of the interchange of ideas in which universities must engage. *See, e.g.*, *Mabey v. Reagan*, 537 F.2d 1036, 1050 (9th Cir. 1976); *Adamian v. Jacobsen*, 539 F.2d 929, 934 (9th Cir. 1975). Therefore, while normal employers are generally entitled to fire employees who have (for instance) offended customers or members of the public, universities are probably bound by the First Amendment to tolerate similarly offensive speech by teachers, at least outside the classroom.

Note that this applies to professors facing discipline that might affect their academic posts. Professors who double as administrators—deans, chairs, heads of institutes—may be stripped of their administrative positions whenever they say something that higher administrations reasonable see as likely to be disruptive. *See Jeffries v. Harleston*, 52 F.3d 9, 14 (2nd Cir. 1995). Academic freedom may mandate that the professor keep his academic post, but not that he keep related administrative posts.

e. Faculty scholarship. There is virtually no case law having to do with discipline based on faculty scholarship. Just as student academic assignments must be evaluated by the university based on its content and sometimes even its viewpoint, so faculty scholarship must be evaluated, when candidates are hired or not hired, when professors are tenured or not tenured, and when other promotion decisions are made. It seems likely that here too the constraints on university action will stem from professional norms of academic freedom, and not from judicially enforced First Amendment principles.

Firing of a tenured professor for the viewpoints expressed in his scholarship, on the other hand, would violate the tenure contract and probably violate the First

Amendment as well, since the university could not defend the firing as just a normal employment decision that is routinely made on the basis of the professor's scholarship.

f. Faculty teaching. A public university professor's First Amendment rights are likely at their narrowest when it comes to teaching. The professor teaches at the behest of and on behalf of his academic department; and both the university and the public have an interest in making sure that certain materials are taught, and taught effectively. For example, scholarship often aims at upsetting conventional wisdom, but in most undergraduate classes, the conventional wisdom is precisely what must be taught. Likewise, professors usually have broad flexibility in choosing their scholarship topics, but may not have the same flexibility in choosing what to cover in particular courses.

Most universities give professors substantial flexibility in their choice of syllabus and teaching techniques, and this may generally make sense. But no court cases suggest that the First Amendment secures the same flexibility. The Supreme Court has never expressly considered the question, and lower courts have generally not faced it at the college or university level. Nonetheless, it seems likely that courts would hold that the administration is constitutionally allowed to dictate what matters a professor teaches, to require a professor to use a certain teaching method, and even to require the professor to teach certain viewpoints (e.g., the view that the Earth is much older than 6000 years) as true.

On the other hand, before a university disciplines a professor for supposedly improper teaching, the university likely has to make clear to the professor what is allowed and what is not. A professor cannot, for instance, be punished for using allegedly excessive sexual humor and metaphor as a teaching tool under a general "sexual harassment" policy that never made clear that such sexual allusions are forbidden. *See Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996); *Silva v. University of N.H.*, 888 F. Supp. 293 (D.N.H. 1994).

Finally, note that under the First Amendment, what one level of supervisor (the dean) may do, higher-level supervisors—such as college administrators, the Regents, or even the legislature—likely may do as well. Broader academic freedom principles, and (usually) simple good sense, may suggest that the curriculum or teaching styles in public university classes should be dictated chiefly by fellow academics. But the First Amendment draws no such line; if the speech of a professor as university employee can be regulated, it can be regulated by the university's ultimate controllers (the Regents or the legislature, representing the people) as well as by university officials.

Members of the faculty are entitled as University employees to the full protections of the Constitutions of the United States and of California.[10] These protections are in addition to whatever rights, privileges and responsibilities attach to the academic freedom

[10] In addition, the due process clauses of the state and federal constitutions protect professors who by statute or contract is entitled to keep their job unless the University has good cause to discharge them. In the case of an attempted discharge, professors are entitled to adequate notice and a fair hearing. See *Bd. of Regents v. Roth*, 408 U.S. 564 (1972).

of university faculty.

5. Academic freedom and responsibilities of the professoriate. Many faculty members have little appreciation or grounding in the tradition of academic freedom.[11] Clark Kerr, a former president of the University of California, noted that in the past "there was a generally understood academic ethic that was part of the orientation of the professoriate and this ethic was reinforced by advice and personal pressure when it was not voluntarily followed."[12] The rapid expansion of academia and the proliferation of titles that lie outside the Academic Senate have created different classes of the professoriate, serving different masters and motivated by different pressures. This has in turn weakened the ethical vision that was once far more consistent within a unified profession.[13]

"The price of an exceptional vocational freedom to speak the truth as one sees it is the cost of exceptional care in the representation of that truth, a professional standard of care."[14] Professors who fail to meet scholarly standards of competence or who abuse their position to indoctrinate students cannot claim the protection of academic freedom and can be disciplined. However, the determination of the competency of their scholarship must be judged by professional peers, who alone have the necessary qualifications.[15]

Professors violate the norms of academic freedom if they falsify, fabricate or plagiarize material, indoctrinate students, follow blindly the dictates of political or religious authority or allow influences from government or industrial institutions to distort or alter their assigned duties. Even if professors do not violate academic freedom they cannot invoke its protection to shelter incompetence, lack of productivity, coercion of students or neglect of legitimately assigned duties.[16]

It is more important than ever before for the faculty to devote time to educating itself as to the importance of academic freedom to society and to the nature of its privileges and obligations. Without such reflection the professoriate will be unprepared to use the privilege of academic freedom for the betterment of the society and as a result may lose the privilege.

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[11] See Hamilton, note 1, Chapter 12.
[12] Kerr, Clark. Knowledge, Ethics and the new Academic Culture. Change, Jan/Feb 1994.
[13] American Association of University Professors. Academic Freedom and Tenure: Corporate Funding of Academic Research. Academe Nov-Dec 1983.
[14] Van Alstyne, William W. The Specific Theory of Academic Freedom and the General Issue of Civil Liberty in: The Concept of Academic Freedom. Edmond L. Pincoffs, Editor. University of Texas Press, pg 59 & 61-63, 1972.
[15] See AAUP, note 7.
[16] Rabban, David M. Does Academic Freedom Limit Faculty Autonomy. Texas Law Review. 66:1405-1428, 1988.