Colleges Face Ominous New Pressures on Academic Freedom

By ROBERT M. O'NEIL

Does academic freedom really matter in the 21st century?

Most professors will never experience a serious threat to their independence or free expression. They may even resent the expectation that they join or support organizations that defend such freedoms when the risks seem so remote to their own careers and fields.

Yet for the small fraction of faculty members who do encounter such pressures, academic freedom makes a major difference. It certainly matters, for example, to the growing number of reputable scholars who have questioned the wisdom of U.S. foreign policy in the Middle East (especially in Iraq), just as academic freedom safeguarded many professors whose outspoken opposition to the Vietnam War, in the 1960s, would otherwise surely have put them at grave risk. In an ideal world, such protection would be unnecessary because legislatures, boards, and administrators would always recognize the need for independent thought and inquiry on a campus. But that is not the world in which we live.

Indeed, the first decade of the new millennium could be described as both the best of times and the worst of times for academic freedom. On one hand, outspoken scholars fared much better than one would have expected in the aftermath of September 11, 2001. Richard Berthold, at the University of New Mexico, incurred only a reprimand for telling his freshman history class that "anyone who bombs the Pentagon gets an A in my book." At Columbia University, Nicholas DeGenova got essentially a pass when he called for "a million Mogadishus." Arthur Butz remained a professor in good standing at Northwestern University after he lauded Iran's president for Holocaust denial. The moderate and deliberative response to such incidents and others suggests that academic freedom is in excellent health.

But a host of ominous new forces and pressures clouds this happy picture. Federal and state courts have seemed surprisingly receptive to an emerging and deeply disturbing view of academic interests, whether the issue is who controls a professor's choice of teaching materials and assignment of grades, who makes the final decisions in allocating endowment money for the support of academic programs, or what happens when a student objects to an unwelcome course assignment.

Changes in the medium of expression have also produced significant shifts — most notably in failing to accord to electronic messages and information many of the protections that faculty members have taken for granted in their paper and telephonic communications. Resource materials gathered through Internet searches have in several situations received far less protection than would routinely be accorded to the same materials in print.
Then there are the new qualifications and exceptions to traditional safeguards for academic research, such as permitting a private litigant, for purely commercial gain, to compel the premature disclosure of research in progress. The gravest of new threats may come not from the government but from the corporate sector. When universities agree to draconian prepublication rules or restraints on internal review, faculty members whose laboratory work depends on corporate sponsorship have little choice but to accept them, however uncongenial those restrictions may be to the process of scientific inquiry. Although institutions may guard against such intrusions or reduce the risks of compromise, the allure of corporate support — often extending well beyond specific research programs — seems too often not only to have "bought" the time and creativity of scientists, but also to have distorted the conscience of the academy in vital areas.

Finally, and to some observers most ominous of all, is an array of new threats to academic freedom from private sources. The recent offer of a conservative alumni group at the University of California at Los Angeles to pay students to monitor the classes of "liberal" professors and tape lectures for posting on the organization's Web site may be the most alarming example, but it is by no means the only one.

Such threats are potentially more ominous than traditional attacks on academic freedom. They affect the classroom directly. Moreover, such attacks by private groups are typically immune from any legal recourse. Professors who are vilified on a burgeoning array of Web sites and blogs, such as NoIndoctrination.org and Campus Watch, clearly may not assert any First Amendment claims on their behalf. Nor, save in the most extreme circumstances, may an embattled professor whose views are distorted on such a Web page sue for libel; typically such a person would need to prove actual malice to get a defamation claim beyond the threshold in court.

Given such trends, what actions might provide better protection for academic freedom in the future?

First, academe should be substantially more aggressive in seeking legal protection for the vital interests of free inquiry and scholarship. Seldom have the organizations that represent universities gone on the offensive. For the most part those groups have been fully occupied in fending off threatened intrusions and restrictions, leaving precious little time or political capital for countermeasures.

A notable example of rare initiative, one that suggests new ways to enhance the legal safeguards for academic freedom, was the proposed Freedom to Read Protection Act of 2003. It would have mitigated substantially the most intrusive features of the USA Patriot Act's Business Records section, under which federal law-enforcement officers could demand such sensitive materials as the records of people who borrow or purchase books, without formal legal process and on mere suspicion of terrorist involvement. Publishers, librarians, and various free-speech, free-press, and scholarly organizations came together to seek what proved to be surprisingly extensive Congressional support for the measure. The bill came within one vote of passage, and in the eventual reauthorization of the Patriot Act its spirit was substantially incorporated in much-improved legislation. (It was so much better, in fact, that the American Civil Liberties Union withdrew a court challenge to the previous language because the group's concerns had been basically redressed.)

Second, the academy needs to resist more vigorously any potentially grave threats that arise in the courts, even though only a single institution may be directly affected. When New York University is effectively forced to settle with Kinko's over a method of compiling course materials, or Princeton University is sued for allegedly departing from a donor's intent in the use of endowment funds, or Hampton University is sued for allegedly failing to silence libelous statements by one member of its faculty against another, much of the rest of higher education is informed and may be uneasy about the implications of such litigation. But other institutions do not readily come forward to support the manifestly common interests in ways that will apprise the courts of such shared concerns.

One striking recent example to the contrary illustrates the potential of making common cause in major test cases. When the Supreme Court agreed to revisit the issue of race-sensitive admission policies at the
University of Michigan, amicus curiae briefs were sought and filed from many sympathetic organizations, drawn from beyond Ann Arbor as well as beyond higher education. Especially persuasive to Justice Sandra Day O'Connor's favorable majority view of the law school's affirmative-action program were compelling briefs filed by corporate CEOs and senior retired military officers.

Third, accrediting associations should focus more sharply and critically on violations of academic freedom. Being accredited is a virtual necessity for an institution of higher learning, whether in terms of the eligibility of its students for federal financial aid or the admission of its graduates to selective professional and other programs. One would suppose that an institution that deprived its faculty members of academic freedom might forfeit or at least jeopardize its accredited status.

A few specialized accrediting groups — notably the Association of Theological Schools and the Association of American Law Schools — have imposed restrictions on previously accredited programs or have deferred admission of new programs in response to serious academic-freedom violations. However, the major regional organizations have been far less aggressive in policing academic-freedom conditions, even though their policies typically make mention of free inquiry and expression as general expectations. Closer attention to such issues by accreditors could substantially enhance academic freedom.

Fifth, administrators should be more willing to impose sanctions, including dismissal, on faculty members who abuse the special privileges and responsibilities of the professoriate. Despite the pervasive belief that "a tenured professor can never be dismissed," as many as 50 such dismissals occur in any given academic year. Typically those cases focus on such inexcusable behavior as plagiarism, serious violations of criminal law, or blatant sexual harassment. But for various reasons, those adverse actions are seldom publicized, enabling the myth of professorial impunity to persist. Renewed faculty commitment to professional ethics and responsibility could help increase public acceptance of the concept of academic freedom.

Sixth, the academic left should be more willing to come together with colleagues on the academic right who share academic-freedom concerns. Those who classify themselves as liberal often tend to disparage even the potentially sympathetic views of colleagues who describe their political beliefs and affiliations as conservative.

During the deliberations of the American Association of University Professors' Special Committee on Academic Freedom and National Security in Time of Crisis, arguably the most valuable contributions were those of the resident conservative whose views on the Bush administration, U.S. foreign policy, and other contentious issues differed sharply from the liberal consensus. The simple presence of the name of a recognized conservative among the signatories at once signaled to conservative colleagues an unusual degree of balance within the committee, thus commanding a far broader and more receptive audience than would otherwise have been the case. In addition, he provided a constant reality check in the assessment of specific conclusions and recommendations. The lessons of that experience suggest that the occasions on which, for example, the AAUP and the National Association of Scholars could make common cause on issues of no less importance to the right and the left have been underestimated and the potential for collaboration undervalued.

Seventh, more academic-freedom interests should be shared across a higher-education institution. Faculties should maintain close ties with several campus offices — not only those of the dean of students and director of international exchanges, but also campus security and the university counsel, for example.

Eighth, the potential involvement of governing boards offers a fruitful and largely untapped avenue. The "Statement on Board Accountability" of the Association of Governing Boards of Universities and Colleges lists prominently among the "transcendent values" of higher education the specific values of "academic freedom and due process." Most boards take considerable pride in the degree to which the institutions they guide and govern respect such fundamental values. Moreover, because trustees tend to be drawn largely from business and professional fields, they are ideally situated to explain academic values, including
academic freedom, to their sometimes skeptical colleagues and neighbors.

Ninth, the need for better understanding of academic freedom — starting with those who benefit from and depend most upon it — represents a crucial and vital imperative. By analogy to the fish who is the last to discover water, most professors understandably take academic freedom largely for granted. Even when one or several members of a particular faculty are threatened with reprisal because they advocate unpopular views or broadcast unwelcome research results, most other faculty members tend to look the other way, confident that they will not also be seen as troublemakers or malcontents — and usually they are quite correct. Indeed, life may even be easier for the rest of the faculty members if one or two or three of their colleagues have been weeded out and tranquility returns to the campus. Few others are likely to adopt a "there but for the grace of God" view of the fate of the sacrificial mavericks.

Yet the central lesson one should derive from such experience reflects James Madison's wise caution that "it is proper to take alarm at the first experiment on our liberties." What happens to one, or a few, could happen to others, even to those who consider their views wholly conventional and their positions thus secure. What such predictable and pervasive complacency forfeits is the opportunity for the education not only of the faculty member involved but also of many other people who need to understand why the silencing or dismissal of a single faculty crackpot or nutcase potentially affects everyone involved with the institution — in terms of the quality of education their children and grandchildren will receive; the quality of scholarship provided to government, business, and the professions; and the capacity of higher education to advance knowledge and pursue the eternal quest for truth.

That, after all, is what academic freedom is all about, and why it matters to those who are not professors as much as to those who are. The sooner citizens at large appreciate that reality, the better for them as well as for those of us within higher education.

Robert M. O'Neil is a founding director of the Thomas Jefferson Center for the Protection of Free Expression, a former president of the University of Virginia, and a professor emeritus of law at UVa. This essay was adapted from Academic Freedom in a Wired World, published this month by Harvard University Press. © 2008 by Harvard University Press.

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