Constitutional Academic Freedom in Scholarship and in Court

By J. PETER BYRNE

What role does the First Amendment play in protecting the academic freedom of faculty members? A recent decision by the U.S. Court of Appeals for the Fourth Circuit, *Urofsky v. Gilmore*, raises that fundamental question in a surprising context and answers it with brutal clarity. The Supreme Court is expected to decide this month whether it will hear the case.

The court upheld a Virginia statute that prohibits any state employee from viewing sexually explicit material on computers owned or leased by the state. The statute was challenged by a group of professors at public universities in Virginia, who argued that it violated their constitutional right to academic freedom, at least when they viewed such material for professional research. Not only did the court uphold the ban, it denied that professors have any constitutional right to academic freedom, and it said that the state had as much right to control the teaching, research, and scholarship of professors at state universities as it did the pleadings of a state lawyer or the reports of state bureaucrats.

Because the court relied in no small part on a scholarly article by me to support its conclusion, I feel a duty to express my professional view that the opinion is profoundly wrong as a matter of law, and threatens the freedom of higher education.

The significance of the court's analysis greatly exceeds the importance of the specific issue raised by this case. No one argues that professors or any other state employees have a constitutional right to spend time at work surfing the Web for lascivious images of genitals. And the Virginia statute permits state employees to view sexually explicit material at work if they have written authorization from a supervisor to do so as part of a bona fide research project. Thus, the statute places only relatively minor inconveniences before a professor who wants access to the material, if one assumes that deans and department chairmen will routinely grant permission to do research that requires it. What is troubling is how the court's reasoning broadly withdraws First Amendment protection against state regulation of faculty members' research.

The court began its analysis by holding that the state, as employer, has nearly complete control over the speech of public employees when the speech is part of the employees' duties. The court stated that "the government is entitled to control the content of the speech because it has, in a meaningful sense, 'purchased' the speech at issue through a grant of funding or payment of salary."
That view seems to push state control past any point approved by the Supreme Court, which has exempted employees' speech from state control when the speech concerns matters of public interest. The plaintiffs were forced to argue that academic freedom gave them greater immunity from state control than other public employees.

Thus the court came to the question of whether academic freedom protected the professors' right to conduct research. The court acknowledged that the statute might well violate the norms of academic freedom that have developed at American universities since the 19th century -- norms that guarantee faculty members substantial autonomy from administrators in their basic work of teaching, research, and writing. But the court held that the Constitution does not protect that academic freedom, only the right of a university itself to be free from interference by political actors in such functions.

In the court's view, the statute did not violate any right of universities, because university officials could grant permission to faculty members to view sexually explicit material for the purposes of research; accordingly, any restriction on a faculty member actually was being imposed not by the state but by the university, in not granting permission.

The court's ruling threatens disaster for the academic freedom of faculty members at state universities. If we think of the case as involving access to information through the state's equipment or material, it surely covers research in state libraries, including those of state universities. The opinion also gives no ground for distinguishing sexually explicit material from other books, pictures, or electronic media that a person might look at for pleasure.

Finally, the idea that the state owns and may dictate the professional speech of professors at state universities just as fully as it does the information given out by a clerk at the department of motor vehicles could justify a state's insisting on the topics and even opinions that a professor may express in class or in scholarly publications.

For its claim that academic freedom protects only the rights of the university, not those of the individual professor, the court relied on an article that I published in The Yale Law Journal in 1989. The article examined in detail the development of academic freedom in U.S. universities and highlighted the constructive role played in that development by the American Association of University Professors. It noted that the idea of a constitutional right to academic freedom developed later, in response to governmental interference in internal university affairs in the McCarthy period, and built upon long-standing legal traditions of academic institutional autonomy.

The A.A.U.P.'s approach to academic freedom has emphasized the rights of professors vis-a-vis university boards and administrators. The courts have focused instead on protecting the overall academic enterprise from outside political disruption. In my article, I argued that those differing emphases were appropriate because academics have practical experience with the tensions among individual freedom, peer review, and educational duties, while judges are better than academics at determining whether outside political influences have unduly interfered with academic decision-making.
My article was not the only study around that time of the creative tension between individual and institutional academic freedom. My work benefited from studies by Walter Metzger, the invaluable historian of academic freedom from Columbia University, and by Mark Yudof, a distinguished legal scholar of education who is now president of the University of Minnesota.

Moreover, my article stimulated vigorous disagreement from David Rabban, a leading scholar of the First Amendment and of labor law at the University of Texas School of Law, who criticized my conclusions at length in an article in *Law and Contemporary Problems*.

Professor Rabban believed that the courts had not distinguished between individual and institutional rights to academic freedom, because the interests of individual faculty members and universities were aligned in the early cases that reached the courts. When professors sought to challenge university rules as violations of constitutional academic freedom, conflict between the two developed. Professor Rabban favored giving precedence to individual rights, to guard against universities' penalizing professors for political reasons, but offering academic reasons as pretexts.

I read the cases Professor Rabban noted as concerned about the academic enterprise as a whole, and I worried that recognizing an individual's right would import civil norms into an academic realm already committed to a peculiar and valuable balance of freedom and professional responsibility. A neutral reader would find substantial agreement between our analyses and, where we disagreed, shared commitment to the precious American tradition of free scholarship and teaching.

Law professors typically enjoy being cited by courts; it relieves the worry that almost all academics have about whether their scholarship matters. And one might imagine that I would take satisfaction when a federal court of appeals embraces my view that constitutional academic freedom primarily protects the university and not individual professors. But the *Urofsky* opinion sickens me, and the court's use of my work to strip away legal protection for free intellectual inquiry leaves me distraught. Judges, like other lawyers engaged in advocacy, often use scholarly works argumentatively to score points rather than to increase their readers' understanding. In its distortion of my work, the *Urofsky* court showed itself indifferent to academic values and traditions, and quite incurious about how courts can best preserve our system of higher education -- the finest in the world.

The plaintiffs, supported by the A.A.U.P., have asked the Supreme Court to review the decision. The A.A.U.P. argues that individual faculty members do have a constitutional right of academic freedom.

I am concerned that recognizing such a right would lead to the judicial resolution of disputes between professors and administrators or faculty bodies about academic matters -- like tenure review or the content of the curriculum -- that judges are not competent to
decide. Nonetheless, the Supreme Court has ample grounds on which to reverse the
decision by the court of appeals. In addition to its unprecedented reduction of state
employees' general right to free speech, the lower court made two legal errors concerning
academic freedom.

First, it ignored the fact that the Virginia law in question, enacted by the state legislature,
represents the very type of "governmental intrusion into the intellectual life of a
university" -- in the words of Supreme Court Justice Felix Frankfurter, quoted by the
Urofsky court -- that the Supreme Court has repeatedly condemned, and that I highlighted
in my article as the central concern of academic freedom. Although deans may grant
waivers to individuals, the law significantly changes the power relation between faculty
members and administrators in the core academic activities of research and teaching. Red
tape and embarrassment will deter professors from investigating sources within the
banned category. The statute empowers administrators to determine what constitutes
bona fide research, but such questions should be addressed only by scholars.

Justice Frankfurter argued for "the exclusion of governmental intervention in the
intellectual life of a university" in an important concurring opinion in the 1957 case
Sweezy v. New Hampshire. He found that questioning a guest lecturer about the political
content of classroom speech was unconstitutional: "It matters little whether such
intervention occurs avowedly or through action that tends to check the ardor and
fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful
academic labor." The Urofsky court missed an important point when it stated that no one
should assume that university administrators would abuse their discretion: The state
should not require them to exercise that discretion.

Second, the court ignored the importance of academic speech in a society that values
First Amendment rights, insisting on the lack of constitutional significance in the
different roles of a psychologist at a state hospital and a professor of psychology at a state
university. In his concurring opinion, which upheld the statute on narrow grounds but
also affirmed the constitutional value of academic research, Chief Judge J. Harvie
Wilkinson noted that professors "are hired for the very purpose of inquiring into,
reflecting upon, and speaking out on matters of public concern." The academic work of
professors lies at the heart of the most generous ambitions of the First Amendment.
Preserving the fundamental academic values of disinterested inquiry, reasoned and
critical discourse, and liberal education justifies a constitutional right of academic
freedom. Those goals give intellectual and educational expression to the vision of human
reason implicit in the Constitution.

Chief Justice Earl Warren, writing for a plurality of the Supreme Court in Sweezy, made
the point more urgently: "Teachers and students must always remain free to inquire, to
study and to evaluate, to gain new maturity and understanding; otherwise our civilization
will stagnate and die." When courts apply the First Amendment to academic life, as when
they consider the state's control of speech by public employees, they must give weight to
the values of free research and teaching that sustain our country's intellectual life.
The *Urofsky* decision illustrates the alarming tendency in the federal courts over the past decade to discount the significance of the academic enterprise. The distinctive needs and values of the intellectual life of a university have sunk from judicial view, as legal doctrines fashioned for the streets and the market are applied to the classroom or the admissions process without nuanced consideration of how the operations and purposes of higher education are different, and how that difference benefits society.

Including the content of scholarship and teaching in the speech of public employees that a state can regulate, however, represents a new low in understanding and appreciation. Professors and administrators must speak up about the contributions of intellectual and educational work to the wider society. Let us hope, as well, that the Supreme Court will take up the *Urofsky* case and reassert the traditional constitutional right to academic freedom.

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