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Academic Freedom in *Urofsky*'s Wake: Post September 11 Remarks on "Who Owns Academic Freedom?"

Doug Rendleman*

Ms. Stacy Smith researched and wrote her excellent Note, *Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities*,¹ in one world; it will be published in another. The watershed event was September 11, 2001.

"Normal academics" characterized the world in which Ms. Smith wrote her Note. The subject was sex – but isn't it always? The members of the Virginia General Assembly were avid to curb state employees' use of government time and computers to study sex on the Internet.² Professors at state universities were eager to examine the forbidden topic; all the better, they maintained, to push back the frontiers of knowledge. The collision was inevitable, but "normal."

Although the dispute about professors' internet research into sexually explicit information comes under the heading of "normal academics," Ms. Smith demonstrates that the way the court resolved the dispute was aberrant. Professors' academic freedom to teach and research, as Ms. Smith capably shows, was, we thought, a prominent ingredient in educational culture and law. However, in *Urofsky v. Gilmore*,³ the Fourth Circuit held that a professor, as an individual teacher and researcher, lacks any separate academic freedom protected by the First Amendment; instead, the university that

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1. Stacy E. Smith, Note, *Who Owns Academic Freedom: The Standard for Academic Free Speech in Public Universities*, 59 WASH. & LEE L. REV. 299 (2002).

2. See VA. CODE ANN. § 2.1-805, amended by § 2.1-805 (Michie Supp. 1999), recodified at § 2-2827B (Michie 2001) (stating that no state agency employee may use agency-owned or agency-leased computer equipment "to access, download, print or store any information infrastructure files or services having sexually explicit content" without prior written approval from agency head).

3. 216 F.3d 401 (4th Cir. 2000) (en banc), cert. denied, 531 U.S. 1070 (2001).

employs the professor "owns" whatever academic freedom exists.⁴ A state university professor's free speech rights are identical to a prison guard's – because academic freedom is merely the institution's right to govern itself in academic matters.⁵

The court's doctrine is pernicious. *Urofsky* is a triumph for collectivism and conformity and a recipe for timidity. The American Association of University Professors articulated the correct principles nearly a century ago in its 1915 Declaration of Principles.⁶ Academic freedom ought to be – we used to think *is* – an individual, not merely a collective, right.⁷ Academic freedom protects university autonomy from outside interference; but more importantly, it enables independent teachers and researchers with academic freedom to be indispensable to the modern university's teaching and research missions.⁸

Ms. Smith demonstrates that the *Urofsky* decision is a setback for the legal protection of academic freedom, and her Note strengthens the argument against the *Urofsky* court's result.⁹ Ms. Smith's thought process is lucid. She writes fluently, and her Note is easy to read. Having picked a subject she could treat in depth within the compass of a Note, she examines the legal rules in light of public policy, and she reaches a courageous conclusion – the *Urofsky* court's decision is incorrect in principle and ought to be repudiated at the first opportunity.¹⁰ I steadfastly hope that other courts will take Ms. Smith's advice – not to emulate *Urofsky*.

4. *Urofsky v. Gilmore*, 216 F.3d 401, 408, 412, 416 (4th Cir. 2000) (en banc), cert. denied, 531 U.S. 1070 (2001).

5. See *id.* at 412 (stating that "[t]he Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs").

6. AM. ASS'N OF UNIV. PROFESSORS, GENERAL REPORT ON THE COMMITTEE OF ACADEMIC FREEDOM AND ACADEMIC TENURE (1915), reprinted in FREEDOM AND TENURE IN THE ACADEMY, app. A, at 393-406 (William W. Van Alstyne ed., 1993).

7. See *id.* at 393 (defining academic freedom as comprising individual professors' "freedom of inquiry and research").

8. See generally David M. Rabban, *Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 L. & CONTEMP. PROBS. 227, 300 (1990) (emphasizing that Supreme Court has recognized academic freedom as "unenumerated [F]irst [A]mendment right with both individual and institutional components").

9. See Smith, *supra* note 1, at 360 (asserting that Fourth Circuit should have appreciated distinction between garden-variety public employee speech and academic free speech or inquiry).

10. *Id.* at 336-60. For a shorter article with similar conclusions, see David Rabban, *Academic Freedom, Individual or Institutional?*, ACADEME, Nov.-Dec. 2001, at 16. See also Case Comment, *Fourth Circuit Upholds Virginia Statute Prohibiting State Employees from Downloading Sexually Explicit Material* – *Urofsky v. Gilmore*, 114 HARV. L. REV. 1414, 1418-20 (2001) (concluding that *Urofsky* court threatened doctrine of academic freedom).

Academic freedom has always been "soft law," precarious and narrow.¹¹ If *Urofsky* foreshadows things to come, the already "soft" law just got a lot mushier. If, after *Urofsky*, academic freedom is less important in academic law, then it ought to become a more important part of academic culture. It underscores the need for contractual and cultural protections for dissent.

Like any subculture, colleges and universities have an overlay of "common law": academic freedom, procedures, values, and precepts which have no counterpart in government or business.¹² A culture of academic freedom must include tolerance for dissent in both public and private higher education. Moreover, while protection of a tenure contract is not in order for nontenured instructors and students, a culture of tolerance for dissent for all would be salutary.

"It still astounds me," Professor and *Urofsky* plaintiff Terry Meyers observed to me in an e-mail, "that I have to seek permission of a state official to read poetry kept on a state data base at [the University of Virginia]."¹³ The rules that officials employ to implement censorship are, in addition to being cumbersome and stifling, silly. Professor Meyers must read the actual books from the College of William and Mary's library; because he cannot, without an official's permission, access the University of Virginia's archives on his computer.¹⁴ Professor Meyers's inability to peruse the Victorian poet Swinburne on his computer, I candidly admit, is peripheral to the national debate about public policy. Nonetheless, the principle he asserts – that of a professor's academic freedom to conduct research autonomously – is indispensable to public policy. Unfortunately, the *Urofsky* court has undermined the legal stature of academic freedom when the world needs academic freedom now more than ever.

For we are now on the other side of the September 11 watershed. Hyper-nationalism exacerbated by twisted religious fundamentalism led terrorists to kill thousands of innocent people in Pennsylvania, New York, and Virginia. The United States government has unleashed internal measures to uncover potential perpetrators and to prevent future terrorism. Because of the military

11. William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79, 79-80 (1990).

12. *The University Counsel: A Roundtable Discussion*, ACADEME, Nov.-Dec. 2001, at 27-28 (quoting Bob O'Neil).

13. E-mail from Terry Meyers, Professor and Chair of the English Department, College of William and Mary, to Doug R. Rendleman (Oct. 1, 2001) (on file with author).

14. See VA. CODE ANN. § 2.1-805 (Michie Supp. 1999), *recodified at* § 2.2-2827B (Michie 2001) (stating that "[e]xcept to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content").

activity in Afghanistan, the paradigm has shifted from normal to crisis, and not just in academics. Reflecting upon the relationship between crisis and liberty, Justice Thurgood Marshall wrote:

History teaches that grave threats to liberty often come in times of urgency when constitutional rights seem too extravagant to endure. The World War II relocation-camp cases, and the Red Scare and McCarthy-era internal subversion cases are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.¹⁵

The United States Government's responses to earlier war-related crises augur badly for individuals' civil liberties in this one. Congress passed the Sedition Act in 1798 because of the post-Revolutionary Terror in France. Habeas corpus was suspended during the Civil War. During and after World War I, people went to jail because their mild criticism violated the Sedition and Espionage Acts. The Palmer raids followed World War I. During World War II, 140,000 Japanese, two-thirds of them citizens, were interned. McCarthyism, grounded on fear of communism, flourished during the Cold War.

The September 11 crisis has created the conditions where academic freedom, always precarious, is threatened – precisely when society needs academic freedom to serve its core values and to deal with the crisis. In the fluctuations between the individual and the collective, war moves the focus to the collective at the expense of the individual. In conditions of crisis, the group, through official coercion and public opinion, puts pressure on individuals to get with the program, to speak with one voice, and to fall into line. The social sense of humor ebbs; commentators view lampoon, satire, and skepticism as disarming democracy.

Professors' voices are needed in this time of crisis. Many professors have developed specialized expertise in subjects formerly thought to be arcane, such as Afghanistan and anthrax. Good professors possess critical intelligence and are willing to deploy it, even in dissenting opinions. Independence is a prerequisite for asking the hard questions that may be unasked by politicians and journalists. Because universities employ professors specifically to test the prevailing wisdom and to propose revisions, professors differ from other public employees. The government should protect a professor's schol-

15. *Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 634 (1989) (Marshall, J., dissenting) (citations omitted); see also Vince Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 457 (1985) (noting fragility of most constitutional commitments in that "they embody ideals that are easily abandoned or tempered in times of stress"). I agree with Professor Blasi's recognition that the most serious threats to the core commitments of the First Amendment "tend to be concentrated in unusual, intense periods and tend to derive from powerful social dynamics." *Id.* at 462.

arly speech more than an ordinary employee's speech. For it is important to ask the hard questions now, before the issues are settled. The difficult questions are both internal ones about surveillance, preventive detention, and searches, and external ones about proposed foreign policy adventures.

Dissent is, however, easier to tolerate when everyone feels safe. Crisis always imperils free speech. Universities, traditional free speech bastions, have terminated professors with unpopular political views during times of national crisis.¹⁶ In the weeks after September 11, raw emotions made it difficult for most Americans to think critically.¹⁷ There were panel discussions and teach-ins on many campuses. Some speakers made unbalanced and intemperate statements.

For example, a professor at the University of British Columbia drew parallels between terrorism and United States foreign policy.¹⁸ At a conference in Ottawa on injustice against women and violence, Professor Sunera Thobani was still, she said, feeling the pain from the thousands of deaths on September 11.¹⁹ Professor Thobani continued:

But do we feel any pain for the victims of U.S. aggression? . . . Today in the world, the United States is the most dangerous and the most powerful global force unleashing horrific levels of violence. From Chile to El Salvador to Nicaragua to Iraq, the path of U.S. foreign policy is soaked with blood.²⁰

Richard Berthold, a professor at the University of New Mexico, in two open classes, said, "Anyone who can blow up the Pentagon gets my vote."²¹

Widespread campus pressure for conformity, unity, and patriotism accompanied these professors' critical comments. Legislators and university administrators emphasized that professors should respect the emotional sensitivity of students, especially considering the potential for Middle Eastern

16. See Robin Wilson & Ana Marie Cox, *Terrorist Attacks Put Academic Freedom to the Test*, CHRON. HIGHER EDUC., Oct. 5, 2001, available at <http://chronicle.com/free/v48/i06/06a01201.htm> (stating that during "the Red Scare of the 1950s and during the Vietnam War, tenured professors were dismissed and even jailed for espousing views many considered anti-American").

17. *Id.* (noting that after thousands of deaths and worldwide crisis of conscience, some administrators would prefer that professors not try to "think critically about what happened").

18. See generally Karen Birchard, *U. of British Columbia Stands Behind Professor Who Blasted U.S. Foreign Policy*, CHRON. HIGHER EDUC., Oct. 4, 2001, available at <http://chronicle.com/free/2001/10/2001100408n.htm>.

19. *Id.*

20. *Id.*

21. See Scott Smallwood, *U. of New Mexico Disciplines Professor for His Comments to Class on September 11*, CHRON. HIGHER EDUC., Dec. 12, 2001, available at <http://chronicle.com/daily/2001/2001121201n.htm> (quoting Associate Professor Richard M. Berthold).

students to feel "scrutinized, blamed for the incident, or threatened."²² In other words, campus administrators told professors to wait or to remain silent.²³

Politicians thought that professors' and students' behavior was outrageous, atrocious, and unacceptable. Letter writing campaigns began in an effort to silence campus critics. Some administrators may have sought to head off or mollify critics from the outside. Other timid administrators feared what the potential ramifications might be for their state budgets and donations by alums.

Some ominous signals came from a group called the American Council of Trustees and Alumni (ACTA), which released a report entitled "Defending Civilization: How Our Universities Are Failing America, and What Can Be Done About It."²⁴ The report included a list of 117 remarks by professors, students, and others which, the report maintained, showed a blame-America-first mentality, not in line with people outside the academic world.²⁵ The ACTA's ostensible purpose was to augment education in Western civilization and American history.²⁶ However, the ACTA report also stated that if institutions failed to provide their students American and Western civilization history courses, "alumni should protest, donors should fund new programs, and trustees should demand action."²⁷ This exhortation makes the ACTA report a cause for concern.

Let me contrast the respective universities' responses to Professors Thobani and Berthold. An academic vice president at the University of British Columbia defended Professor Thobani's right to take a position because "the cornerstone of a university is the ability to speak out on important issues."²⁸ The academic vice president further stated that "[t]he university is a place where there must be a free exchange of ideas, and I hope people understand that."²⁹

22. See Wilson & Cox, *supra* note 16 (quoting memorandum by administrator asking faculty members to think hard about effects of their remarks).

23. *Id.* (remarking that some critics maintain that "now simply isn't the time . . . to say anything that might offend others").

24. AM. COUNSEL OF TR. & ALUMNI, DEFENDING OUR CIVILIZATION: HOW OUR UNIVERSITIES ARE FAILING AMERICA AND WHAT CAN BE DONE ABOUT IT, Nov. 2001, available at <http://www.goacta.org/Reports/defciv.pdf>.

25. See *id.* at 1 (stating that some faculty "pointed accusatory fingers, not at the terrorists, but at America itself").

26. See *id.* at 8 (calling upon all colleges and universities "to adopt strong core curricula that include rigorous, broad-based courses on the great works of Western civilization as well as courses on American history, America's founding documents, and America's continuing struggle to extend and defend the principles on which it was founded").

27. *Id.*

28. Birchard, *supra* note 18 (quoting Barry McBride, academic vice president of University of British Columbia).

29. *Id.*

The University of New Mexico, on the other hand, disciplined Professor Berthold.³⁰ For his bad joke, he will have a letter of reprimand placed in his file, he will be subject to rigorous post-tenure review, and he will be barred, "for the immediate future," from teaching freshmen.³¹ While the chagrined professor has apologized and apparently has acceded to the discipline, the university, recognizing his right to protected speech, nevertheless grounded its response on his irresponsible failure to recognize his students' "unique vulnerability" in the immediate aftermath of the terrorist attacks.³²

During my career, there have been classroom discussions of the women's movement, abortion, civil rights for minorities, and the Vietnam war. The students' education has benefitted from robust exchanges on emotionally charged issues. In fact, one important goal of higher education is to help students learn to think for themselves. Administrators intolerant of dissent, even expressed through bad jokes, seal the students in a hermetic quarantine. Squelching debate ought to disturb every educator, both because it militates against professors' contributions to the public dialogue on important issues and because it undermines the work of higher education.

What is new in higher education since the Vietnam war last tested academic freedom? I have observed several tendencies that accompany the *Urofsky* court's constricted legal protection for exchange of ideas, thereby hindering the creation of more robust academic freedom and tolerance for dissent. For example, the development of private fundraising leads administrators to keep a low profile to avoid displeasing actual and prospective donors. Consumer definitions of education emphasize student happiness, as if education were a service industry with students as customers and consumers. Concern about offensive behavior led many colleges to adopt speech codes and sexual harassment policies. Theorists claim free speech to be a mask for the exercise of power. Finally, the American Association of University Professors seems to speak with a diminished voice for academic freedom and academic values as compared to the 1960s and 1970s. That the academic "common law" is precarious is well illustrated by the University of Virginia administration's brazen series of decisions to ignore academic due process procedures and to discharge a tenured (and chaired) professor of physics after a Kafka-esque series of meetings with administrative staff.³³

30. See Smallwood, *supra* note 21 (noting that University of New Mexico disciplined Richard M. Berthold, associate history professor, for joking to class of freshman on September 11 that "anyone who can blow up the Pentagon gets my vote").

31. *Id.*

32. *Id.*

33. Report, *Academic Freedom and Tenure: University of Virginia*, ACADEME, Nov.-Dec. 2001, at 49.

Nevertheless, a culture of academic freedom is imperative if we are to carry out the function of the university properly. Professor Owen Fiss succinctly stated that "[o]ur task is . . . to address the great issues of the day and to discover and then explain what justice requires, with the hope that some day and in some way the truth will find a home in this world."³⁴ To strengthen ourselves to advance this goal, we can draw on a store of courageous academicians in earlier crises. I will cite but one example.

Anti-communism combined with opposition to civil rights in the late 1950s and early 1960s, when the North Carolina legislature passed the accurately-named Speaker Ban Law.³⁵ Proponents of the Speaker Ban Law intended to isolate the Tar Heel State's impressionable campus youth from improper communistic and integrationist influences.³⁶ Chancellor, later Professor, Bill Aycock eloquently began his opposition to the speaker-ban movement with remarks that carry conviction today:

A true university must seek out, examine, assemble, and interpret facts. It must seek new ideas, new forms of knowledge, new values and new artistic standards in order that mankind may continue to grow in understanding and wisdom. A part of its creative mission is the duty to examine the bases, the foundations, and the assumptions on which present knowledge rests An institution engaged in higher education cannot be a university if it undertakes to fix or freeze knowledge or doctrine merely because it is suitable to some individual or group, however highly placed. By what authority, may I ask, can a person say that he has found the final truth for the youth of our land? . . . Those of us entrusted, for the time being, with the leadership of the University of the people have a duty to express forthright concern when the freedom of the University is threatened If a governor should attempt to dilute freedom in the University, it would be tantamount to an attempt to destroy it. This institution was fathered by rebellion against oppression and mothered by a vision of freedom. It has become an instrument of democracy and a place in which the weak can grow strong and the strong can grow great.³⁷

34. Owen Fiss, *Reply: A Third Reconstruction?*, in *A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS* 97, 102 (Joshua Cohen & Joel Rogers eds., 1999).

35. Act of June 26, 1963, ch. 1207, §§ 1-2, 1963 N.C. Sess. Laws 1688, *amended by* Act of Nov. 17, 1965, ch. 1, § 1, 1965 N.C. Sess. Laws 5, *repealed by* Act of July 6, 1995, ch. 379, § 17, 1995 N.C. Sess. Laws 933, 942 (codified at N.C. GEN. STAT. § 116-199 (1999)).

36. See Gene R. Nichol, Essay, *Bill Aycock and the North Carolina Speaker Ban Law*, 79 N.C. L. REV. 1725, 1729 (2001) (stating that "Communist" theory of Speaker Ban Law was notion that "anyone who advocated civil rights and integration must be a Communist") (citation omitted).

37. *Id.* (quoting Chancellor Bill Aycock's Speech to Alumni concerning future Speaker Ban in North Carolina on June 6, 1960).

As Ms. Smith has capably demonstrated, the *Urofsky* court has desiccated legal protection for professors' academic freedom. As these lines go to press, I cannot know how well the culture of higher education will deal with the crisis of post-September 11. I hope that the University of British Columbia administrator's attitude is typical and that the University of New Mexico's unfortunate reprimand is an aberration.³⁸ The way the University of South Florida eventually responds to its president's improper move to dismiss Professor Sami Al-Arian may be the bellwether event that sets the direction of future events.³⁹

Far from undermining American liberty and democracy, professors' exercising their "academic freedom" to express their views on campus and in the public forum ought to advance their educational function while assuring more discerning public policy decisions. A decision made after open discussion is more likely to be a wise decision because all points of view were heard and considered. Moreover, a decision made after consulting all concerned is more likely to be perceived as legitimate.

As George Orwell wrote at the beginning of World War II, "Patriotism and intelligence will have to come together again. It is the fact that we are fighting a war, and a very peculiar kind of war, that may make this possible."⁴⁰

38. See *supra* notes 28-32 and accompanying text (contrasting reactions of administrators at University of British Columbia and University of New Mexico to professors' speech).

39. See Sharon Walsh, *Blaming the Victim? A University Vows to Fire a Tenured Professor Facing Death Threats in the Wake of September 11*, Feb. 8, 2002, available at <http://chronicle.com/weekly/v48/i22/22a01001.htm> (noting that fear of faculty groups that Professor Al-Arian's case "may presage what kind of debate is to be allowed - both on campus and off - in a time of war"). Professor Al-Arian might lose his job due to his controversial public comments made on a national television show post-September 11.

40. GEORGE ORWELL, *England Your England*, in A COLLECTION OF ESSAYS 1, 276 (1946).

ARTICLES
