

Academic Freedom in Classroom Speech: A Heuristic Model for U.S. Catholic Higher Education

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Abstract

As the nation's Catholic universities and colleges continually clarify their identity, this article examines academic freedom in classroom speech, offering a heuristic model for use as board members, academic administrators, and faculty leaders discuss, evaluate, and judge allegations of misconduct in classroom speech.

Focusing upon the practice of academic freedom in classroom speech, this article aims to map this contested terrain for board members, academic administrators, and faculty leaders in U.S. Catholic higher education. More substantively, this article identifies what forms of classroom speech are allowed and disallowed, and why this is so.

Identifying the Terrain: Institutional Religious Mission and Academic Freedom

In the decades following Vatican II, the interface of institutional mission and academic freedom has figured prominently in debate at all levels of U.S. Catholic higher education. What this debate has clarified are two very different understandings of institutional mission and definitions of academic freedom.

In April 1967, the University of Notre Dame (UND) hosted a symposium, "Academic Freedom and the Catholic University." At this conference, Philip Gleason called academic freedom "the most crucial problem facing Catholic higher education."¹ John Walsh asserted that it was erroneous to speak of a Catholic university "as part of the teaching

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¹ Philip Gleason, "Academic Freedom and the Crisis in Catholic Universities," in *Academic Freedom and the Catholic University*, eds. Edward Manier and John W. Houck (Notre Dame, IN: University of Notre Dame Press, 1967), 53.

function of the Roman Catholic Church or even its teaching apostolate,” arguing that a Catholic university must stand apart from and not be controlled by the Church because a Catholic university is “perhaps the highest formal, explicit, and systematic manifestation—of the Church *learning*.”² John McKenzie proposed that academic freedom should be without qualification because “the principle of censorship is basically irrational and immoral.”³ He added: “Censorship settles scholarly differences of opinion by a moral bludgeon. And censorship is totally unnecessary, because scholarship is equipped to do better what censorship pretends to do....”⁴

Commensurate with Pope John XXIII’s call for “*aggiornamento*,” most speakers advocated greater autonomy and independence from the Church. They argued this would liberate U.S. Catholic higher education from its parochial past so that it could achieve greater prominence among its public and private counterparts. What these speakers emphasized was the *public* mission of higher education, namely, the unfettered pursuit of truth wherever the evidence may lead. What they hoped to renew—or for some, like Walsh and McKenzie, to eschew—was a more sectarian understanding of the *religious* mission of Catholic higher education, namely, the unencumbered pursuit of truth in fidelity to the Church and its teaching. In retrospect, the speakers raised an issue that would be the subject of much debate in the next five decades: the interface of institutional mission and academic freedom.

Twenty-three years later, Pope John Paul II promulgated *Ex corde Ecclesiae*, an apostolic constitution directly addressing the first matter, the character (or “identity”) of Catholic higher education. John Paul II asserted that continuous renewal “requires a clear awareness that, by its Catholic character, a University is made more capable of conducting an *impartial* search for truth, a search that is neither subordinated to nor conditioned by particular interests of any kind.”⁵ Later in the document, he clarified the meaning of the term “impartial,”

² John E. Walsh, “The University and the Church,” in *Academic Freedom and the Catholic University*, 109.

³ John L. McKenzie, “The Freedom of the Priest-Scholar,” in *Academic Freedom and the Catholic University*, 172.

⁴ *Ibid.*, 173.

⁵ Pope John Paul II, “*Apostolic Constitution: Ex corde Ecclesiae*” (http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_15081990_ex-corde-ecclesiae_en.html). (accessed December 12, 2009), sec 7, ¶2.

which has implications for those teaching in Catholic universities and colleges:

One consequence of its essential relationship to the Church is that the *institutional* fidelity of the University to the Christian message includes a recognition of and adherence to the teaching authority of the Church in matters of faith and morals. Catholic members of the university community are also called to a personal fidelity to the Church with all that this implies. Non-Catholic members are required to respect the Catholic character of the University, while the University in turn respects their religious liberty.⁶

John Paul II then specified four “essential characteristics” that identify a Catholic university, making it clear that greater institutional fidelity to its religious mission was required.⁷

Addressing the nation’s Catholic educators in 2008, Pope Benedict XVI discussed the second matter, academic freedom, stating:

In virtue of this freedom[,] you are called to search for the truth wherever careful analysis of evidence leads you. Yet it is also the case that any appeal to the principle of academic freedom in order to justify positions that contradict the faith and the teaching of the Church would obstruct or even betray the university’s identity and mission, a mission at the heart of the Church’s *munus docendi* and not somehow autonomous or independent of it.⁸

While neither pope denied the principle of academic freedom that is essential to the public mission of higher education, both have insisted that renewal of U.S. Catholic higher education requires bringing into a more appropriate balance the public *and* religious mission of U.S. Catholic higher education. The emphasis in this era, both popes maintained, is its religious mission.

In this debate, what both sides have steadfastly advocated—each believing its definition and understanding of academic freedom thoroughly orthodox—clarifies the terrain where institutional mission and academic freedom interface in U.S. Catholic higher education. Arguably, nowhere is this terrain more likely to be contested than when a professor is alleged to have ventured beyond the boundaries of classroom speech that academic freedom protects.

⁶ Pope John Paul II, *Ex corde Ecclesiae*, sec 3, ¶27.

⁷ Pope John Paul II, *Ex corde Ecclesiae*, Part I:A, sec 1, ¶13.

⁸ Benedict XVI, “Meeting with Catholic Educators: Address of His Holiness Pope Benedict XVI,” http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe_20080417_cath-univ-washington_en.html (accessed March 15, 2010), ¶16.

Two Cases: Clarifying Academic Freedom in Classroom Speech

Adjudicating what constitutes a violation of academic freedom in classroom speech is a complicated endeavor. One must evaluate not only a professor's words and intentions but also how students and other stakeholders interpret those words and intentions. The following two cases clarify the boundaries demarcating the terrain of classroom speech in the nation's Catholic universities and colleges.

Case 1: Donald Hindley's Reprimand

Professor Donald Hindley had taught political science for nearly five decades at Brandeis University (BU), a nonsectarian, Jewish-sponsored, private, research university. In the fall of 2007, at least one student accused Hindley of uttering "inappropriate and racially derogatory statements." The allegation stemmed from Hindley's course in Latin American history and his use of the term "wetback." If true, Hindley's classroom speech violated BU's nondiscrimination and harassment policy, and the professor would be subject to various sanctions.⁹

A student brought her accusation to BU's Provost, Marty Krauss, who forwarded it to the Director of Employment, Jesse Simone. Although BU's policy directs administrators to attempt to mediate such conflicts, Simone initiated an investigation and, on October 22, interviewed Hindley without alerting him to the nature of the complaint. The next day and without having first offered Hindley an opportunity to make comments and clarifications as guaranteed by BU's policy, Simone submitted a report to Krauss.

On October 30, Simone informed Hindley of her verdict: his conduct violated BU's policy.¹⁰ That same day, Krauss sent Hindley a letter notifying him that she would apply two sanctions for his "inappropriate, racial and discriminatory conduct...." An Assistant Provost would "monitor" Hindley's classroom for an indefinite, but temporary, period

⁹ Andy Guess, "Sending in the Class Monitor," *Inside Higher Education*, <http://www.insidehighered.com/news/2007/11/09/brandeis>. (accessed December 4, 2008); Andy Guess, "Harassment vs. Academic Freedom: Round Two," *Inside Higher Education*, <http://www.insidehighered.com/news/2008/01/24/brandeis>. (accessed January 25, 2009).

¹⁰ Jesse Simone, "Letter to Professor David Hindley," Foundation for Individual Rights in Education, <http://www.thefire.org/pdfs/c2dd5effe39ca1444f7df643382f3c38.pdf>. (accessed October 30, 2009).

of time until Krauss determined Hindley was “able to conduct [himself] appropriately in the classroom.” She also required Hindley to attend sensitivity training. Failure to correct his conduct, Krauss warned, “may result in further disciplinary action up to, and including, termination.”¹¹

Hindley claimed that he had invoked the term in the context of explaining its historical usage. Hindley complicated matters, however, by reading Simone’s and Krauss’ letters to his class. This led approximately one-third of the class to stage a walkout to protest the professor’s treatment. Hindley also scanned Krauss’ letter and emailed it to a listserv.¹²

Following Hindley’s appeal of Krauss’ decision to the Faculty Senate, the dispute escalated. Meeting in an emergency session on November 8, the Faculty Senate unanimously asserted that its members were “seriously concerned” about procedural problems.¹³ The Committee on Faculty Rights and Responsibilities (CFRR) accepted Hindley’s appeal and wrote the Provost on November 29, calling for a reversal and citing threats to academic freedom, procedural irregularities, and excessive punishments. CFRR also ruled that the Provost’s “actions to date pose a threat to...academic freedom...a matter on which we retain an active interest.”¹⁴

On December 10, Krauss rejected CFRR’s ruling, referring to “errors, both factual and legal.”¹⁵ She also asserted that accepting CFRR’s recommendations “would undermine the community’s faith in the integrity of the University’s policies; chill future students, faculty, and staff from coming forward with complaints; place the University at significant risk of violating state and federal law; and potentially lead to retaliation against those individuals who have the courage to speak out against discrimination.” The Provost was adamant concerning the

¹¹ Marty W. Krauss, “Letter to Professor David Hindley,” <http://thefire.org/pdfs/4bb7801320fb0fbecb4734c2cf1e4a09.pdf>. (accessed April 15, 2009).

¹² David Pepose, “Politics Professor Accused of Making Racist Remarks,” *The Brandeis Hoot*, <http://thehoot.net/articles/2054>. (accessed April 13, 2009).

¹³ Brandeis University Faculty Senate, “Minutes of Fourth Meeting,” <http://thefire.org/pdfs/8e00d6c4705a5e04ec7c5677507052a8.pdf>. (accessed April 16, 2009).

¹⁴ Committee on Faculty Rights and Responsibilities, “A Ruling from the Committee on Faculty Rights and Responsibilities: Appeal by Professor David Hindley,” <http://www.thefire.org/public/pdfs/be2e57b7b537a256b5e1b8a6d0a00141.pdf?direct>. (accessed April 21, 2009).

¹⁵ Andy Guess, “Harassment vs. Academic Freedom.”

offended students' legal rights to anonymity. Lastly, Krauss defended Simone's investigation.¹⁶

That same day, CFRR issued a memo to the Faculty Senate chiding Krauss for violating Hindley's academic freedom as well as the threat this posed to "other faculty and students at Brandeis."¹⁷ Responding to the memo, the Faculty Senate sent a letter to BU's President two days later. Concerning the reappointment of Krauss as Provost, the letter stated: "Several faculty reported a 'chilling atmosphere' concerning free speech of faculty throughout the campus and some untenured faculty members are afraid to speak their minds candidly and forthrightly."¹⁸

On December 17, CFRR ruled on "the remaining issues of academic freedom and 'fair and equitable treatment' in the application of university policies." Suggesting the Provost's actions were based upon a "polarizing theory" that "treats academic freedom as encroaching on policies for preventing discriminatory treatment—or vice versa," CFRR maintained that BU's policy was written to promote academic freedom and nondiscrimination "without dilution." The sanctions applied, especially inserting the monitor into Hindley's classroom, violated the policy, as "the inevitable function of the monitor as censor...[can] alter the dynamics of a classroom, inhibiting faculty and students alike."¹⁹

After issuing three letters, CFRR requested the Provost to rescind her decision, accused BU's administrators of abusing the policy as well as their own power with the goal of punishing Hindley, and asserted that BU's administrators had denied Hindley his rights to fair treatment and academic freedom. In its December 19 letter, CFRR stated: "It is a curious feature of the faculty dispute resolution process that the

¹⁶ Noah Bein, "Provost Rejects Ruling: A Committee's Memo Asserting Prof. David Hindley's Innocence was Deemed Inaccurate," *The Justice Online.com*, <http://media.www.thejusticeonline.com/media/storage/paper573/news/2008/01/15/News/Provost.Rejects.Ruling-3152660.shtml>. (accessed April 21, 2009).

¹⁷ Committee on Faculty Rights and Responsibilities, "Brettler Memo to Faculty Senate," <http://www.thefire.org/pdfs/21bcc5919e54a2e65098071a74af8571.pdf>. (accessed April 16, 2009).

¹⁸ Adam Kissel, "Letter to President Jehuda Reinharz," <http://thefire.org/pdfs/30ebf20be60ac4b81980853f4c93f2ea.pdf>. (May 10, 2009).

¹⁹ Committee on Faculty Rights and Responsibilities, "A Supplementary Ruling from the Committee on Faculty Rights and Responsibilities: Appeal by Professor David Hindley," <http://www.thefire.org/pdfs/00bcccd95d06617733c57659906b82bf.pdf>. (accessed April 16, 2009).

Provost, in cases of this sort, essentially becomes the final judge of her own actions.”²⁰

Meanwhile, Hindley had contacted The Foundation for Individual Rights in Education. The Director of its Individual Rights Defense Program, Adam Kissel, wrote BU’s President on December 12: “If Brandeis is to legitimately claim to provide a liberal education, it cannot prioritize individual sensitivities over protecting the freedom of speech and academic freedom of its professors. Guarantees of liberty, such as those found in the canons of academic freedom and in Brandeis’s own policies, are meaningless if they are jettisoned as soon as they become unpopular.”²¹ BU’s President did not respond.

There was no hearing or apology. However, on January 7, 2008, BU’s Provost sent Hindley a letter stating: “The University now considers this matter closed.”²² Hindley responded, stating that the letter came “out of the blue” and “needs considerable thought as to how to reply to it, and I have not yet made up my mind.”²³

Despite Krauss’ assertion to the contrary, the matter was far from “closed.” On January 31, the Faculty Senate suspended its support of the nondiscrimination and harassment policy.²⁴ CFRR continued to critique the administration and, on March 6, extended its criticism, citing a “breakdown,” and reported that CFRR had “deferred the review of faculty grievances pending a clear reaffirmation by the Faculty Senate and by the administration of shared principles of faculty governance.” One week later, the Faculty Senate passed additional unanimous resolutions objecting to the Provost’s actions. Krauss responded on April 10, invoking “specific legal responsibilities” in Hindley’s case, yet did not explain what they were.²⁵ The Faculty Senate passed another resolution on May 1, reaffirming CFRR’s findings, including the judgment that Krauss had “violated Professor Hindley’s faculty rights, including the right to academic freedom and the right to be treated fairly under University policies.”²⁶

Although the conflicts between BU’s faculty and the Provost went unresolved, Hindley’s case required determining which is of greater

²⁰ Bein, “Provost Rejects Ruling.”

²¹ Kissel, “Letter to President.”

²² Marty W. Krauss, “Letter to Faculty Colleagues,” <http://www.thefire.org/pdfs/e5d8217c3641324d532ec36029144519.pdf>. (accessed April 15, 2009).

²³ Bein, “Provost Rejects Ruling.”

²⁴ Kissel, “Letter to President.”

²⁵ *Ibid.*

²⁶ *Ibid.*

importance: protecting a professor's academic freedom in classroom speech or ensuring that students will come forward when they believe professors have used harassing language.²⁷ Hindley's classroom speech proved crucial in the Provost's determination and application of sanctions. Judged guilty for subjecting students to discriminatory and harassing speech, the question is whether academic freedom—intended to protect professors in fulfilling the public mission of U.S. higher education, namely, the unfettered pursuit of truth wherever the evidence may lead—protects such speech in classrooms.

To arrive at this conclusion, academic freedom must be defined in such a way that its boundaries are narrowed to disallow classroom speech that might be deemed discriminatory or harassing, thus restricting classroom speech to statements and phrases that will not be taken out of context. Yet, professors oftentimes will use such speech to challenge students to think ideas through to reasoned conclusions, to broaden intellectual perspectives, and to form hypotheses that can be critically scrutinized in a public forum like classrooms.

If classroom speech is restricted, would that not do a disservice to the public mission of U.S. higher education as well as to students and their intellectual formation by limiting the language used in classrooms to vocabulary specific to the discipline being studied? This narrowing of boundaries makes it less probable that students will encounter professors who engage their classes in the dispassionate and unfettered search for truth. The sanctions imposed on Hindley served notice that classroom speech is restricted: discriminatory or harassing language that engenders a hostile learning environment is not protected. There is a boundary beyond which academic freedom does not protect classroom speech.

Although Hindley's case was adjudicated at a private university, it provides two standards concerning the practice of academic freedom in classroom speech for U.S. Catholic higher education. First, academic freedom does not protect discriminatory or harassing classroom speech that engenders a hostile learning environment. The unfettered pursuit of truth does not allow for beliefs, generalizations, prejudices, and the like to be asserted as fact and go unchallenged. Second, the criteria used to judge Hindley can be expanded to include discriminatory or harassing speech directed at the faith or teaching of the Church which engenders a hostile learning environment. This latter standard is likely to

²⁷ Guess, "Harassment vs. Academic Freedom."

generate controversy in U.S. Catholic higher education, especially among those who believe that the practice of academic freedom in classroom speech is unrestricted.

Pope Benedict XVI has addressed this tension and its potential for controversy, indicating that the unfettered pursuit of truth does not allow for beliefs, generalizations, prejudices, and the like concerning the faith or teaching of the Church to be stated as fact and go unchallenged:

In regard to faculty members at Catholic colleges [and] universities, I wish to reaffirm the great value of academic freedom. In virtue of this freedom, you are called to search for the truth wherever careful analysis of evidence leads you. Yet it is also the case that any appeal to the principle of academic freedom in order to justify positions that contradict the faith and teaching of the Church would obstruct or even betray the university's identity and mission.²⁸

Case 2: Charles Curran's Firing

Along with U.S. public and private higher education, Catholic higher education shares a public mission. Catholic higher education differs in that it also has a religious mission, which inspires and informs its identity. It is this latter mission that some constituents will use to justify allegations that professors have violated the practice of academic freedom in classroom speech.

To date, the most publicized case in U.S. Catholic higher education involved Charles Curran. His mortal sin? In his publications, Curran dared to disagree openly with official Church teaching concerning sexual ethics. His speculations raised the eyebrows of Vatican officials at the Congregation for the Doctrine of the Faith (CDF) as early as 1968. Eleven years later, Curran received a sixteen-page list detailing his "principal errors and ambiguities."²⁹ Then, in 1986, CDF declared Curran "neither suitable nor eligible to teach Catholic theology."³⁰ A tenured professor at the Catholic University of America (CUA), Curran was subsequently fired by its board, silencing his voice inside of CUA classrooms.

²⁸ Benedict XVI, "Meeting with Catholic Educators," ¶16.

²⁹ Charles Curran, *Loyal Dissent: Memoir of a Catholic Theologian* (Washington: Georgetown University Press, 2006), 107.

³⁰ Peter Steinfeld, "Compromise Sought at Catholic U on Teacher Censored by Vatican," *New York Times*, April 8, 1988, <http://query.nytimes.com/gst/fullpage.html?res=940-DE2DB133EF93BA35757C0A96E948260>. (accessed April 29, 2009).

On the assumption that Curran taught students about his published speculations, what lessons might the board's action suggest about those forms of classroom speech that academic freedom does and does not protect vis-à-vis the religious mission of Catholic higher education?

Consider the teaching of theology, an academic discipline that is singularly important, if not central, to the religious mission of Catholic higher education. Some stakeholders are vociferous in asserting that academic administrators, as well as diocesan and Vatican officials, possess the right to dismiss theologians whose conclusions contradict Church teaching, especially when this transpires in classrooms. Liking these institutions to local franchises of a multinational corporation, those who espouse this view expect professors teaching theology to “promote and safeguard” Church teaching. Others believe theologians should be “licensed” to teach.

When theologians present only the faith or teaching of the Church and do not subject both to critical scrutiny inside of classrooms, does this not smack of indoctrination rather than the “joy of searching for, discovering, and communicating truth in every field of knowledge,” what John Paul II called the “privileged task” of the Catholic university or college?³¹ Should students—and all stakeholders as well—not fully expect professors teaching theology to subject the faith and teaching of the Church to objective, if not critical, scrutiny? With respect to U.S. Catholic higher education in general, how would Catholic theology progress if theologians—like Curran—are not free to speak in their classrooms about what advances in sciences and culture may portend for Church teaching?

These are substantive questions for theologians, but Pope Benedict XVI has expanded these questions to include all who teach in Catholic higher education, noting:

Clearly, then, Catholic identity is not dependent upon statistics. Neither can it be equated simply with orthodoxy of course content. It demands and inspires much more: namely that each and every aspect of your learning communities reverberates within the ecclesial life of faith. Only in faith can truth become incarnate and reason truly human, capable of directing the will along the path of freedom.³²

³¹ Pope John Paul II, *Ex corde Ecclesiae*, Introduction, ¶1.

³² Benedict XVI, “Meeting with Catholic Educators,” ¶10.

Each Catholic university and college has a public mission—to provide a forum wherein professors and students freely pursue the truth—as well as a religious mission—the unfettered pursuit of truth in fidelity to the Church and its teaching—and is asked to fulfill these missions “in the context of the impartial search for truth, that the relationship between faith and reason is brought to light and meaning.”³³

Curran’s firing served notice of a second standard that directly impacts classroom speech in U.S. Catholic higher education: professors may not subject students, as CDF would argue, to “opinions that seem to be contrary or dangerous” while allowing for no rebuttal. Later clarifications by John Paul II and Benedict XVI suggest that the religious mission of an institution of Catholic higher education provides justification to widen scrutiny of alleged misconduct to include a professor’s classroom speech.

Curran’s case provides two standards concerning the practice of academic freedom in classroom speech for U.S. Catholic higher education. First, academic freedom does not protect classroom speech which promotes any ideology—even an institution’s religious mission—if professors do not situate that ideology within the broader context of their disciplinary knowledge. Second, the practice of academic freedom in classroom speech in U.S. Catholic higher education is restricted in that any speech that would either seek to impose or to deny or ridicule an institution’s religious mission violates academic freedom. This latter standard is likely to generate controversy among stakeholders, especially those who want to guard against classroom speech they believe would contradict or seek to diminish an institution’s Catholic identity.

Since the practice of academic freedom in classroom speech is restricted, where is the line to be drawn? In the Curran case, CUA’s board did not yield to Curran and his supporters. Consequently, the boundary demarcating what classroom speech is and is not protected in U.S. Catholic higher education is a bit clearer. However, the board’s decision did not put an end to the skirmishing at CUA or other Catholic universities and colleges. Those professing unrestricted freedom of speech in classrooms continue to battle their opponents with the goal that their cherished definition of academic freedom will ultimately prevail.

³³ Benedict XVI, “Meeting with Catholic Educators,” ¶1.

A Heuristic Model: Situating the Practice of Academic Freedom in Classroom Speech

Hindley's and Curran's supporters are adamant: both professors were denied the protections afforded by academic freedom. Using a "without dilution" standard to define orthodox practice, these supporters root their definition in political philosophy, as John Stuart Mill described speech in *On Liberty*,³⁴ as well as in First Amendment political guarantees, specifically the U.S. Supreme Court's opinion in *Keyishian v. Board of Regents*.³⁵

This defense of unrestricted academic freedom presents three problems. First, even Mill restricted some speech to avoid the tyranny of the majority,³⁶ as did the U.S. Supreme Court in *Schenck v. United States*, when the Court asserted that citizens are free to say anything except to shout "Fire!" falsely—a metaphor for "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils."³⁷

Second, this defense fails to account for *Brandenburg v. Ohio* which overturned *Schenck*, the Court's majority arguing that only speech directed to and likely to incite imminent lawless action can be banned.³⁸ Since *Brandenburg*, courts have construed "shouting 'Fire!' in a crowded theater" to mean "reckless or malicious speech or actions whose injurious outcomes are blatantly obvious." If the interpretations and competing ideas exchanged in classrooms are stated in reckless or malicious ways or involve actions whose injurious outcomes are blatantly obvious—does either Hindley's use of the word "wetback" or Curran's dissent from Church teaching qualify?—then academic freedom does not protect such speech.

Third, the American Association of University Professors (AAUP) has acknowledged a post-*Brandenburg* boundary: harassing and discriminatory speech or speech that engenders a hostile learning environment is prohibited.³⁹

³⁴ John Stuart Mill, *On Liberty*, <http://www.fordham.edu/halsall/mod/jsmill-lib.html>. I:13 (accessed May 29, 2009).

³⁵ *Keyishian v. Board of Regents*, 385 U.S. 589, (1967).

³⁶ John Stuart Mill, *On Liberty*, <http://www.fordham.edu/halsall/mod/jsmill-lib.html>. I:6.

³⁷ *Schenck v. United States*, 249 U.S. 47, (1919).

³⁸ *Brandenburg v. Ohio*, 395 U.S. 444, (1969).

³⁹ American Association of University Professors, "Freedom in the Classroom," <http://www.aaup.org/AAUP/comm/rep/A/class.htm>. II.B.2 (accessed October 25, 2008).

For the purpose of formulating a heuristic model that maps the terrain associated with the practice of academic freedom in classroom speech, consider how the *public mission* of a Catholic university or college can be used to disallow any harassing and discriminatory speech directed at the faith or teaching of the Church as well as speech that engenders a hostile learning environment. Let's call this terrain "Ideology-PM." That is, there exists a boundary beyond which academic freedom does not protect these forms of classroom speech because beliefs, generalizations, prejudices, and the like cannot be asserted as fact and go unchallenged. Those who desire to restrict speech in U.S. Catholic higher education protest an Ideology-PM definition of academic freedom, believing that the public mission of U.S. Catholic higher education does not protect some speech. In this, they are correct.

Consider also how the *religious mission* of a Catholic university or college can be invoked to disallow any classroom speech directed at the faith or teaching of the Church. Let's call this terrain "Ideology-RM." That is, a boundary exists beyond which academic freedom does not protect these forms of classroom speech because they threaten to dilute or diminish the institution's religious mission. Those who reference the *Keyishian* decision and those who support Charles Curran protest an Ideology-RM definition of academic freedom, firm in the belief that it casts "a pall of orthodoxy over the classroom." In this, they are correct because this ideology would not allow professors to question the institution's religious mission in light of the "new questions arising from the progress of the sciences or human culture."⁴⁰

This distinction between "Ideology-PM" and "Ideology-RM" definitions of academic freedom is hardly novel. Marsden traces the Ideology-PM definition to the emergence of intellectualism in the nineteenth century, largely in reaction to the control exercised by clergymen—and, in the United States, Protestant clergymen—who imposed and enforced their orthodox Ideology-RM definition upon professors.⁴¹ Ironically, the then heterodox embraced the scientific method and its positivistic empiricism. Imbued with the same religious zeal they decried in the then orthodox,⁴²

⁴⁰ Pope John Paul II, *Apostolic Constitution: Pastor Bonus*, http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_19880628_pastor-bonus-index_en.html. (accessed October 15, 2008), Article 49.

⁴¹ George Marsden, *The Soul of the American University: From Protestant Establishment to Established Nonbelief* (New York: Oxford University Press, 1994).

⁴² Gleason, "Academic Freedom," 49. See also: Edward Shils, "The Intellectuals and the Powers: Some Perspectives for Comparative Analysis," *Comparative Studies in Society and History*, 1:1 (1958), 16-17.

the heterodox rooted their definition in the moral belief that all speech is unrestricted.⁴³ The Ideology-RM definition can be traced at least as far back as the emergence of the medieval universities, although theologians have used this definition from Christianity's earliest years to defend their heterodox speculations.⁴⁴ Those holding this definition have rooted it in the moral belief that Church teaching proscribes certain forms of speech.

To map this terrain, let's consider two Catholic colleges, Wyoming Catholic College (WCC) and the now-closed Southern Catholic College (SCC), and what they require of professors. Using the AAUP's definition as the standard of assessment, while both are Catholic institutions of higher education, their policies governing the practice of academic freedom in classroom speech could not differ more.

At WCC, "Catholic members of the faculty will voluntarily make a public *Profession of Faith* and take the *Oath of Fidelity*...in the presence of the Ordinary of the Diocese of Cheyenne or his representative."⁴⁵ Perhaps not surprisingly, in light of Vatican and United States Conference of Catholic Bishops attempts since the early 1990s to rein in theologians in Catholic universities and colleges by mandating that they swear allegiance to Church teaching,⁴⁶ the public profession and oath also targets Catholic faculty in other disciplines. At WCC, all Catholic professors must voluntarily accede to Church teaching and papal authority, even in the event that one's subject identifies "new questions arising from the progress of the sciences or human culture."⁴⁷ The purpose is that WCC "meet rigorous standards of being truly Catholic," according to its President, Rev. Robert W. Cook.⁴⁸

This requirement maps the terrain lying beyond the boundary erected by an Ideology-RM definition of academic freedom. Were a Catholic

⁴³ Gleason, "Academic Freedom," 53.

⁴⁴ Jaroslav Pelikan, *The Christian Tradition: A History of the Development of Doctrine*, Vol. 1 (Chicago: University of Chicago Press, 1971).

⁴⁵ Wyoming Catholic College, "Profession of Faith: Faculty Profession of Faith and Oath of Fidelity," <http://www.wyomingcatholiccollege.com/tabid/112/Default.aspx>. (accessed December 2, 2008).

⁴⁶ Pope John Paul II, *Ex corde Ecclesiae*; United States Conference of Catholic Bishops (2001), "Guidelines concerning the academic *mandatum* in Catholic universities (Canon 812)," <http://www.usccb.org/bishops/mandatumguidelines.shtml>. (accessed May 17, 2009).

⁴⁷ Pope John Paul II, *Pastor Bonus*, Article 49.

⁴⁸ Elizabeth Redden, "Catholic Character," *Inside Higher Education*, September 25, 2007, <http://www.insidehighered.com/layout/set/dialog/news/2007/09/25/catholic>. (accessed December 2, 2008).

professor to opine during class concerning his or her heterodox views, WCC's requirement would fully justify a student to file charges alleging professorial misconduct in classroom speech. If the allegation were proven, a Catholic professor would have violated the public profession and oath and could be subject to sanctions, including possible dismissal.

Southern Catholic College (SCC) did not require a public profession and oath. Yet, its President, Jeremiah J. Ashcroft, also asserted that his institution was "truly Catholic." To uphold this standard, applicants for teaching positions were informed during the hiring process of the expectation that they were to respect the faith and teaching of the Church which, for Ashcroft, meant faculty were encouraged to allow classroom discussion on all sides of a cultural debate.⁴⁹

Although less restrictive, SCC's requirement identified the boundary erected by an Ideology-RM definition of academic freedom which demarcates classroom speech that is and is not protected. At SCC, professors could espouse their heterodox views during class as long as they were respectful of the faith and Church teaching. Were a student to believe a professor was not being respectful, this requirement would fully justify that student to file charges alleging professorial misconduct in classroom speech. While it would be more difficult to prove an allegation of misconduct, if an allegation were proven, the professor may be subject to sanctions, though probably not dismissal unless the professor continued to voice the prohibited speech.

The line of demarcation? Restricting classroom speech when the issue concerns the faith or teaching of the Church. The boundaries are clear at WCC: controversial issues are "driven and informed by the church's position." At SCC, the boundaries are more ambiguous: professors determine what respect of the faith and Church teachings require.

The intersection of the public *and* religious missions of U.S. Catholic higher education renders classroom speech restricted. For the nation's Catholic universities and colleges, the two barriers beyond which classroom speech is not protected—the terrain of Ideology-PM and Ideology-RM—make it possible to map the spacious terrain of classroom speech that academic freedom protects (Fig. 1).

⁴⁹ Ibid.

The purpose of U.S. Catholic higher education:

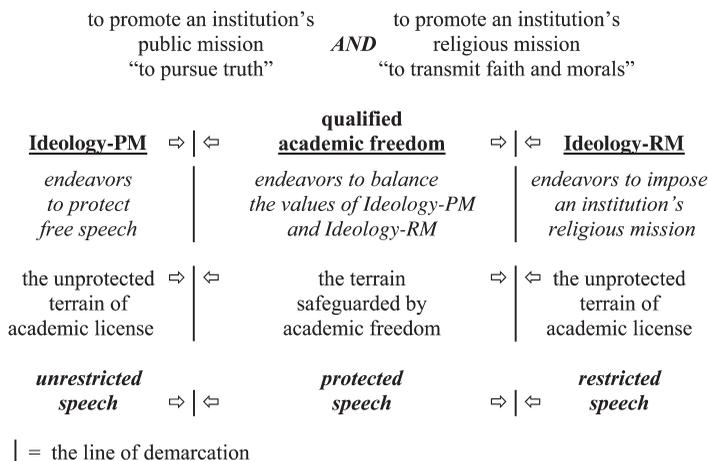


Figure 1. Situating classroom speech in U.S. Catholic higher education

Aware of the potential for the concept of academic freedom to be misinterpreted and used for purposes other than to safeguard the public mission of U.S. higher education, the AAUP defined the practice of academic freedom in classroom speech in these words: “Teachers 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*” (italics added).⁵⁰ Its interpretive comments specify the term “subject” to denote a professor’s discipline or area of inquiry. Accordingly, academic freedom in U.S. Catholic higher education protects classroom speech—even controversial speech that pushes right up to the boundaries of Ideology-PM or Ideology-RM. The AAUP notes: “The intent of this statement is not to discourage what is ‘controversial.’ Controversy is at the heart of the free academic inquiry that the entire statement is designed to foster. The passage serves to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject.”⁵¹

Invoking this standard, BU’s Provost determined that Hindley’s classroom speech violated academic freedom because she deemed it discriminatory and/or racially harassing. For venturing into the terrain of unrestricted speech, the Provost applied sanctions. Similar to Hindley, Charles Curran was judged guilty of violating academic freedom. Writing

⁵⁰ American Association of University Professors, “Statement of Principles,” ¶b.

⁵¹ American Association of University Professors, “Statement of Principles,” fn. 2.

about controversial matters that were directly related to his subject, Curran also ventured into the terrain of unrestricted speech because, in the CDF's judgment, he wrote in a way that misrepresented the faith and teaching of the Church. Thus, CDF stripped Curran of the right to call himself a "Catholic" theologian. Then, invoking an Ideology-RM definition of academic freedom to justify its decision to restrict classroom speech, CUA's board fired Curran, effectively silencing his voice in the institution's classrooms.

What is the lesson for professors who teach in the nation's Catholic universities and colleges? Despite what some—if not many—may believe, the practice of academic freedom in classroom speech is neither unrestricted—giving license to professors to state whatever they want in classrooms—or restricted—denying professors the right to subject the faith or teaching of the Church and an institution's religious mission to intense scrutiny. Practiced within boundaries demarcated by an institution's public and religious missions, academic freedom protects all classroom speech directed at seeking the truth wherever the evidence may lead. Professors do not violate academic freedom by introducing provocative, challenging, or dissenting ideas into classroom speech. Nor do professors violate academic freedom by introducing subjective beliefs, fictions, and deceptions into classroom speech. Both represent valid forms of classroom speech professors can use to get students to think and to do so critically. This is the stuff of intellectual formation that academic freedom is intended to protect.⁵² In contrast, professors violate academic freedom when they "dogmatically insist on the truth of such propositions by refusing to accord their students the opportunity to contest them." This is indoctrination and, as the AAUP notes, "The essence of higher education does not lie in the passive transmission of knowledge but in the inculcation of a mature independence of mind."⁵³

Discussing, Evaluating, and Judging Allegations of Professorial Misconduct

The heuristic model (Fig. 1, p. 188) raises questions for board members, academic administrators, and faculty leaders to answer as they discuss, evaluate, and judge an allegation that a professor's classroom speech in a Catholic university or college has trespassed beyond the boundaries of protected speech. While this model will not make it possible for these

⁵² American Association of University Professors, "Statement of Principles," II.C.3.

⁵³ American Association of University Professors, "Statement of Principles," II.A.3.¶7.

persons to settle every dispute, this model offers a prudent and principled pathway if and when these persons are called upon to judge an allegation.

Relative to a Catholic institution's public mission, five questions must be answered:

1. Is the classroom speech in question in fact unrelated to a professor's subject?⁵⁴
2. Is the speech reckless or malicious, or did it involve actions whose injurious outcomes are blatantly obvious?⁵⁵
3. Is the speech harassing and discriminatory, or did it engender a hostile learning environment?⁵⁶
4. Has the classroom speech disallowed other points of view to be entertained, discussed, and critiqued?⁵⁷
5. If so, has this speech been persistent?⁵⁸

Affirmative answers to all of these questions justify the imposition of sanctions. Why? The lessons of the Hindley case provide one answer. Only when a professor acts on an Ideology-PM definition to introduce into classroom speech topics that are unrelated to one's subject, uses harassing or discriminatory language, engages in actions whose injurious outcomes are blatantly obvious, engenders a hostile learning environment, persists in doing so, and, furthermore, does not allow other points of view to be introduced and evaluated fairly, the professor has engaged in classroom speech that is inimical to the public mission of U.S. higher education. Statements made by other students indicate that Hindley's classroom speech failed to fulfill these five requirements.

Relative to an institution's religious mission, board members, academic administrators, and faculty leaders must also assess allegations made about a professor's classroom speech by asking five questions:

⁵⁴ American Association of University Professors, "Statement of Principles," ¶b.

⁵⁵ *Brandenburg v. Ohio*, 395 U.S. 444, (1969); American Association of University Professors, "Statement of Principles," ¶b; American Association of University Professors, "Freedom in the Classroom," II.B.2.

⁵⁶ American Association of University Professors, "Freedom in the Classroom," II.B.2, C.

⁵⁷ American Association of University Professors, "Freedom in the Classroom," II.A.4; Pope John Paul II, *Ex corde Ecclesiae*, ¶15.

⁵⁸ American Association of University Professors, "Freedom in the Classroom," II.B.2; American Association of University Professors, "Statement of Principles," fn. 2.

1. Are the institution's religious mission or other aims clearly stated?⁵⁹
2. Were any restrictions upon academic freedom due to the institution's religious mission or other aims clearly stated in writing at the time of the appointment?⁶⁰
3. Does the speech in question seek to impose or to deny or ridicule the institution's religious mission or the faith and Church teaching?⁶¹
4. Is the appeal to the principle of academic freedom justifying positions that contradict the faith and teaching of the Church in a way that would obstruct or even betray the university's identity and mission?⁶²
5. Are favorable opinions of an institution's religious mission or the faith and Church teaching belittled or dismissed without due consideration?⁶³

Affirmative responses to all of these questions also justify the imposition of sanctions. Why? Once again, the lessons of the Hindley case provide an answer. When a professor allows an Ideology-PM definition of academic freedom to introduce into classroom speech topics whose sole purpose is to impose or to deny or ridicule the institution's religious mission and, furthermore, does not allow for a rebuttal, a professor has taken license with the rights afforded by academic freedom and not borne its concomitant responsibilities as these relate to classroom speech. The lessons of the Curran case also provide an answer. Academic freedom does not protect classroom speech that promotes any ideology—even an institution's religious mission—if professors do not situate that ideology within the broader context of their disciplinary knowledge.

What about stakeholders who hold an Ideology-RM definition of academic freedom—like alumni/ae or students—and want sanctions imposed upon a professor with whose classroom speech they happen to disagree? When misconduct is alleged, academic administrators and faculty leaders must first establish the facts of the allegation.⁶⁴ If the facts support the allegation, board members, academic administrators, and faculty leaders then must answer five questions:

⁵⁹ American Association of University Professors, "Statement of Principles," ¶b.

⁶⁰ *Ibid.*

⁶¹ American Association of University Professors, "Freedom in the Classroom," II.B.6.

⁶² Benedict XVI, "Meeting with Catholic Educators," ¶16.

⁶³ American Association of University Professors, "Freedom in the Classroom," II.B.2.

⁶⁴ This excludes second-hand or anecdotal information. Although these allegations should be investigated informally, they are not of sufficient merit to warrant an official inquiry.

1. Was the language used reckless, malicious, harassing, or discriminatory?⁶⁵
2. Did the language engender a hostile learning environment?⁶⁶
3. Was the language accompanied by actions whose injurious outcomes are blatantly obvious?⁶⁷
4. Were other points of view belittled or rejected without due consideration?⁶⁸
5. Was the language used persistently?⁶⁹

Negative responses to all of these questions indicate that the individual (or group) alleging misconduct is likely endeavoring to impose an Ideology-RM definition of academic freedom and, hence, to restrict classroom speech. This obligates board members, academic administrators, and faculty leaders to dismiss such false allegations. These persons must also clear the professor of any and all charges as well as to re-establish the professor's good standing. Why? The lessons of the Curran case provide the answer. The practice of academic freedom in classroom speech in U.S. Catholic higher education encourages discussion and debate of all sides of an issue, as long as professors do not seek to impose or to deny or ridicule an institution's religious mission or the faith or teaching of the Church.⁷⁰

It is incumbent upon board members, academic administrators, and faculty leaders to do all in their power to protect their institution's public *and* religious purpose whenever it comes under assault by ideologues. The practice of academic freedom in classroom speech is neither unrestricted—giving license to professors to state whatever they want in classrooms—or restricted—denying professors the right to subject the faith or teaching of the Church and an institution's religious mission to intense scrutiny.

Professors, board members, academic administrators, faculty leaders, alumni/ae, students, and other stakeholders should fully expect that

⁶⁵ American Association of University Professors, "Freedom in the Classroom," II.B.2.

⁶⁶ American Association of University Professors, "Statement of Principles," #2.

⁶⁷ *Schenck v. United States*, 249 U.S. 47, (1919).

⁶⁸ American Association of University Professors, "Freedom in the Classroom," II.B.8; II.C.3.

⁶⁹ American Association of University Professors, "Statement of Principles," #2.

⁷⁰ Pope John Paul II, "*Ex corde Ecclesiae*," sec 7, ¶2.

classroom speech in the nation's Catholic universities and colleges provides students the very best possible intellectual and moral formation. Otherwise, the term "Catholic university," as Bernard Shaw once noted, is a "contradiction in terms"⁷¹ and differences of opinion will likely be settled with "moral bludgeons," as John McKenzie feared.⁷²

⁷¹ Bernard Shaw, *Plays Unpleasant* (New York: Penguin Books, 1953), 194.

⁷² John L. McKenzie, "The Freedom of the Priest-Scholar," 173.

