The Report of the
President's Commission on Free Speech
and Academic Freedom

Executive Summary
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A Message from the President

Last spring, Binghamton University's Commission on Free Speech and Academic Freedom issued its final report to the University community. The report was detailed, thoughtful, and far-reaching. From that report, we have developed this Executive Summary so that the Commission's principal findings could be more widely disseminated.

I appointed the Commission after Binghamton, like many other colleges and universities, experienced a number of incidents that tested our definitions of free speech. I urged the members of the Commission to look beyond specific events to examine the entire range of First Amendment issues as they relate to universities. The faculty, students, and staff who comprised the Commission took their charge seriously. They sought expert advice; they surveyed other campuses; and they held a series of open meetings. The Commission discovered that misunderstandings concerning freedom of expression are widespread among faculty and students. Thus, over half of the recommendations in the Commission's report focus on the need for education within the University community.

Binghamton has not adopted a "hate speech" code, and the Commission recommends against doing so in the future. Not only are public universities held to a special standard under the First Amendment, but Binghamton has a strong tradition of tolerating and encouraging many diverse views. Our challenge here is to build a multicultural community characterized by reasoned debate and dialogue. At the same time, we must guarantee, for each individual, the rights of free expression which, the courts have declared, transcend our collective desire for community and even, at times, civility. Clearly, our community bonds must be nurtured by a variety of mechanisms, but I believe we have the best chance for success if we concentrate on what we do best: education.

Our University benefitted by having a broad-based group examine issues of free expression in an open and dispassionate manner, and I am pleased with the results. It is my hope that both the processes and the substantive recommendations contained in this summary will offer guidance to others as they deal with these significant and often difficult issues.

Introduction

Freedom of expression and academic freedom are essential to our understanding of the purpose of a university. At the State University of New York at Binghamton we view the university as an institution that recognizes unfettered freedom in the give and take of ideas and opinions as an integral part of its mission. The ideal of the university as a marketplace of ideas must not, however, interfere with the equally important ideal of a university as a place where all people are respected, and where tolerance, rational discourse, thoughtfulness, and reason prevail over uncontrolled emotion and prejudice. In theory, the twin ideals of a university as a marketplace of ideas and as a community of scholarship should not conflict; in practice, however, they sometimes do.¹

On campuses across the country, incidents that reflect this conflict indicate that fundamental questions must be faced: How should the equilibrium be regained when these twin ideals clash? What should be done when the exercise of First Amendment rights by some involves statements that are deeply offensive to others? How can the protection of freedom of expression be balanced against securing a campus relatively free of bias?

The Universities of Wisconsin and Michigan are among those that have addressed this conflict by instituting policies restricting freedom of expression. However, their "hate speech" codes were struck down by federal courts. Of the Michigan code the court said, "the policy swept within its scope a significant amount of verbal conduct or verbal behavior that is unquestionably protected under the First Amendment."² Nevertheless, the issue of providing a sup-
I. Consultation with the Campus Community and Others

One of the first activities of the Commission was to consult with various campus groups. The Commission issued an open invitation to all members of the University community who wished to share their ideas and concerns regarding appropriate principles of debate and dialogue in an academic community and received a number of thoughtful responses. In addition, Commission members met with students, faculty, and administrators who wished to discuss their individual concerns and many who represented various campus institutions.

The Commission also consulted individuals and sources beyond the University in order to review the status of the First Amendment as it pertains to public universities and to learn the basic sources of legal rights and responsibilities at public universities.

II. Academic Freedom and the First Amendment

Since academics hold few things in higher esteem than academic freedom it is quite understandable that more concerned questions were put to the Commission about the implications of its recommendations on this matter than about any other issue. What emerged is that there exists a multiplicity of understandings about the nature of academic freedom. Thus it is important that the reader have an adequate grasp of the concept of academic freedom.
as it applies to American universities in general and to state universities in particular.

In the discussion that follows, the term "academic freedom" sometimes refers to traditions and principles not always codified by law (often called "professional academic freedom") and at other times refers to legal rights recognized by the courts to be subsumed by the First Amendment ("constitutional academic freedom"). The term is also sometimes differentiated by "individual academic freedom" and "institutional academic freedom." A basic understanding of the distinctions is necessary to comprehend the role of academic freedom in both tradition and law.

A widely accepted approach maintains that much of the misunderstanding about academic freedom results from a failure to realize that the American university is the inheritor of two distinct concepts of academic freedom: professional and constitutional. "[W]e cannot escape this dual legacy, but this does not mean that we fully understand it." The best way to begin to understand this dual legacy, and thereby the nature of academic freedom, is to have a clear sense of what each entails.

The professional conception of academic freedom is almost wholly derived from various policy documents of the American Association of University Professors (AAUP). The 1940 Statement is its definitive declaration on academic freedom.4

(a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject.5 Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.6

(c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.

One should note several things concerning the above statement. Aside from the gender-specific language, it focuses on individual academic freedom and does not address institutional academic freedom. In terms of law, it is significant to note: "The 1940 Statement is not policed by courts. Rather, it is policed principally by...the AAUP.... [It] is certainly not hard law in the ultimate sense one...associates, say, with the first amendment to the Constitution with its general protection of free speech." It is also important to point out that the Board of Trustees of the State University of New
York has never formally adopted the complete AAUP policy statements.

By contrast, the constitutional conception of academic freedom is the collection of First Amendment rights of all members of state educational institutions. The First Amendment to the US Constitution states that “Congress shall make no law...abridging the freedom of speech....” The wording of this amendment makes it clear that it applies only to the actions of the federal government. But the First Amendment applies equally to state governments because the Fourteenth Amendment requires that, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States....” These “privileges or immunities” include First Amendment rights. Because the First and Fourteenth Amendments prohibit “Congress” and “States,” respectively, from acting in certain ways, and do not so enjoin non-governmental or private entities, these constitutional guarantees of civil liberties and rights are effective only against governmental action impairing those rights. Thus, a public educational institution as a state agency is legally required to protect its members' First Amendment rights.

A. PUBLIC V. PRIVATE UNIVERSITIES

The most important difference between constitutional and professional academic freedom is that the first applies only to public institutions, while the latter applies to all colleges and universities. Academics believe that all of their colleagues should have the freedom to inquire into and have the opportunity to teach any subject that arouses their intellectual interest, as well as to discuss or publish their conclusions without censorship. And yet none of this is constitutionally protected for academics in private institutions. A private university may choose to give its professors the equivalent of constitutional academic freedom by contract or other legal means, but they are not required to do so.

B. STUDENT ACADEMIC FREEDOM

Student academic freedom is a recent and relatively undeveloped concept.

In the late 1960s, in response to changes in law and student mood, the AAUP joined with other groups in higher education to draft a cautious Magna Carta of student rights. But the AAUP has never investigated a campus incident in which the alleged violation of student freedom was the sole complaint, and it has always assumed that student freedom is not an integral part of academic freedom, but is something different—and something less. Actually, the constitutional rights of students are as firm as the constitutional rights of professors. Indeed, from the legal point of view, they are the same rights. Therefore, students at public, but not private, educational institutions are guaranteed constitutional academic freedom.

One of the fundamental rights secured by the First Amendment for students at state colleges and universities is that of free, uncensored expression, even on matters some may think are trivial, vulgar, or profane. Neither does the First Amendment recognize exceptions for bigotry, racism, and religious intolerance, or other offensive expression. Nor may it hinder the exercise of students' First Amendment rights simply because it feels that exposure to some student groups' ideas may be somehow harmful to certain other students. Still less may the administration limit nonverbal forms of expression on the basis that only speech is protected by the First Amendment.
A state university cannot limit freedom of expression simply on the grounds that any of the following would be undermined, even though they appear to be consistent with the purposes of the Civil Rights laws or the University’s mission: the education of students of color and women, promotion of learning through a culturally diverse student body, and elimination of racist and sexist behavior on campus. The administration must show that such activity would constitute a substantial or material disruption of its educational mission. Furthermore, the courts have given First Amendment rights preferred status when conflicting claims to protection are made. In an important decision on speech codes, the court said: “While the court is sympathetic to the University’s obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech.”

There are a number of limitations to First Amendment rights to freedom of expression. The following kinds of speech are not protected: fraudulent misrepresentation, defamation, incitement to imminent lawless behavior, invasion of privacy, obscenity, and “fighting words.” It is important to note that in their most recent decisions the courts have narrowed the scope of “fighting words” to the equivalent of imminent lawless behavior, thus making it difficult to fashion lawful hate speech codes. A state university may also subject all speech and conduct to reasonable and nondiscriminatory time, place, and manner restrictions that are specific and limited in nature and allow alternative ways for free expression. Such restrictions may be carried out in order that the university provides an institutional setting for the expression of diverse opinions, the safety of its students, and the use of facilities for their normal and intended uses. Administrative offices and classrooms, as settings for specifically defined purposes, are not “public forums.” Thus freedom of expression may be limited in such places provided that such limitations are content neutral and there are reasonably available alternative places for the exercises of freedom of expression.

C. STATE AS GOVERNMENT V. STATE AS EMPLOYER

Whether or not faculty members have the right to criticize the internal policies of their administrators is another important divide between professional and constitutional academic freedom. In deciding what kind of faculty speech is and is not constitutionally protected, the courts have made a distinction between the state as government and the state as employer.

[The State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.]

Based on this distinction, the court decided in a 1983 case that “the Constitution protects only speech relating to matters of public concern; and, in matters of employment, even this speech is protected only if the public and private interests in its protection outweigh the employer's legitimate interest in maintaining the effectiveness of working relationships.”

Here is a significant difference between professional and constitutional academic freedom. While professors do have the right to
criticize the administration on matters of public concern, they would nevertheless insist that they also have the right, as part of their professional academic freedom, to criticize the administration about its internal policies irrespective of the public interest. Interestingly, students have more protection to criticize the administration about its internal policies because they are not university employees. Because they are state employees, staff members are subject to the same “public concern” restrictions as faculty.

D. ACADEMIC FREEDOM AND INSTITUTIONAL AUTONOMY

Most academics view the institutional autonomy of universities as an integral part of professional academic freedom, holding that they should be free of outside authority. One of the bases for this position is the often quoted “four essential freedoms” of a university that former Supreme Court Justice Felix Frankfurter referred to in 1957, in the case of Sweezy v. New Hampshire: the freedom to “determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”

There is often a parting of the ways, however, between faculty and administrators as to who makes decisions regarding the internal functioning of the university. Court decisions continue to reflect active reexamination of this clash. Recently, a federal appeals court, taking note of “the coercive effect upon students that a professor’s speech inherently possesses,” affirmed the right of university officials “to hold sway over an individual professor’s judgments.” The ruling went on to say, “We do not find support to conclude that academic freedom is a First Amendment right.” An appeal has been filed.

Since public campuses depend upon public financing, institutional autonomy faces legislative control as well as judicial scrutiny. But the Supreme Court has spoken decisively on the issue of academic speech, stating that “the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government’s ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.” While this confirms the commitment to the constitutional guarantee of freedom of expression, the question of how the courts regard the concept of professional academic freedom continues to be an unresolved issue.

Conclusion: The complete report of the Commission includes discussion of academic freedom in public high schools, peer review, artistic freedom, and sponsored research. The Commission’s analysis of academic freedom and free expression has the following objectives: first, to provoke additional reflection and dialogue on these complex issues; and second, to provide a conceptual framework for the sections that follow.

III. Recommendations for University Policies

Note: The original commission report prepared for the Binghamton University community dealt primarily with material specific to the campus. Included here are excerpts that have significance for other colleges and universities.
1. There should be no additional rules restricting freedom of speech on campus and no actions that conflict with First Amendment rights, which include constitutional academic freedom.

Our aim is to prevent any hampering of free speech. While very moving, powerful, and rational arguments can be made in support of speech codes, the Commission believes, as do the courts to date, that the case against them is more compelling. The overwhelming majority of those who communicated with the Commission supported this view.

2. The areas on campus that are “public forums” should be clearly identified and publicized widely.

The courts have affirmed the widest possible range of expression in such areas as campus quadrangles and student unions. It is therefore important that all public forums on campus be officially and clearly identified.

3. The Commission believes that a review of the SUNY Trustees statement on academic freedom, the foundation of all such statements, is required. Article XI, Title I of the Policies of the Board of Trustees (1990) now reads:

It is the policy of the University to maintain and encourage full freedom, within the law, of inquiry, teaching, and research. In the exercise of this freedom, faculty members may, without limitation, discuss their own subject in the classroom; they may not, however, claim as their right the privilege of discussing in their classroom controversial matter which has no relation to their subject. The principle of academic freedom shall be accompanied by a corresponding principle of responsibility. In their role as citizens, employees have the same freedoms as other citizens. However, in their extramural utterances employees have an obligation to indicate that they are not institutional spokespersons.

The following clause needs to be changed: “they [faculty] may not, however, claim as their right the privilege of discussing in their classroom controversial matter which has no relation to their subject.” This implies erroneously that instructors may claim the right to discuss in their classrooms noncontroversial matters which have no relation to the subject of their course (see note 5).

The Commission believes that the Trustees’ basic statement should be included in all major campus documents and suggests a new statement be developed to include the concept of student academic freedom. Finally, the implications of the “corresponding principle of responsibility” and “extramural utterances” should be clearly defined.

4. There should be an official statement of student academic freedom in Binghamton University documents. The Commission proposes the following:

Students have freedom to exercise their intellectual curiosity, to draw conclusions for themselves and to express their own opinions, no matter how controversial, without being in jeopardy of not getting a deserved grade or scholarship, and without fear of being expelled from the University. However, academic freedom does not entitle students to in-
roduce topics unrelated to the subject being taught, or in any other way to substantially disrupt a class.

This proposed statement not only affirms the concept for students, but also highlights the significance of the academic program for implanting the principles of free expression.

5. The traditional tolerance of employee free speech on matters of internal policies and governance should continue.

As previously noted, limitations exist on employees' rights to criticize the administration on matters other than those of public concern. Admirably, the tradition at Binghamton has been to tolerate such criticism.

6. Departments and other units should have grievance policies and procedures which should be updated periodically. They should inform faculty, staff, and students of these policies and procedures and their availability at unit offices. All grievance policies should include a statement on the basic rights of freedom of expression and academic freedom.

7. Additional confidential avenues should be made available for students seeking advice before proceeding with a formal grievance. The Provost and the Vice President for Student Affairs should identify specific faculty and staff advisors who are knowledgeable in the area of freedom of expression and would be available to students when such questions arise in the classroom and other campus contexts. These advisors could work in coordination with the SA ombudsperson.

When standards of appropriate behavior are violated, grievance procedures provide the institutional mechanism for redress of legitimate grievances. Members of the University community can initiate these procedures only if informed of their existence and aware of what constitutes a “grievable” issue. Recommendation 7 is intended to accommodate students who might feel uncomfortable about instituting a formal grievance, but who would like to talk freely and informally with someone about a particular problem involving freedom of expression.

8. Education for the entire University community with respect to basic First Amendment rights should occur annually. Groups requiring special emphasis are undergraduate and graduate teaching assistants, residential life staff, individuals involved in grievance procedures, and international students who might not be aware of their rights to freedom of expression.

9. Administrators and staff who deal directly with students should be well informed with respect to First Amendment issues.

One of the necessary elements in ensuring that members of our community respect one another's rights of freedom of expression and academic freedom is education about these rights and the concomitant responsibilities. It is important, however, that this burden not fall on any one segment of our University but be evenly shared.

10. Departments, academic programs, and supervising professors should assume responsibility for ensuring that their teaching assistants are conscious of First Amendment issues in
the performance of their duties and that they respect the academic freedom of their students.

11. Faculty, who have the predominant influence over the classroom atmosphere, should strive to establish an environment that encourages civility and freedom of expression.

12. All evaluations of teaching should include consideration of the classroom atmosphere of freedom of expression. Evaluation-of-teaching questionnaires should contain explicit questions about freedom of expression in the classroom.

The three preceding recommendations were developed in response to student concerns expressed to the Commission and reflect student wishes for an academic environment that encourages free and open dialogue.

13. We recommend a University-wide scheduling process for extracurricular events to insure, insofar as possible, accountability for University policies on safety and order.

14. Organizers of public events involving potentially controversial subjects should consider the appointment of a neutral moderator. The role of the moderator is to establish ground rules to protect the basic rights of free expression of all those in attendance, as well as to encourage dialogue and civility.

15. The Commission offers the following suggestions that can further serve to educate the campus community and promote active dialogue:

- Produce an audiovisual tape on the exercise of freedom of expression and academic freedom on a public university campus.
- Compile a bibliography of relevant resource materials.
- Produce a handbook on the rights and responsibilities of freedom of expression and academic freedom for colleges and universities within the SUNY system, and later for public universities in general.
- Create and maintain a collection of materials on academic freedom and freedom of expression.
- Hold a University-wide meeting on freedom of expression and the law.
- Sponsor debates by prominent scholars and advocates.
- Organize workshops for faculty, staff, and students.
- Organize University forums for faculty, staff, and students on issues of academic freedom and freedom of speech.

IV. Traditions and Expectations

This section addresses principles and expectations which, although not legally sanctionable, nevertheless reflect the norms of civility and respect for others.

Exercise of our individual rights does not occur in a vacuum, but takes place within a complex environment that reflects the traditions and expectations of our campus community. Ultimately, the quality
of life we experience within that environment is a function of voluntary, not mandatory, behavior. The very concept of community implies freely shared goals and values, and a shared commitment to consciously and constantly nurture and renew them.

In the broadest sense we share with other State University of New York campuses the institutional goal set forth in the mission statement: to provide "educational services of the highest quality, with the broadest possible access, fully representative of all segments of the population." The Binghamton mission statement affirms the goal of building "a multicultural community through recruitment of a diverse student body, faculty, and staff, one that encourages full participation and respect." The Binghamton University Faculty Senate adopted a statement of professional standards in May 1990 that defined the responsibilities of the faculty regarding freedom of expression, academic freedom, the free pursuit of learning for students, and civility.

The Commission proposes adoption of the following or similar shared values for our entire campus community:

First, Binghamton strives to be an educationally purposeful community, a place where faculty and students share academic goals and work together to strengthen teaching and learning on campus.

Second, Binghamton strives to be an open community, a place where freedom of expression is uncompromisingly protected and where civility is powerfully affirmed.

Third, Binghamton strives to be a just community, a place where the dignity of the person is honored, where prejudice is rejected, where diversity is celebrated, and where equity and fairness are aggressively pursued.

Fourth, Binghamton strives to be a disciplined community, a place where individuals accept their obligations to the group and where well defined governance procedures guide behavior for the common good.

Fifth, Binghamton strives to be a caring community, a place where the well being of each member is sensitively supported and where service to others is encouraged.

The University's traditions also play an important role in setting its expectations. Access to a quality education was one of the founding traditions of Binghamton University from its inception as Harpur College, which sought to open the doors of higher education to many students who had been denied access because of prejudice or lack of funds. From the appearance of Communist historian Herbert Aptheker in 1961 to that of CUNY professor Leonard Jeffries in 1992, Binghamton has resisted the efforts of those who would declare certain ideas off limits. The University's tradition is that a placid climate is to be avoided, not envied; that contentious ideas are addressed through vigorous debate and sometimes protest. Some at Binghamton can recall the student strikes and teach-ins of the Vietnam War and the extraordinary efforts made to maintain an open dialogue not only with each other but also with the local community. Civility, often in the eye of the beholder and not required by the First Amendment, has been absent on occasion, causing consternation and reminding the community how fragile the values of academic freedom are without it.
Binghamton, like all universities, should strive for an environment wherein it is never unacceptable to disagree with the opinion of others. No campus groups or individuals should feel that they are not free to speak out, and they should understand the significance of seeking to deny that right to others. To inhibit free expression not only infringes a basic right, it destroys our sense of community.

These traditions and expectations have to be periodically renewed to ensure their relevance for new generations within the university community. In 1972, Supreme Court Justice William O. Douglas said, "If we are to become an integrated, adult society, rather than a stubborn status quo opposed to change, students and faculties should have communal interests in which each age learns from the other. Without ferment of one kind or another, a college or university...becomes a useless appendage to a society which traditionally has reflected the spirit of rebellion." At Binghamton this latest renewal reaffirms our campus tradition that the full exercise of freedom of expression is encouraged and protected. As we address the particular challenges of a diverse community, the expectation is that these rights are practiced with respect and responsibility, and with the recognition that abridging the rights of any one person or group ultimately endangers the rights of all. In this way we shall balance our ideals of Binghamton University as both a marketplace of ideas and a scholarly community.

Notes


5. The AAUP has added the following interpretive comment to the preceding sentence. "The intent of this statement is not to discourage what is 'controversial.' Controversy is at the heart of the free academic inquiry, which the entire statement is designed to foster. The passage serves to underscore the need for the teacher to avoid persistently intruding material which has no relation to his subject." Id., p. 5.

6. The AAUP no longer holds that church-related institutions may depart from the principle of academic freedom. Id., p. 5.


8. See Metzger, supra, note 3, 1272.


12. This case, Bishop v. University of Alabama, was reported in the Chronicle of Higher Education, April 17, 1991, p. A23.


Bibliography


