THE CRUMBLING ACADEMIC FREEDOM CONSENSUS AND THE THREAT OF U.S. ANTITERRORISM POLICY

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INTRODUCTION

Beginning with the bombings of the World Trade Centers in 1993, escalating with the Oklahoma City Bombing, and with the 9/11 World Trade Center bombings, the U.S. government has adopted steadily more intrusive policies and legislation aimed at the monitoring and apprehension of terrorists. The impact of this growing web of regulation has been felt by Americans in many of their daily activities. One aspect of the tightening U.S. security web that has not been examined in detail is its impact on academic freedom. Some of the new policies are directly aimed at higher education, other aspects of the policies have a disproportionate impact on higher education. Still other aspects of the policies affect academia only indirectly. Cumulatively U.S. antiterrorism policy has a significant impact on academic institutions restricting openness and limiting institutional autonomy in contravention of fundamental principles of academic freedom.

On the eve of 9/11, academic freedom was already in fragile condition. The ongoing politicization of the humanities and social sciences and the increasing dependence of universities on external funding with commercial and ideological ties were already eroding free thought on campus and institutional autonomy. The additional strain of the war on terror caused by the use of universities as a weapon in the war, government interference with the ability of universities to attract and accept qualified students and continue existing research programs, and a chilling climate for academic work critical of the government, may spell the end of academic freedom as it has been conceived for the last hundred years in American colleges and universities. In this paper, I argue that academic freedom is secured not primarily by law but by a social compact. U.S. anti-terrorism policy, clumsily implemented with little regard for the academic costs, may be the proverbial straw that breaks the back of

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academic freedom. The politicization of the academy and the increasing dependence of college and universities on ideological and commercially based funding have weakened the compact substantially. Because academic freedom is the defining characteristic of a university in a free society, the idea of the university itself is in grave danger. Universities have been the source of much of the critical thinking on literature, science and policy questions in the United States.[1] Because the university has traditionally been insulated from the pressures of public and political life, it has provided the distance necessary for reasoned reflection and critique. Universities have furnished a laboratory in which many students develop their own world view for the first time. This world view is shaped not only by reading, reflection discussion and debate, but by study with faculty who are themselves responsible for the expansion of knowledge in their fields of expertise. Universities have been able to fulfill this function largely because academic freedom, at least in theory, protects the autonomy of educational institutions free exchange of ideas within in them.2 Professor Reichard de George recently observed:

[1] Richard Hofstadter declared, "[n]o one can or should underestimate the contributions of research to American life, nor the ideas which university scholars have given to the material and intellectual well-being of our society." Richard H. Hofstadter, The Scope of Higher Education in the United States 66 (Richard H. Hofstadter ed., 1952). Similarly, Arthur M. Cohen wrote in his sweeping survey of American higher education history, "[t]he Enlightenment dream was that debates on justice and equity would take place in a public arena, that an ever-evolving quest for truth would replace tradition. Research, experimentation and rational inquiry in the universities fit the dream." Arthur M. Cohen, The Shaping of American Higher Education: Emergence and Growth of the Contemporary Sydtem 129 (1998). 2Arthur O. Lovejoy, one of the founders and early leaders of the AAUP "observed in the 1930 edition of the Encyclopedia of Social Sciences, the ultimate social good of a university 'is rendered impossible if the work of the investigator is shackled by the requirement that his conclusions shall never seriously deviate from the generally accepted beliefs or from those accepted by the persons, private or official, through whom society provides the means for the maintenance of universities.'" William W. Van Alstyne, Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review, 53 L. & Contemp. Probs. 79, 87 (1990)(hereinafter "Academic Freedom and the First Amedment"). C. DeWitt Hardy, in a companion essay to Richard Hofstadter's historical survey, supra note 2, noted, "[t]he violence of the controversy around [the social scientist] is a measure of the social importance of what he is doing, the critical value of what he may discover. . . . His research will bring tenseness into the academic community, a sharp, bracing air from the outside world." C. DeWitt Hardy, The Development and Scope of Higher Education in the United States, Higher Education in America, supra note at 203.

> In the former Soviet Union, the state prescribed what would be taught, what could be published and what research was allowed. The result was a passive citizenry and a stultified research program. It is not coincidental that academic freedom came into its own in Europe along with the emergence of political and religious freedom, the spread of democracy, the burgeoning of science and the articulation of a liberal approach to thought. They all go together as the intellectual authority of the state and or the church are replaced by the authority of reason, argument and evidence.[2]

ACADEMIC FREEDOM AND THE IDEA OF THE UNIVERSITY

Academic freedom is a social compact. Its continued vitality is dependent not on law, but rather, on the willingness of those involved in the academic enterprise to adhere to its core ideas and the willingness of those outside the academic enterprise to refrain from undue interference[3] While some aspects of academic freedom intersect the law of contracts and the protection of free speech, its core ideals do not find roots in legal soil. If academics (both administrators and faculty) lose track of their commitment to academic freedom, if they fail to explain and defend the concept to those outside the academic enterprise, or if those third parties no longer feel constrained to intervene in decisions of the academy, academic freedom as it has been understood will not survive. Higher Education will survive, but it will be fundamentally changed -- it will look more like private research entities, schools of vocational education, and ideological think tanks. Research and teaching agendas will be determined more directly by vocational needs and by political strategy, and will be controlled by market forces and politics. Our higher education system will resemble the stultified and passive system described by de George.

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[2] Richard T. de George, Purely Academic; Even Professor Misinterpret This Freedom, Wash. Post, May 15, 2005, at B03, available at Lexis, News library, All File.

[3] See John P. Nidiry, Cuny Trustees: Let Free Speech Flourish, Newsday, October 2001, at A50, available at Lexis, News Library, All File. (quoting Benno C. Schmidt's memo urging caution to the Cuny Board of Trustes in disciplining faculty for controversial comments at a post 9/11 teach-in. Schmidt wrote: "The freedom of thought to challenge and to speak one's mind [is] the matrix, the indispensable condition of any university worthy of the name.") The Newsday article and Schmidt's comments are cited in AAUP, Academic Freedom and National Security in a Time of Crisis, Academe, October 27, 2003, at 34, available at:
.http://www.aaup.org/statements/REPORTS/911report.htm
(hereinafter academic Freedom and National Security").

ACADEMIC FREEDOM AND THE IDEA OF A UNIVERSITY

American universities were built on the foundation of academic freedom from their beginnings at the end of the 19th century, in what Walter Metzger calls the "university movement."[4] The modern university emerged, in part, from the concerted effort of a small groups of academics to reproduce the German research university in the United States.[5] At the same time, early liberal arts colleges began to separate themselves from dominance by their founding churches.[6] Both movements contributed to the developing ideal of academic freedom. By the middle of the 19th Century, the German research universities had embraced the ideas of lerhfreiheit ("the freedom of teaching and freedom of inquiry")[7] and lernfreiheit ("the absence of administrative coercions in the learning situation").[8] These universities were conceived as a places where scholars pursued truth, formulated and transmitted it to students and where students themselves, learned to pursue truth[9]. In the U.S., by the end of the 19th Century leading universities were modeled explicitly on the German ideal. Johns Hopkins University, the first of such institutions, was dedicated to the unity of teaching and research – the notion that students should be taught by teachers engaged in the study and exploration of the fields in which they taught.[10] The first president of the University of Chicago, another school that emerged during this period, expressly sought to replicate the model of the "Humboldtian university"[11] embracing the unity of teaching and research,

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[4]Richard Hofstadter & Walter P. Metzger, The Development of Academic Freedom in the United States, 393-94 (1955).

[5] Hofstadter & Metzger, supra note 5 at 367-68. Metzger writes that " The conception of a university as a research university was in large part a German contribution." Id. at 369. Metzger points out that the small trickle of American scholars traveling to German Universities prior to the Civil War grew substantially in the latter years of the 19th Century as American Colleges became increasingly secularized and were willing to engages in exchanges with the Germans despite doubts about German theology and religious philosophy.

[6] Id. at 152-201, 244.

[7] Id. at 387.

[8] Id. at 386.

[9] Ralph F. Fuchs, Academic Freedom – Its Basic Philosophy, Function and History, in American Association of University Professors, Academic Freedom & Tenure, 248 (Louis Joughin, ed. 1967) (hereinafter "AAUP:Academic Freedom & Tenure")

[10] Hofstadter & Metzger, supra note 5 at 377.

[11] Edward Shils, The Academic Ethic, reprinted in Edward Shils, The Calling of Education: The Academic Ethic and Other Essays on Higher Education 3 (Steven Grosby ed. 1997); Donald N. Levine, The Idea of the University, Take One: On the Genius of this Place, The Idea of the University Colloquium at the University of Chicago at http://iotu.uchicago.edu/levine.html (November 8, 2001).

freedom of teaching and academic self-governance.[12] While schools such as Johns Hopkins and the University of Chicago were conceived as new endeavors other American universities developed from previously church dominated schools for the training of ministers. The emergence of these schools as modern universities was characterized by a rejection of external regulation and dominance by the churches they served.[13] Early academic freedom arguments that arose in the context of these sectarian institutions were often phrased as religious liberty arguments.[14] Only when these colleges shed their domination by sectarian and denominational forces, did the modern university become possible.[15] The university that emerged from these developments was characterized by three principles. Research would inform teaching and not be conducted as a separate endeavor. Teaching would be governed only by the convictions of a scholar based on research and study. The endeavors of teaching and research would take place in an environment free from domination by the churches and free of government regulation and control. These principles – the centrality of research, freedom of teachers to determine what to teach, and the freedom of universities from external regulation and control of their activities -- are the core ideas of academic freedom. These principles embody the freedom of the university as an institution to provide education, foster research, and sponsor service, free from intervention by those outside its governance. They also include the freedom of teachers and researchers to work within the scope of their assignments subject to regulation based only on standards of professional ethics.[16] These freedoms are core to the functioning of universities as we have know them for they ensure that universities are neither a tool of prevailing power structure nor a place for the indoctrination of established dogma. Rather academic freedom ensures that research and teaching take place in an environment of free thought, experimentation and creativity. Ideas that appear radical and unjustified to one generation can become generally accepted principles to the next. Ideas that appear central are discarded as false by later inquirers. If the development and teaching of radical ideas of some could be stifled or officially discredited, or if the core principles of one generation can be

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[12] 13 Levine, supra note 12.

[13] Hofstadter describes the first half of the 19th century as a regression in the advance toward academic freedom and modern university. Hofstadter & Metzger, supra note 5 at 209-211.

[14] Id. at 263. (noting that "academic freedom first appeared in the guise of religious liberty for professors.")

[15] Id.

[16] William Van Alstyne, The Specific Theory of Academic Freedom, and the General Issue of Civil Liberty, in The Concept of Academic Freedom 71 (Edmund L. Pincoffs, ed., 1975).

the dogma of the next, this system of inquiry and questioning that leads to the advancement of knowledge would disintegrate.

THE AAUP: NURTURING THE IDEAL OF ACADEMIC FREEDOM FOR FACULTY

The American Association of University Professors has been the most vigilant guardian of academic freedom for individual faculty in the United States.[17] Formed in 1915, the AAUP made the articulation of a theory for its claims of academic freedom one of its primary goals.[18] The result, the 1915 General Report of the Committee on Academic Freedom and Academic Tenure ("The 1915 Declaration"), is the seminal document of academic freedom in the United States.[19] While The 1915 Declaration was influenced by sources as diverse as the libertarian ideals of J.S. Mill and Biblical concepts of stewardship,[20] it expressly built on prevailing German notions of lehrfreiheit and lernfreiheit.[21] The Declaration articulated a three-part vision: academic freedom consisted of the freedom of faculty member to teach, to do research, and to talk and write on matters outside her or his discipline.[22] Although The 1915 Declaration is a

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[17] Certainly other organizations such as the Association of American College and Universities have not dedicated the resources the protection of academic freedom that the AAUP as. No other organization, has the history of vigilant inquiry to, and reporting upon the history of academic freedom as does the AAUP. See generally Walter P. Metzger, The 1940 Statement of Principles on Academic Freedom and Tenure, 53 L. & Contemp. Probs. 3 (1990)(discussing the development of the AAUP's policies and practices on academic freedom). See also

[18] The AAUP's Committee on Academic Freedom and Academic Tenure ("Committee A") was formed in 1915. See Metzger, The 1940 Statement, supra note 18 at 3, 13-14 (1990)(Metzger served as a member of the AAUP's Committee A on Academic Freedom from 1957 until his retirement in the early 1990's).

[19] General Report of the Committee on Academic Freedom and Academic Tenure, 1 AAUP Bull. 17 (December 1915), reprinted in Appendix A: General Report of the Committee on Academic Freedom and Academic Tenure (1915), 53 L. & Contemp. Probs. 393 (1990) (hereinafter "The 1915 Declaration").

[20] Metzger, The 1940 Statement of Principles, supra note 18 at 13-14. Metzger describes the 1915 Declaration as follows: "the term [principles] was a misnomer, not because the authors commingled policies and precepts . . ., but because, despite the obvious need for brevity, they refused to reduce their value judgments to a few unargued propositions. Theirs, they felt, was to reason why, and their reasoning which borrowed from intellectual history and social philosophy as well as from practical ethics, was intended to provide a rationale founded on a coherent, if not elaborately embroidered, theory." Id. at 13.

[21] The 1915 Declaration, supra note20. With regard to the academic freedom of students, the AAUP's position has always been ambiguous.

[22] Id. at 14-15.

statement of philosophy and not a set of rules it nonetheless it served as an action plan for the young AAUP, which began a process of investigating and reporting on the complaints of individual faculty members regarding alleged infringements of academic freedom.[23] This process of investigation and reporting underscored the necessity of a set of rules – something more concrete than the far-ranging 1915 Declaration. In 1940, the AAUP re-articulated the basis and scope of academic freedom in the 1940 Statement of Principles on Academic Freedom and Tenure ("The 1940 Statement of Principles").[24]

THE 1940 STATEMENT OF PRINCIPLES CONTAINS THREE CORE PROVISIONS:

a. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

b. 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. 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.

c. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should

[23] Id. at 16. Today investigations of the AAUP are regularly reported on in the organization's publication, Academe (formerly the AAUP Bulletin) and on its website. The list of censured organizations is also listed on the website. American Association of University Professors, http://www.aaup.org/Com-a/Censure.htm (visited, May 13 2005).

[24] American Association of University Professors, 1940 Statement of Principles on Academic Freedom and Tenure, http://www.aaup.org/statements/Redbook/1940stat.htm (visited May 13, 2005)(interpretive comments omitted). See also Appendix B: 1940 Statement of Principles on Academic Freedom and Tenure, 53 L. & Contemp. Probs. 407 (1990)(hereinafter "The 1940 Statement of Principles") and AAUP: Academic Freedom & Tenure supra note 10 at 33.

> show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.[25]

These principles reflect the developing consensus that the academic freedom of individual faculty members embraces the freedom to teach, research and to speck as citizens.

The success of the AAUP at obtaining the support of other academic organizations for its statements regarding academic freedom, and the ongoing publication of the reports of its investigations and censures has been responsible, in part, for the primacy of its vision of academic freedom. Theoretically an institution can ignore AAUP actions. And, while some institutions have not responded to AAUP criticism, most respond do. The list of censured institutions is remarkably short – 45.[26] The desire of most institutions to appear within the mainstream o higher education, if not their philosophical commitment to academic freedom, operates to keep the censure list short.

THE CONSTITUTIONAL ASPECTS OF ACADEMIC FREEDOM – THE RISE OF INSTITUTIONAL ACADEMIC FREEDOM

While the AAUP has been the guardian of the individual academic freedom of faculty members, the Court has recognized the autonomy and freedom of academic institutions. Even though American courts have found a nexus between academic freedom and rights of free speech protected in the First Amendment,[27] the scope of the First Amendment protection afforded academic speech is ambiguous at best.[28] The Court's approach to academic freedom and the First Amendment is rooted in a trio of cases arising out of Cold War legislation in the 1950's.[29] *Sweezy v. New Hampshire*[30] involved the contempt prosecution of a University of

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[25] The 1940 Statement of Principles, supra note 25.

[26] AAUP:Censured Administrations, last modified April 2005, at http://www.aaup.org/Com-a/Censure.htm.

[27] The Supreme Court has referred to academic freedom as "a special concern of the First Amendment." Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

[28] J. Peter Byrne, Academic Freedom: A "Special Concern of the First Amendment," 99 Yale L. J. 251, 252(1989)("Attempts to understand the scope and foundation of a constitutional guarantee of academic freedom, however, generally result in paradox or confusion.").

[29] The Court's approach was foreshadowed in two earlier cases, *Adler v. Board of Education*, 342 U.S. 485, 508 (1952) and *Wieman v. Updegraff*, 344 U.S. 183 (1952). Both cases, decided during the Court's 1952 term, dealt with state regulations arising from the Cold War. Adler involved New York legislation which required that any person espousing the use of violence to alter the form of U.S. government be removed

New Hampshire professor who refused to provide details of his lectures and political associations in answer to questions by the state attorney general as part of a state anti-subversive investigation. In his concurring opinion, Justice Frankfurter reasoned that the examination of the content of Sweezy's lectures violated his academic freedom rights ensured by the First Amendment. Frankfurter wrote, "[w]hen weighed against the grave harm [to academic freedom] resulting from governmental intrusion into the intellectual life of a university, [ordinary justifications] for compelling a witness to discuss the contents of his lecture [appear] grossly inadequate."[31] If Sweezy were subject to prosecution for the content of his lectures, Frankfurter reasoned, the chilling effect on the continued free exchange of ideas within the university would be immeasurable.[32]

Frankfurter's opinion in Sweezy is rooted in the government's intrusion into the university as an institution; he characterizes the government's action as an intrusion into the "intellectual life of a university" not as an intrusion into the free speech and association rights of a professor.[33] Yet the case involved an individual faculty member, not by the University of New Hampshire. Furthermore, Frankfurter's conclusions, based on the general value to society of free academic inquiry, do not define the scope of First Amendment inquiry in academic freedom situations. Frankfurter's grand but unspecific conclusion is that a free society depends on free universities, and that "this means the exclusion of governmental intervention in the intellectual life of a university"[34]

The Court's majority recognized the link between free speech and academic freedom for the first time in 1967 in Keyishian v. Board of Regents.[35] Writing for the majority striking down New York anti-subversive legislation that would have required the removal of public employees, including teachers,

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from public employment. In his dissenting opinion, Justice William O. Douglas reasoned that the law unreasonably infringed on the academic freedom of public school teachers. 342 U.S. at 509 (Douglas dissenting). Wieman raised the constitutionality of a state statute requiring that state employees take an oath disclaiming affiliation with a subversive organization as a condition of state employment. In his opinion concurring in the Court's decision to strike down the statute, Justice Felix Frankfurter wrote separately reasoning that in addition to the infringement on associational rights of state employees, the disclaimer oath would have a pernicious effect on the academic freedom of teachers. 344 U.S. at 191. See Van Alstyne, Academic Freedom and the First Amendment, supra note 2. See also Byrne, supra note 29 at 288-299.

[30] 354 U.S. 234 (1957).

[31] Id. at 145.

[32] The characterization is Professor Van Alstyne's. Van Alstyne, Academic Freedom and the First Amendment, supra note 2 at 111.

[33] Sweezy, 354 U.S. at 261 (Frankfurter, J., concurring).

[34] Id. at 262.

[35] 385 U.S. 589 (1967).

who espoused the use of violence to alter the form of the U.S. government, Justice William Brennan reasoned:

> [A]cademic freedom . . . is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that case a pall of orthodoxy over the classroom. . . . The classroom is particularly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection..[36]

The Keyeshian Court relied on Sweezy, and, as in Frankfurter's opinion in Sweezy, reverted to grand conclusions and avoided specific analysis. While Justice Douglas characterized academic freedom as a "transcendent value"[37] his opinion for the Court does not shed additional light on the relationship between academic freedom and the First Amendment.

The year after Keyishian, Justice Douglas, writing for the majority again, in Whitehall v. Elkins,[38] struck down a state law requiring public employees including teachers, to take an oath disclaiming affiliation with any subversive organizations on express academic freedom grounds. Again the opinion is frustratingly devoid of specific analysis. Douglas concluded "[t]he continuing surveillance which this type of law places on teachers is hostile to academic freedom. . . . The restraints on conscientious teachers are obvious."[39]

The promise of a well-articulated First Amendment basis for academic freedom represented by these cases has not been borne out by the Court. The contribution of the Supreme Court authority is the articulation of a constitutional basis for the autonomy of educational institutions from the state – an aspect of academic freedom not adequately explored by the AAUP.[40] It has not addressed the First Amendment and academic freedom in any detail in the years since Keyeshian and Whitehall. Opinions invoking academic freedom are

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[36] Id at 603.

[37] Id.

[38] 389 U.S. 54 (1967).

[39] Id. at 59 (citing Sweezy, 354 U.S. 250). C.f Badgett v. Bullit, 377 U.S. 360 (1964)(striking down two anti-subversive oath provisions that applied to university teachers on First Amendment grounds but not on academic freedom grounds).

[40] David M. Rabban, A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment, 53 L. & CONTEMP. PROBS. 227, 231 (1990).

most often explained by other lines of analysis.[41] One result of the paucity of authority is that tensions exist between individual academic freedom – the freedom of individual faculty and researchers to speak and teach without institutional intervention – and institutional academic freedom – the right of colleges and universities to be free from intervention of the state.[42] The AAUP's 1940 Statement is primarily a statement of the rights of individual professors to academic freedom; the First Amendment cases, while recognizing the individual aspects of academic freedom, deal primarily with institutional freedom from external governmental interference.[43]

This notion that the First Amendment protects primarily institutional academic freedom is underscored by the development of the "public employee doctrine." This doctrine defines the scope of free speech rights of public employees, including, arguably, faculty members, at public college and universities.[44] The Court has held that the free speech rights of an employee speaking about matters of public concern must be balanced against the government's interest in the efficient operation of the governmental entity involved.[45]

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[41] Van Alstyne discusses the post-Keyeshian cases in detail with regard to the elaboration of an academic freedom/First Amendment doctrine. See, e.g., Van Alstyne, Academic Freedom and the First Amendment, supra note 2 at 118-138. See, e.g., University of California Regents, v. Bakke, 438 U.S. 265 (1978); Grutter v. Bollinger, 539 U.S. 306 (2003)

[42] Walter P. Metzger, Profession and Constitution: Two Definitions of Academic Freedom in America, 66 TEX. L REV. 1265 (1988); Rabban, supra note 39.

[43] Rabban, supra note 39 at 229. One commentator has argued that only the institutional aspect of academic freedom is protected by the Supreme Court. See Byrne, supra note 29 at 312-322.

[44] See Van Alstyne, Academic Freedom and the First Amendment, supra note 2 at 83-84 and 105-06. Van Alstyne traces this line of authority back to nineteenth century First Amendment jurisprudence represented by opinion such as that of Justice Holmes in McAuliff v. Mayor of New Bedford, 29 N.E. 517, 518 (1892). Addressing the free speech argument of a police officer discharged for criticizing the police department, Holmes wrote:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.

[45] See Pickering v. Bd. of Educ, 391 U.S. 563 (1968); Connick v. Meyers, 461 U.S. 138 (1983); Waters v. Churchill, 511 U.S. 661 (1994). Interestingly enough, although the primary modern case addressing this doctrine, Pickering v. Bd. of Educ., involved speech by a public school teacher, the court did not rely on notions of academic

The public employee doctrine raises questions about the extent of First Amendment protection for academic freedom.[46] While the Court certainly recognizes that the speech of public employees is protected by the First Amendment, it nonetheless appears to treat the speech of teachers no differently from the speech of other public employees. It may be that the public employee doctrine does not reach to the speech of college and university teachers.[47] or that it only applies to the speech of teachers outside the areas of the classroom and scholarly pursuits.[48] While the latter limitation would be inconsistent with the AAUP's conception of individual academic freedom,[49] it would leave intact the reasoning of Sweezy, Keyishian and Whitehall regarding institutional academic freedom.

The connection between the First Amendment and academic freedom is appealing. At first blush the relationship seems obvious. As a result, for many academic freedom exists only to the extent of its first amendment content.[50]

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freedom for its conclusion that the teacher's free speech rights were infringed by the school district. Pickering, 391 U.S. at 564-68. Pickering instead established a framework in which public employers could regulate the speech of public employees to a greater degree than if those individuals were not public employees. The test balanced the government's interest in the efficient operation of public services is in not having those services disrupted against the speech of the public employee. The potential disruptiveness of a public employee's speech must outweigh the value of that speech. Id. at 568; see also Connick, 461 U.S. at 147-48. Finally the Court held that the government must act to avoid the disruption in pubic services and not as retaliation against the speech itself. Waters, 511 U.S. at 680.

[46] See generally, Matthew W. Finkin, Intramural Speech, Academic Freedom and the First Amendment, 66 Tex. L. Rev. 1323 (1988). Finkin's article was part of a symposium and the two shorter comments on it are also helpful. See Mark G. Yudof, Intramural Musings on Academic Freedom: A Reply to Professor Finkin, 66 Tex. L. Rev. 1351 (1988), and Paul Brest, Protecting Academic Freedom Through the First Amendment: Raising the Unanswered Questions, 66 Tex. L. Rev.. 1359(1988).

[47] See, e.g., Peter E. Barber, Recent Decision – Bishop v. Aranov: "No Talking in Class!": Does the Elementary Adage Apply to University Professors?, 44 ALA. L. Rev. 211, 230 (1992). 48 For detailed discussion of the scope of Pickering and its relationship to academic freedom, see the sources cited in note 46 supra.

[48] For detailed discussion of the scope of *Pickering* and its relationship to academic freedom, see the sources cited in note 46 supra.

[49] Part (c) of The 1940 Statement of Principles expressly protects the external speech of teachers on matters of public concern. See text accompanying note 26 supra.

[50] See Van Alstyne, The Specific Theory of Academic Freedom, supra note 17 at 62-63. Van Alstyne argues that by equating academic freedom with Free speech, the idea of academic freedom is diminished. C.f T. M. Scanlon, Academic Freedom and the

Certainly academic freedom is rooted in many of the same values that inform the First Amendment – those of free association, freedom of thought and inquiry and freedom of speech. Broad generalizations regarding the importance of free thought to free societies, such as Frankfurter's statements in Sweeezy, seem undebatable on their face. Despite this apparent relationship, however, there are both structural and theoretical limitations on the promise of the First Amendment as a bulwark against incursions on academic freedom.

Structurally, the First Amendment can only reach governmental incursions on academic freedom. Sweezy, Keyishian and Whitehall all involved attempts by state government to interfere with academic speech. Yet core academic freedom principles dictate that individual faculty must be free to pursue research and teaching subject only to ethical obligations and institutional decision regarding programs of study.[51] Because a constitutional claim requires some action by a state actor, the First Amendment would not be implicated directly where a private university takes disciplinary action against a faculty member based on the person's speech[52] and yet, such action would raise academic freedom issues.

Moreover, the striking failure of the Court to extend it's reasoning in the years since Sweeezy, Keyishian and Whitehall, may indicate that the reach of those decisions is limited. They might be characterized as more a product of their times than the beginnings of a constitutionally based theory of academic freedom. All three cases arose out of the sweeping and often clumsy attempts of states to reach and regulate perceived subversive activity during the Cold War. Given this context it may be that the cases really only stand for the limited proposition that the state may not use universities as a weapon in an overbroad and ill-defined fishing expedition. Frankfurter hints at such a theory when he focuses on the institutional needs of a university to make its own decisions about the nature and scope of academic inquiry.[53] The constitutional protection of academic freedom may not extend beyond this situation to interference by state supported universities and schools into the academic freedom of their faculties. It is also not clear what sorts

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Control of Research in The Concept of Academic Freedom 237 (Edmund L. Pincoffs ed. 1975)

[51] See note 26, supra, and accompanying text.

[52] See Byrne, supra note 29 at 299-301.

[53] Frankfurter extensively quotes a plea for academic freedom at South African universities which concludes, in part, that the "'four essential freedoms' of a university" are the freedoms "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." Sweezy, 354 U.S. at 263 (Frankfurter, J., concurring).

of governmental purposes would support regulations that interfere with academic freedom. Frankfurter's opinion in Sweezy and the majority opinions in Keyishian and Whitehall each focus on the weakness of the government's purpose. In Sweezy, Frankfurter reasoned that Sweezy's academic freedom rights could not be "encroached upon on the basis of so meagre [sic] a countervailing interest of the State as may be argumentatively found in the remote, shadowy threat to the security of New Hampshire . . . ."[54] Writing for the majority in Keyishian, Douglas concluded that "the very intricacy of the plan and the uncertainty as to the scope of its proscriptions make it a highly efficient in terrorem mechanism"[55] The majority in Whitehall concluded: "[p]recision and clarity are not present. Rather we find an over breadth that makes possible oppressive or capricious application as regimes change."[56]

Narrowly tailored regulations supported by perceived needs to foster institutional independence and academic purposes might more easily survive scrutiny. Reading the academic freedom decisions together with the public employee cases leads to exactly such a conclusion. On the one hand, Keyishian holds that direct governmental intervention requires specific, narrowly tailored regulations based on compelling state interests. On the other hand, Pickering upholds university or school regulations supported by concerns of the school as an employer in maintaining the efficient operation or public services. The Court's failure to address academic freedom concerns in its public employee cases involving teachers also can be explained both by the fact that Sweezy, Keyishian and Whitehall are applicable only in a limited context and by the fact that narrowly tailored, specific regulations regarding employment must be scrutinized under some analytical framework other than academic freedom.

The First Amendment provides a constitutional justification for institutional academic freedom, and the freedom of individual faculty to the extent incursions on such freedom also jeopardize institutional freedom. This contribution must be viewed in concert with the AAUP's articulation of individual academic freedom. Faculty who look to the Constitution to protect their individual rights to academic freedom are likely to be disappointed unless those rights intersect with the autonomy of the institution from the state. The cases imply do not provide a coherent framework for the enforcement of academic freedom rights, particularly for individual faculty members whose college or university seeks to restrict that faculty members' speech. Even on the front of institutional academic freedom, the Supreme Court cases are woefully thin on analysis.

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[54] 354 U.S. at 265 (Frankfurter, J., concurring).

[55] 55 385 U.S. at 601.

[56] 56 Whitehall, 389 U.S. at 62.

THE CONTRACTUAL ASPECTS OF ACADEMIC FREEDOM

Academic tenure which ensures that faculty may not be fired except for good cause, is incorporated into most academic employment contracts.[57] Moreover, many universities' faculty handbooks or other official documents contain express protections of academic freedom.[58] Some university faculty handbooks expressly reference or incorporate The 1940 Statement of Principles.[59] The handbooks of other universities contain original statements of commitment to academic freedom.[60] Under prevailing contract law, these official university pronouncements become part of an employee's contract with the university.[61] Some courts have also recognized that a right to academic freedom can be based on the custom and tradition of a particular university.[62]

The scope of protection afforded academic freedom in by contract law may vary from institution to institution. Contract protections are limited by the terms of an individual faculty member's employment contract, and by the language of university documents dealing with academic freedom and by the ability under state law to make those documents

[57] See generally, Jim Jackson, Express and Implied Contractual Rights to Academic Freedom in the United States, 22 HAMLINE L. REV. 467 (1999);. Finkin, supra note 46 at 357.

[58] See, Jackson, supra note 57 at 477- 483 (surveying cases relying upon academic freedom statements in university handbooks); Finkin, supra note 46 at 360-61 (noting that contemporary employment law has recognized that language contained in employee handbooks is part of the employment contract).

[59] See, e.g. Ohio University Faculty Handbook, at http://www.ohio.edu/facultysenate/handbook/ (visited May 8,2005); Wesleyan, Faculty Governance, at http://www.wesleyan.edu/acaf/policy/academic_freedom.html (visited May 8, 2005); University of Delaware Faculty Handbook, at http://www.udel.edu/provost/fachb/IV-B-4-profethics.html (visited May 8, 2005); University of Colorado System. Faculty Handbook, at http://www.cu.edu/faculty/fac_handbook/06/Six-II.html (visited May 8, 2005).

[60] See, e.g. Oregon State University Faculty Handbook, at http://oregonstate.edu/facultystaff/handbook/acafree/acafree.htm (visited May 8, 2005); Boston University Faculty Handbook, at http://www.bu.edu/faculty/handbook/policies/policies-freedom.htm (visited May 8, 2005); New York University, Faculty Handbook, at http://www.nyu.edu/academic.appointments/faculty.html#Academic (visited May 8, 2005)

[61] See generally, Jackson, supra note 57.

[62] Id.

part of an employment contract. These terms are generally set by the institution and are not subject to negotiation by individual faculty members. Despite these ambiguities, academic freedom's continuing tender in academia is at least partially attributable to its protection by contracts.

ACADEMIC FREEDOM ON THE EVE OF 9/11

Politics and Academic Freedom

Beginning in the late 1980's and 1990's as both radical and conservative politicians and academics took aim at each other and higher education in general, claiming on the one hand that knowledge had become politicized and that moral relativism had corrupted the educational process, and on the other, that the inability to acknowledge the political nature of knowledge perpetuated racism, sexism and parochialism. [63]Radicals attacked traditional scholarship and teaching as sexist, racist and Eurocentric and sought to expose its hidden political agenda.[64] Traditional scholars rejected the views of radicals as nihilistic and truth-denying.[65] Conservative critics argued that colleges and universities had come under the control of radicals determined to undermine the integrity of the academic process through multiculturalism and moral relativism.[66] Advocates at each end of the spectrum argued that academic

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[63] Louis Menand, The Limits of Academic Freedom, in. The Future of Academic Freedom 3, 5 (Louis Menand, ed, 1996)("The debate over the contemporary university has become absorbed by two issues. The first is the so-called politicization of the humanities – the notion that since all knowledge is political and furthers the interests of some person or some group, teaching and scholarship out to be undertaken with their political intentions firmly in mind, and specifically with a view to redressing the disparagement of neglect of subordinate groups. The second is epistemological relativism – the notion that judgments and values cannot be objective or universal, and that ideals lime 'disinterestedness," "reason," and "truth" are insupportable abstractions which we would be better off abandoning in favor of more frankly relational and historicist terms like 'perspective,' 'understanding' and ' interpretation.")

[64] See e.g. Henry Louis Gates, Whose Cannon is it Anyway? reprinted in DebatingP.C.: The Controversy Over Political Correctness on College Campuses 190 (Paul Berman, ed., 1992); Ann C. Scales, The Emergence of Feminist Jurisprudence: An Essay, 95 Yale L.J. 1373, 1377-78 (1986).

[65] See, e.g., Paul D. Carrington, Of Law and the River, 34 J. Legal Educ. 222, 227 (1984); Shils, supra note 12 at 3; Neil Hamilton, Zealotry & Academic Freedom: A Legal and Historical Perspective, 56-60 (1995).

[66] See Dinesch D'souza, Illiberal Education: The Politics of Race and Sex on Campus 13, 229 (1991)(Describing what he sees as a "victim's revolution" on college campuses, D'Souza writes: "This revolution is conducted in the name

freedom was the sword by which the hegemony of the opposition was maintained.[67]

The debate politicization of the academy has ebbed and flowed over the past twenty years, but it has not been resolved. Although issues are not still framed in terms of political correctness and campus speech codes are not commonly at the center of controversy, charges of inappropriate politicization are still troubling academics. Recently, Harvard President Lawrence Summers won a no-confidence vote from the faculty because of comments he made suggesting that one of the reasons fewer women make it to the top in science and mathematics may be innate biological differences in ability.[68] Some of the debate has shifted to conservative outsiders who argue that university teaching is biased and reflects moral relativism and liberal politics. Groups such as the American Council of Trustees and Alumni ("ACTA"), Campus Watch, Students for Academic Freedom have continued a conservative critique of higher education

ACTA argues that universities have abandoned their standards by eliminating requirements and through grade inflation, and fail to teach core principles leading to "historical illiteracy."[69] The group, chaired by Lynne Cheney – the wife of the vice president and the former head of the National

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of those who suffer form the effects of Western colonialism in the Third World, as well as race and gender discrimination in America. It is a revolution on behalf of minority victims. Its mission is to put an end to bigoted attitudes which permit perceived social injustice to continue, to rectify past and present inequities and to advance the interests of the previously disenfranchised." D'Souza concludes, "[i]nstead of liberal education, what American students are getting is its diametrical opposite, an education in closed-mindedness and intolerance, which is to say, an illiberal education."). See also Lynne V. Cheney, Telling the Truth: Why Our Culture and Our Country Have Stopped Making Sense and What We Can Do About It, (1995);

[67] Paula Rothenberg, Critics of Attempts to Democratize the Curriculum are Waging a Campaign to Misrepresent the Work of Responsible Professors, in Debating P.C.: The Controversy Over Political Correctness on College Campuses 267-268 (Paul Berman, ed., 1992); George F. Will, Radical English, in Debating P.C.: The Controversy Over Political Correctness on College Campuses 258-61 (Paul Berman, ed., 1992).

[68] Piper Fogg, Harvard's President Wonders Aloud About Women in Science and Math, Chron. Higher Educ., January 28, 2005, available at http://chronicle.com/prm/weekly/v51/i21/21a01201.htm .

[69] See The American Council of Trustees and Alumni ("ACTA"), http://www.goacta.org/publications/reports.html, (last modified Sept. 13, 2004).

Endowment for the Humanities – issued an extensive report critical of the lack of "patriotism" of universities.[70] The report lists 115 incidents of the failure of universities to respond to 9/11 in an appropriately patriotic way. The report, which indicts universities for broadening their curricula to include Asian and Islamic studies and for not requiring students to take American history, concludes that "[i]t is urgent that students and professors who support the war against terrorism, as well as those who are opposed, not be intimidated."[71] However, the goal of ACTA seems to be to do just that; the litany of examples consists almost exclusively of anecdotal comments critical of post-9/11 U.S. policy.[72]

Campus Watch[73] came to the attention of the public when it published "dossiers" on eight middle east scholars who were critical of U.S. foreign and the Israeli occupation of Palestine labeling them as "unpatriotic."[74] The Campus Watch blacklist resulted in the appointment of a congressional panel seeking increased oversight of federally funded international studies programs.[75]

Students for Academic Freedom's slogan is "you can't get a good education if they're only telling you half the story."[76] In the "About Us" section

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[70] See also Jim Lobe, The War on Dissent Widens, AlterNet.org, http://www.alternet.org/story.html?StoryID=12612 (visited March 22, 2002). The full text of the ACTA report, Jerry L. Martin, Anne D. Neal, eds., Defending Civilization: How Are Universities Are Failing America and What Can Be Done About It (2002)is available through the organization's website: http://www.goacta.org/reports/defciv.pdf .

[71] See Defending Civilization, supra note 70 at 6.

[72] Id.

[73] Campus Watch: Monitoring Middle East Studies on Campus, at http://www.campus-watch.org/ (last modified May 19, 2005). Campus Watch is the brainchild of Daniel Pipes a pro-Israel middle east scholar sometimes described as a neoconservative. See The West Bank and the Charles, Economist, November 2002, available at Lexis, News Library, All File

[74] See Kristine McNeil, The War on Academic Freedom, Nation, November 11, 2002, available at http://www.thenation.com/dic.mhtml?i=20021125&s=mcneil; Dave Newbart, Allegations of Anti-Semitism on Campus, Chi. Sun-Times, November 4, 2002, at 12, available at Lexis, News Library, All File; Tamar Lewin, Web Site Fuels Debate on Campus Anti-Semitism, N.Y. Times, September 27, 2002, at A28, available at Lexis News Library, All File

[75] Jon Marcus, Online "Blacklists" of Anti-US faculty Win in Washington, Times Higher Educ. Supp., October 3, 2003, at 12, available at Lexis, News library, All File.

[76] Students for Academic Freedom, at http://www.studentsforacademicfreedom.org/ (last modified May 16, 2005) .

of their website SAF says: [t]he Students for Academic Freedom Information Center is a clearing house and communications center for a national coalition of student organizations whose goal is to end the political abuse of the university and to restore integrity to the academic mission as a disinterested pursuit of knowledge."[77] In Colorado and other states, SAF has worked with Republican politicians to push an "Academic Bill of Rights"[78] in an effort to require political and ideological balance on campus.

Much of the political controversy within academia represents a vigorous and exciting debate over the substance of truth that is exactly the kind of ongoing engagement protected by academic freedom. However, some of the debate has gone further than engagement on the substantive issues, and has taken aim at the fundamental legitimacy of the academic process.[79] On the fringes of each group, the argument was made that others did not legitimately belong in the academy,[80] that the substance of their teaching and writing should not receive credit as scholarship[81] and that the

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[77] Id.

[78] George Merritt and John Ingold, Republicans Seek "Balance" on College Faculties, Denver Post, September 8, 2003, at B-04, available at Lexis, News Library All File; de George, supra note 3.

[79] For example, decrying history standards which she disagreed, Lynne Cheney writes, "Although [the history standards] have been widely condemned, there are twenty thousand copies of them in circulation, put there at government expense; an in the early month of 1995, their influence could be seen in cirric8lar proposals in a number of states. Cheney, supra note 65 at 194. Cheney's inclination, apparently, would have been to withdraw the controversial standards from circulation. Certainly, she does not trust the process of review and refinement by dedicated school academics to vet the standards appropriately. Dinesch D'Souza argues that University's should sanction groups that advocate "shared intellectual or cultural interest" and should refuse to provide support and funding to communities of interest with in the university based on race. D'Souza,, supra note 65 at 253-54.

[80] See, Hamilton, supra note 65 at 63-93 (documenting the efforts of what Hamilton calls " the fundamentalist, radical academic left" to "suppress the competent academic thought and speech of others" through "tactics of public
accusation, social ostracism, investigation, tribunals, threats to employment, and disruption of speeches and administrative functions");

[81] See, e.g., Roger Kimball, The Periphery v. the Center: The MLA in Chicago, in Debating P.C.: The Controversey Over Political Correctness on College Campuses 61 (Paul Berman, ed.,1992)(describing "radical scholars" at the 1990 meeting of the world's largest academic organization as "ridiculous," "repellant," and "quaint," and as using "[t]he full range of barbarous jargon, intellectual posturing, and aggressive politicization.")

government and institutions outside the university should be brought to bear to silence them.[82] Particularly disturbing is the fact that the political attacks on the academy came not only from outside but from academics themselves. The attacks went beyond the scope of legitimate academic disagreement.

EXTERNAL FUNDING AND ACADEMIC FREEDOM

As higher education has become increasingly privatized[83] and as the cost of higher education steadily rises,[84] universities are relying more heavily on external sources of funding other than direct public subsidies and tuition for their operations.[85] This external funding comes from a number of sources but two are most important – grants for research with significant conditions attached and private ideologically based philanthropy. The concern that external funding will influence the content of academic research and the autonomy of academic inquiry is not new. In 1964, one author concluded:

> [i]f educational institutions become dependent for their increase of reputation, or perhaps even for their existence, upon a few sources of benefaction, ineluctably most administrators and even professors will play their pipes accordingly. And this is not less true merely because a government is 'democratic' or foundation 'charitable.' Governments and foundations are directed by men, like all of us, with prejudices and

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[82] See e.g., Hamilton, sup a note 65 at xi-xvi (Hamilton's book is in part a reaction to concerted attempts to dismiss him from his position at William Mitchell College of Law. Allegations of racism among other things were never established),

[83] See Dennis Jones, State Shortfalls Expected Throughout the Decade: Higher Ed Budgets Likely to Feel Continued Squeeze (February 2003) available at National Center for Public Policy and Higher Education, http://www.highereducation.org/pa_0203/; Mark Yudof, The Burgeoning Privatization of State Universities, Chron. Higher Educ., May 13, 1992, at A48.

[84] National Center for Education Statistics, Congressionally Mandated Studies of College Costs and Prices (2003) available at http://nces.ed.gov/pubs2003/2003171.pdf.

[85] See, e.g., Gwendolyn Bradley, Corporate Sponsorship Problematic, Review Finds, Academe, January 1, 2005, at 14, available at Lexis News Library, All File (reporting on a review of corporate sponsorship of a Cal Berkeley academic department: "[u]ltimately, the reviewers said, the Novartis deal cannot be considered apart from the context of declining funding that made it attractive to some, and indeed it 'highlighted the crisis-ridden state of contemporary public higher education in California, in land grant institutions, and across the country'").

> interests – which may not always be identical with the opinions and advantages of the more lively spirits in the Academy.[86]

The problem is that universities have become increasingly dependent on funded private research and ideological philanthropy as other sources of funding have dried up.[87]

Sponsored research may be funded either by industry or government funding – both raise concerns. With regard to industry-funded research, the AAUP has recently observed "[t]he relationship [between academia and industry] has never been free of concerns that the financial ties of researchers or their institutions to industry may exert improper pressure on the design and outcome of research. This is especially true of research that has as its goal commercially valuable innovations, which is the most common type of industry-sponsored research."[88] Statistics released by the National Science Foundation indicate that in 2001, industry provided 6.8 % of academic research and development funding, and that over the past three decades, industry funding for academic research has grown faster than any other source of research funding.[89] In some fields, the increase in industry-funded research has been very substantial.[90] The growth in corporate funding has also been associated with activities that fundamentally jeopardize the independence of such research. For example, the AAUP report details incidents involving conflict of interest, pressure to "cook" research data, attempts to suppress negative research results, and corporate influence over faculty appointments.[91]

In some fields it is common for academic researchers to have direct commercial interests in the subject of their research.[92] As a result of the

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[86] Russell Kirk, Massive Subsidies and Academic Freedom, in Academic Freedom: The Scholar's Place in Modern Society 177 (Hans W. Baade & Robinson O. Everett eds. 1964).

[87] See supra note 83.

[88] AAUP Statement on Corporate Funding of Academic Research, Academe, May-June 2001, available at http://www.aaup.org/statements/Redbook/repcorf.htm (visited on May 8, 2005).

[89] National Science Board, Science and Engineering Indicators 2004, at http://www.nsf.gov/sbe/srs/seind04/ (visited May 8, 2005).

[90] See, e.g., W. John Schroeder, Academic Freedom Fighting Threats to Honest Scholarship, Seattle Times , January 16, 2005, at D4, available at 2005 WLNR 724857 (reporting an increase in industry funding of biomedical research from 32% in 1980 to 62% in 2000).

[91] See AAUP Statement on Corporate Funding, supra note 88.

commercialization of academic research, researchers commonly enter into confidentiality and trade secrets agreements with industry sponsors that restrict their ability and the ability of their students and their educational institutions to disseminate the results of their research.[93] These types of arrangements jeopardize scholarly exchange and openness.[94] Many researchers receive personal gifts from the corporate sponsors of their research in exchange for special treatment such as prepublication review of articles or ownership of intellectual property resulting from the research.[95] These arrangements give rise to the appearance of conflict of interest, and raise the specter of outside influence on research results.

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[92] Sheldon Krimsky, The Profit of Scientific Discovery and its Normative Implications, 75 Chi.-Kent L. Rev. 15, 28-31 (1999)(documenting the rapid commercialization of academic biological research).

[93] See David Blumenthal, et al., Relationship Between Academic Institutions and Industry in the Life Sciences – An Industry Survey, 334 New Eng. J. Med. 368, 371 (1996); David Blumenthal, et al., University-Industry Research Relationships in Biotechnology: Implications for the University, 232 Science 1361, 1361-66 (1986). See also Tainted Research Ends Conflicts of Interest: Scientist Shouldn't Own Stock in Companies Whose Products They Study, The Virginian-Pilot, May 21, 2000 at J4, available at LEXIS, News Library, All File. Some schools have policies against such conflicts of interest. See Harvard Won't Ease Rules, The Hartford Courant, May 31, 2000. at A14, available at Lexis, News Library, All File.

[94] Rebecca Eisenberg, Academic Freedom and Academic Values in Sponsored Research, 66 Tex. L. Rev. 1363, 1374-78 (1988); David Rabban, Does Academic Freedom Limit Faculty Autonomy?, 66 Tex. L. Rev. 1405, 1416-18 (1988).

[95] Eric G. Campbell, et al., Looking a Gift Horse in the Mouth, 279 JAMA 995, 995-99 (1998)(" Forty-three percent of respondents received a research-related gift in the last 3 years independent of a grant or contract. The most frequently received gifts were biomaterials (24%), discretionary funds (15%), research equipment and trips to meetings (11% each), support for students (9%), and other research-related gifts (3%). Of those who received a gift, 66% reported the gift was important to their research. More than half of the recipients reported that donors expected the following in return for the gift: acknowledgment in publications (63%), that the gift not be passed on to a third party (60%), and that the gift be used only for the agreed-on purposes (59%). A total of 32% of recipients reported that the donor wanted prepublication review of any articles or reports stemming from the use of the gift, 30% indicated the company expected testing of their products, and 19% indicated that a donor expected ownership of all patentable results from the research in which a gift was used. However, what recipients thought donors expected differed by the type of gift received.")

While concrete examples of how such conflicts have impacted scientific research are hard to come by, there are some recent high profile situations that provide a glimpse at the issues. For example, when a biomedical researcher at the University of Toronto moved to publish and inform patients of the negative results of a research project in which she was involved, the corporate sponsor discontinued the funding and threatened legal action. The University of Toronto, at which the researcher was a clinical faculty member without tenure, did not support her.[96] Reports have also surfaced that tobacco companies funded research designed to cast doubt on studies documenting the negative public health effects of cigarette smoking and used "ties with the editor of a peer-reviewed scientific journal to have articles published without disclosing the authors' or editor's connections to the tobacco industry."[97] Concerns with national security
are leading the federal government to place limitations on dissemination of federally funded research.[98]

Industry funding is not the only concern. The increase in federally funded research is also an issue. One writer has pointed out that "these [federal] funds did not come without restrictions, 'as government support . . . grew, government regulations affecting universities and research proliferated. While government regulations were primarily directed toward fiscal affairs – ensuring appropriate use of federal funds, recent regulations, laws, and investigations have begun to affect scientific matters."[99]

Closely related to the growth in university dependence on external research funding is the increase in commercial support for the general

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[96] See Andre Picard, Globe and Mail, November 19, 2004, at A14, available at Lexis News Library, All File; A. Schafer, Biomedical Conflicts of Interest: A Defense of the Sequestration Thesis – Learning From the Cases of Nancy Olivieri and David Healy, 30 J. Med. Ethics 8 (2004).

[97] Alex Barnum, How Big Tobacco Reneged on Pledge: Industry Tried to Subvert Study, UCSF Report Finds, San Fran. Chron., January 14, 2005, at A1, available at Lesis News Library, All file. (reporting that the editory of the journal Mutagenesis received tobacco industry funding from 1996-2001).

[98] See notes 221-233 infra and accompanying text.

[99] Deborah L. Smith, Grasping for External Support: Are We Selling our Souls, Proceedings of Conference on Values in Higher Education at http://web.utk.edu/~unistudy/values/ethics98/smith.htm (April 16-18, 1998) quoting C. Steharsky, Evolution of the University Research Mission in the United States, 5 Res. Management Rev. 40, 42 (1992). Smith alludes to the revocation of a grant by the National Institutes of Health to the University of Maryland regarding "genetic factors in crime. Constance Holden, Back to the Drawing Board, Says NIH; National Institutes of Health Suspends Funding for Proposed Conference on Genetic Factors in Crime, 257 Science 1474 (1992), available at Lexis News Library, All File.

operations of universities. Although, private philanthropy has always been a substantial source of university support, the nature of that private philanthropic support has changed; private donors are increasingly commercial entities or are deeply ideological. These donors are interested in using their leverage to secure influence over university decision-making that extends far beyond "naming" opportunities.[100] Private foundations with an ideological agenda have given even larger amounts of money to universities to support research supportive of that agenda.[101] Recent agreements have involved corporate sponsorship of an entire academic department[102] The AAUP Statement on Corporate Funding of Academic Research reports several additional anecdotes.[103]

The insidious impact of external funding is hard to capture. Much of the influence of external funding is positive. It has lead to the democratization of the scientific professions,[104] and an expansion of opportunities.[105] Likewise, private funding has made scholarships available, subsidized the expansion of university operations, and expanded fields of inquiry.[106] Funded research at academic institutions has lead to an explosion in the scope of basic knowledge and scientific discoveries particularly since World War II.[107]

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[100] A number of the most glaring instances are detailed in Lawrence Soley, Leasing the Ivory Tower: The Corporate Takeover of Academis (1995).

[101] The John M. Olin foundation has, for example, invested tens of millions of dollars to prominent law schools to promote law and economics scholarship. Jon Hanson & David Yosifon, The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture, 152 U. PA. L. Rev. 129, 273-74. (2003); Leasing The Ivory Tower, supra note 100 at 137.

[102] See AAUP Statement on Corporate Funding, supra note 88; Bradley, supra note 85 (reporting that " an external review of a controversial $25 million corporate sponsorship agreement between the University of California, Berkeley, and a biotechnology company found that universities should avoid such arrangements.")

[103] See AAUP Statement on Corporate Funding, supra note 88.

[104] See Krimsky, supra note 92 at 15-16 (noting that the advent of large state funded and federal land grant universities has opened scientific careers beyond the realm of the traditional "bourgeoisie").

[105] AAUP Statement on Corporate Funding, supra note 88.

[106] Krimsky, supra note 92 at 15-16.

[107] AAUP Statement on Corporate Funding, supra note 88; Lynn Hunt, Democracy & Hierarchy in Higher Education, The American Historical Association, at http://www.historians.org/Perspectives/issues/2002/0204/0204pre1.cfm (April 2002).

Despite these positives, the growing dependence of universities is straining their independence and the autonomy of academic researchers.[108] The economic productivity of academic programs is becoming one of the most important measures of legitimacy[109] Professor Rebecca Eisenberg has identified three threats to academic freedom associated with funded research: secrecy of research results, distortion of the viewpoints and claims of academic researchers, and distortion of the academic research agenda.[110]

The providers of external funding inevitably influence the functioning oft a university. By conferring the benefit of control over external funding on individual faculty members, the balance of power in a university is redistributed – researchers gain independence, have loyalties to entities other than the university.[111] This may be divisive – enabling some researchers to take advantage of benefits not available to others.[112] Finally, public scandals regarding conflicts of interest can erode trust in academic institutions.[113] The dependence of universities on external funding threatens to convert them into private research facilities – dependent upon producing results that advance the interests of external supporters.

A CRUMBLING CONSENSUS

By 2001, the political polarization in the academy had altered by not dissipated and the dependence of universities upon external funding with ideological and commercial strings attached had only increased. Most universities were taking external funding with inappropriate strings attached while holding their institutional noses an hoping that the next scandal over funded research did not

[108] Eisenberg, supra note 94.

[109] At my own university, an institution-wide program evaluation is currently underway in which the criteria for evaluation are limited to the centrality of the program to the mission of the university, the quality of the program as measured by the quality of its entering students and its scholarly productivity (numbers of publication) and the "economic value" of each program. "Economic value" is primarily being evaluated based on a program's ability to attract external funding. See documents on the University Of Idaho's Provost web site http://www.provost.uidaho.edu/default.aspx?pid=73113 (visited May 8, 2001)(these documents are also on file with the author).

[110] Eisenberg, supra note 94 at 1375-79.

[111] Charles W. Kidd, The Implications of Research Funds for Academic Freedom, in Academic Freedom: The Scholar's Place in Modern Society 187 (Hans W. Baade & Robinson O. Everett eds. 1964).

[112] Id.

[113] Smith, supra note 99.

occur in their institutions. This approach has created a rift between the aspiration of academic freedom and the reality of research practices. Most universities were ignoring the political struggle that had moved outside their doors. This approach has resulted in the shifting of that struggle to an external attack on universities and faculty members that has percolated up in think tanks, Congress and state legislatures. This response of simply papering over or outlasting the debate has left a rift in the academic freedom compact. As understand or care about the aspirations.

The consequences can be seen in a number of indicators. In a 2002 survey, 41% of the respondents said they favored restrictions on the academic freedom of professors to criticize government military during war. 22% strongly supported such restrictions.[114] There appears to be little public will to support state universities – in fact the predominant state policy across the country appears to one of privatization.[115]

ANTITERRORISM POLICY

The United States began adopting more aggressive policies to combat terrorism in the mid-1990s after the first World Trade Center bombing in 1993,[116] and the Oklahoma City Bombing.[117] Spurred to action by the attacks, Congress adopted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[118] Later that year the Illegal Immigration Reform and Immigrant Responsibility

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[114] First Amendment Center, State of the First Amendment 2002, 16, available at http://www.firstamendmentcenter.org/sofa_reports/index.aspx.

[115] See Roger Green, Higher Education in the Twenty-First Century: Markets, Management and "Reengineering" Higher Education, 585 Annals 196 (2003)(outlining an approach for managing the increasing privatization of universities).

[116] See Douglas Jehl, Explosion at the Twin Towers: Car Bombs; A Tool of Foreign Terror, Little Known in U.S., N.Y. Times, Feb. 27, 1993, at 1:24, available at Lexis, News Library, All file .

[117] See Bomb Rocks Federal Building in Oklahoma, Chi. Trib., April 19, 1995, at 1, available at Lexis, News Library, All File.

[118] Pub L. No. 104-132, 110 Stat. 1214 (codified, as amended, in scattered sections of 7, 8, 15, 18, 19, 21, 11, 28, 40, and 42 U.S.C.). President Clinton, who had issued "urgent calls" for Congress to pass antiterrorism legislation, signed the AEDPA one year after the bombing at the Murrah Federal Building. See Note, Blown Away? The Bill of Rights After Oklahoma City, 109 Harv. L. REV. 2074, 2074-76 (1996) As he signed AEDPA into law President Clinton "said that the legislation struck a 'mighty blow' against terrorists. 'America will never tolerate terrorism. America will never abide terrorists.'" Clinton Signs Antiterrorism Bill, Facts on File World News Digest, April 25, 1996, at 277 G1, available at Lexis, News Library, All File.

Act ("IIRIRA") which extended AEDPA and which substantially revised the U.S. immigration laws was adopted.[119] These statutes together with the USA PATRIOT Act[120] and the Public Health Security and Bioterrorism Preparedness and Response Act ("BPARA"), adopted after 9/11,[121] form the core legislative framework for fighting both domestic and international terrorism.

For the most part academia and academic freedom were far from the minds of Congress at the time any of this legislation passed. Although some aspects of the legislation directly relate to higher

[119] Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of 8 U.S.C.). See Jason H. Ehrenberg, A Call for Reform of Recent Immigration Legislation, 32 U. Mich. J. L. Reform 195, 195-96 (1998)(AEDPA and IIRIRA "were aimed at alleviating the negative public response to America's growing population of illegal immigrants. . . . [T]he most dramatic and significant reform measures [in IIRIRA] fell under the category of exclusion and deportation law. As of April 1, 1997, immigrants seeking entry into the United States face tougher entry requirements and have little or no chance of obtaining judicial review of Immigration and Naturalization Service determinations which exclude them from entering the country or deport them once already in the United States."); Ella Dlin, The Antiterrorism and Effective Death Penalty Act of 1996: An Attempt to Quench Anti-Immigration Sentiments, 38 Cath. LAW. 49 (1998).(AEDPA revamped the removal procedures by eliminating judicial review after a final deportation order premised upon the conviction of certain crimes. It expanded the list of crimes that could give rise to a deportation order. Finally the act provided for the exclusion and deportation of immigrants based on their advocacy of terrorism or their membership in a "terrorist organization). See also Robert Plotkin, First Amendment Challenges to the Membership and Advocacy Provisions of the Antiterrorism and Effective Death Penalty Act of 1996, 10 Geo Immirg. L. J. 623, 625 (1996).

[120] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, Pub. L. No. 107-56, 115 Stat. 272 (2001)(codified as amended in scattered sections of the United States Code).

[121] Congress passed the USA Patriot Act just weeks after the September 11 attacks. The dead from the World Trade Center towers in Manhattan, the Pentagon in Washington, and Flight 93 in Pennsylvania were still being buried. An anthrax threat, assumed by many at the time to be another terrorist attack, had forced members of Congress out of their offices. Few if any lawmakers were truly aware of the new and expanded law enforcement authority within the Patriot Act, even in broad strokes. They only knew they had to do something to quiet the public's fears, and their own. The headline of the New York Times Article reporting on the signing of the Patriot Act captures, as nothing else could, the circumstances under which the bill was signed into law. Clyde Haberman, New Legal Powers, Fresh Anthrax Worries, Resilient Taliban, N. Y. Times , October 26, 2001, at A1. In that same newspaper appeared the ongoing tally of the dead and missing in the trade center attack. Erik Lipton, Numbers Vary In Tallies Of the Victims, N. Y. Times, October 25, 2001, at B1, available at Lexis, news Library, All file.

education, such as the PATRIOT Act amendments to FERPA and the provisions dealing with international student visas, other aspects of the legislation affect higher education only indirectly. For academia, however, the cumulative effect of the legislation piled on top of an already weakened foundation of Academic Freedom, is of significant concern.

U.S. antiterrorism policy has thrown the privacy of library records into question. It has limited the ability of universities to accept qualified graduate students and has deterred such students from study in the U.S. It has made all student records significantly more available to federal law enforcement officials as an investigative tool in terrorism investigations. Broad definitions of material support for terrorism may have a chilling effect on research and service activities of faculty and students. New bioterrorism legislation significantly restricts the operation of research facilities in ways that are inconsistent with free thought and intellectual exchange. Finally, the climate on campus has been unsupportive of critique and questioning regarding post 9/11 national security issues.

SURVEILLANCE AND LIBRARIES

While the enhanced surveillance powers conferred on the federal government by the USA PATRIOT Act,[122] were not aimed at higher education, they are of significant concern from the perspective of academic freedom. The unfortunate history of our country is of government surveillance of political dissenters, including academics.[123]

The surveillance provisions of the PATRIOT Act are extensive and complex. They alter, and most would argue, lower the standard for conducting intelligence surveillance within the United States against individuals who are not agents of a foreign power without a search warrant or wiretap order.[124] The

[122] See Timothy Edgar, Perspectives on the USA Patriot Act: We Can be Both Safe and Free: How the Patriot Act Threatens Civil Liberties, 76 Pa. Bar Ass'n. Quarterly 21 (2005)(detailing the surveillance provisions of the Patriot Act.).

[123] See, e.g., Ellen W. Schrecker, No Ivory Tower: McCarthysim and The Universities, 77-79, 165-66, 201, 234 (1986)(documenting the use of informants to provide information on communists in academia during the second Red Scare.)

[124] See, e.g., Jennifer L. Sullivan, Note: From "The Purpose" to "A Significant Purpose": Assessing the Constitutionality of the Foreign Intelligence Surveillance Act Under the Fourth Amendment, 10 ND J. L. Ethics & Pub. Pol'y 379 (2005); Rebecca Copeland, War on Terrorism or War on Constitutional Rights? Blurring the lines of Intelligence Gathering in Post-September 11 America, 35 Tex. Tech. L. Rev. 1 (2004); but see Richard Henry Seamon and William Dylan Gardner, The Patriot Act and the Wall Between Foreign Intelligence and law Enforcement 28 Harv. J. L. & Pub. Pol'y 319 (2005)(arguing that court interpretations if the Foreign Intelligence Surveillance Act prior to 9/11 and of the Patriot Act revisions are incorrect, that the distinction between intelligence gathering and law enforcement is hopelessly blurred and that statutory clarification is needed.)

act also contains provisions lowering the standard for law enforcement roving wiretaps (wiretaps that are not specific to a particular phone line to be tapped) and extending such wiretaps to intelligence surveillance,[125] and provisions expanding both law enforcement and intelligence pen registers and trap and trace devices to computer addressing information.[126] To the extent academics are the subject of terrorism investigations, these powers will assist investigators in accessing telephone conversations, stored voicemail, stored electronic communications and records of internet usage, among other things.

One of the most troubling aspects of PATRIOT Act is a provision that opens the door for virtually unfettered access by federal law enforcement to books, records, papers and documents kept by a third party. Pursuant to the section 215 of the Act, law enforcement officials "may make application for an order requiring the production of any tangible things . . . for an investigation to protect against international terrorism or clandestine intelligence activities."[127] This provision bypasses the traditional subpoena or search warrant procedures that would have been used to obtain such information. The language of the statute deprives the judge of discretion to decline the order stating "[upon] an application made pursuant to this section, the judge shall enter an ex parte order as requested or as modified, approving the release of records."[128] In addition to providing access to records without a subpoena, the law also places a gag on individuals who are ordered to produce records under a section 215 order.[129]

In addition to Section 215, the PATRIOT Act also expanded the use of National Security Letters("NSL").[130] An NSL is essentially an administrative

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[125] Edgar, supra note 122 at 23-24; Elizabeth Barker Brandt and Jack VanValkenburgh, The USA Patriot Act: The Devil Is In the Details, Advocate, December 2003, at 24. Because the wiretap is not specific to the place to be tapped, it permits officials to continue wiretapping an individual even after she or he has changed phones of locations. See USA Patriot Act §§ 206, 209 (codified at 50 U.S.C. §1805(c)(2)(B) and 18 U.S.C. §§ 2510, 2703).

[126] See Brandt & VanValkenburgh, supra note 125 at 25. USA Patriot Act §§ 214, 216 (codified at 50 U.S.C. § 1842 and 18 U.S.C. §3121(c)).

[127] USA Patriot Act § 215 (codified at 50 U.S.C. § 1861).

[128] 128 Id.

[129] See Id.; discussed in Herbert N. Foerstel, Refuge of a Scoundrel: The Patriot Act in Libraries, 61, 89, 96-99 (2004)(hereinafter "Refuge of a Scoundrel"); Edgar supra note 122 at 27-28; Brandt & VanValkenburgh , supra note 125 at 25.

[130] USA Patriot Act § 505(a), codified at 18 U.S.C. § 2709. This provision was declared unconstitutional in violation of the 4th Amendment in Doe v. Ashcroft, 334 F..Supp. 2d 471 (S.D.N.Y. 2004).

search warrant that can be issues by the Attorney General without a court order. These administrative search warrants can be issue for telephone and electronic communication information under the Electronic Communications Privacy Act among other things.[131] Prior to the PATRIOT Act, the FBI could only use NSLs if it could demonstrate that the person whose records were sought was a foreign power or the agent of a foreign power.[132] Section 505 of the Patriot Act removed this restriction making NSLs generally available when the records are "relevant" to an investigation to protect against "international terrorism or clandestine intelligence activities."[133] Like Section 215, NSLs are not aimed directly at libraries. They have significant ramifications for libraries, however, particularly because the provide access to electronic information such as electronic records of patron activity on library computer terminal that might not be available under section 215.

While these provisions are a broad authorization to federal law enforcement for any records in position of a third party, they are of special concern to libraries, including academic libraries because they can be used to obtain the borrowing records of library patrons. The tactic of using library records to conduct surveillance is not new.[134] In 1979, the Alcohol Tobacco and Firearms Division ("ATF") undertook a program of examining library records in general "to see who was reading material related to explosives or guerrilla warfare as part of a larger investigation by the IRS and the Senate Subcommittee on Investigations.[135] Throughout the 1970's and 1980's the FBI operated a "Library Awareness Program" aimed at conducting surveillance on individuals "hostile to the United States" by reviewing their library records.[136] The program was exposed and came under significant attack in 1987 when the Director of Academic Information Services at Columbia University complained

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[131] Edgar, supra note 122 at 27-28; Foerstel, Refuge of a Scroundrel, supra note 129 at 64-67.

[132] USA Patriot Act § 505(a),(codified at 18 U.S.C. § 2709); Edgar, supra note 122 at 27.

[133] Id.

[134] See Herbert N. Foerstel Surveillance in The Stacks, The FBI's Library Awareness Program (1991)(hereinafter "Surveillance in The Stacks") ; Foerstel, Refuge of a Scroundrel, supra note 129; Frederick J. Stielow, The FBI and Library Spying: A World War II Precedent, 24 AM. Libraries 709 (1993).

[135] Foerstel, Refuge of a Scroundrel, supra note 129 at 1-2.

[136] See Id. at 115-135.

to the American Library Association.[137] The Library Awareness Program involved much more than surveillance. The FBI pressured both public and academic libraries to remove unclassified materials from their shelves, restrict borrowing privileges for certain unclassified government materials and recruited library personnel and patrons to spy for the FBI.[138]

The PATRIOT Act provisions permitting access to library records must be understood on the landscape plowed by the Library Awareness Program. The Attorney General has asserted that the PATRIOT Act provision had not been used,[139] but that disclaimer was disputed by librarians who point to testimony by justice department staffers regarding post 9/11 contacts with libraries.[140] In a survey conducted in December 2001, 4.1% of 1503 libraries surveyed reported that law enforcement authorities had requested patron information since 9/11.[141] In a follow-up survey completed in October 2002, 10.7% of 1505 libraries surveyed reported that they had received at least one (and up to 10) request for information about patrons since 9/11.[142]

STUDENTS

International Student Visas

[137] Id.; Foerstel, Refuge of a Scroundrel, supra, note 129 at 3-6.

[138] Id. at 24-25.

[139] See Edgar, supra note 122 at 26; Katherine K. Coolidge, "Baseless Hysteria"; The Controversy Between the Department of Justice and the American Library Association Over the USA Patroit Act, 97 L. Libr. J. 7, 18-20 (2005).

[140] Foerstel, Refuge of a Scoundrel, supra note 129 at 92-93(discussing the testimony of Assistant Attorney General Viet Dinh that federal law enforcement officials had contacted 50 libraries nationwide); Coolidge, supra note 139 at 18-19 (discussing the tactics of the Attorney General's dispute with the American Library Association, the circumstances surrounding the release of information regarding section 215 and doubts as to the credibility of the information.). See also Privacy: Librarian Association Official Challenges Surveillance; Procedures, Nat. J. Tech. Rev., May 21 2004, available at Lexis, News Library, All File .

[141] Leigh Eastabrook, Public Libraries' Response to the Events of September 11th, 6, at Library Research Center, University of Illinois at Urbana-Champaign, http://www.lis.uiuc.edu/gslis/research/national.pdf (visited May 19, 2005).

[142] Leigh Eastabrook, Public Libraries' Response to the Events of September 11th: One Year Later, 1, at Library Research Center, University of Illinois at Urbana-Champaign, http://www.lis.uiuc.edu/gslis/research/finalresults.pdf
(visited May 19, 2005).

Even before 9/11 many people assumed that immigration and terrorism were linked.[143] This link, particularly the alleged connection between terrorism and the student visa system first surfaced publicly when it was discovered that a terrorist who had overstayed a student visa drove the truck bomb into the parking garage of the World Trade Centers in 1993.[144] The supposed link between terrorism and international students was underscored again when it was discovered that one of the 9/11 bombers was present in the United States on a student visa and two others were in the process of adjusting their status by applying for such visas.[145] These facts have driven a perception that U.S. universities are training grounds for terrorists. [146]

Despite the substantial contributions of international students,[147] the focus on regulating their entry and progress in the U.S. led Congress to direct the Immigration and Naturalization Service (now the Bureau of Immigration and customs Enforcement, or "ICE") to develop a computerized system for

[143] See Brian Michael Jenkins, Don't Link Terrorism to Immigration, Viewpoints, Newsday, Aug. 24, 1993, at 73 (citing a Newsweek poll determining that 75 percent of Americans believe a link exists between immigration and terrorist activity). See Richard Cole, Terror Gets New Label: Assembled in the USA, Star Ledger (Newark, N.J.), May 25, 1997, available in 1997 WL 8074601.

[144] U.S. Must Halt Visa Violations, San Fran. Chron., March 10, 1993, at A16, available at Lexis, News Library, All File.

[145] May Beth Sheridan, Suspect May Have Had Student Visa But Didn't Arrive at School, Wash. Post, Sept. 20, 2001, at A12, available at Lexis, News Library, All File; David Treyster, Notes and Comments: Foreign Students v. National Security: Will Denying Education Prevent Terrorism, 22 N.Y. L. SchJ. Int'l. & Comp. L. 497, 498n.8 (2003).

[146] Genevieve J. Knezo, Congressional Research Service, The Library of Congress, Possible Impacts of Major Counter Terrorism Security Actions on Research, Development, and Higher Education 4 (April 8, 2002), available at http://www.fas.org/irp/crs/RL31354.pdf (detailing fears that U.S. training and education contributes to terrorism, that terrorists enter the United States on student visas, and that the ranks of foreign students include individuals who are wish to apply knowledge gained as students in the U.S. to terrorist aims.).

[147] Academic Freedom and National Security, supra note 4 at 49 (quoting American Council of Education President David Ware: "I believe international student and exchange visitor programs are enormously beneficial to the United States. They dramatically increase the knowledge and skills of our workforce. They boost worldwide appreciation for democracy and market-based economics and give future world leaders rifts-hand exposure to America and Americans. At the same time, International education generates billions of dollars in economic activity every year.")

monitoring international students in the U.S.[148] After 9/11, Congress adopted even more restrictive and invasive rules regarding immigration including specific rules regarding the issuance of student visas and the monitoring of international students.[149] The rules have created long delays in the issuance of student visas and, in some cases, denial of visas particularly for students from the Middle East and South East Asia.[150] Certain programs labeled as "sensitive fields" may be prevented from enrolling international students altogether[151] and students from certain countries may only study in the U.S. with the approval of the Secretary of State or the attorney general.[152] Students face invasions of privacy and increased fees to support government's computer monitoring program – SEVIS.[153] Once in the United States, students continue to experience SEVIS-related delays.[154] Others are required to participate in special

[148] See IIRIRA §641(c); Treyster, Foreign Students v. National Security, supra note 4 at 869-70(Congress directed the INS to establish a nationwide electronic system to collect information relating to all foreign students and exchange program participants).

[149] The Patriot Act provided for the funding to move the Ins's paper record keeping system to a computerized database. See Terry Collins, U.S. Explains System for Tracking Foreign Students: Sevis Created by Justice Department Will Link Colleges & the INS to Provide Detailed Data About Students From Abroad, Minn. Star Trib., May 21, 2002, at 18, available at Lexis, News Library, All File.

[150] George Lardner, Views Differ on System for Tracking Foreign Students, Wash. Post, April 3, 2003, at A8, available at Lexis News Library, All File; Jennifer Jacobson, American College Report a Decline in Foreign Student Enrollment as Tighter Consular Regulations Make Scholars Wait or Look Elsewhere, Chhron. Higher Educ., Sept 19, 2003, at 37, available at Lexis News Library, All File.

[151] The Interagency Panel on Advanced Science and Security screens students who wish to study "sensitive topics" –a definition that changes on a case-by-case basis. See Jeffrey Mervis, Panel Would Screen Foreign Scholars, 296 Science 1213 (May 12, 2003), available at Lexis, News Library, All File.

[152] Susan Sachs, Under Fire, INS Begins Rolling Out New Database to Track Foreign Students, N.Y. Times, June 22, 2002, at B2, available at Lexis, News Library, All File. In addition, the Patriot Act § 817 (codified at 18 U.S.C. §175b(a)) prohibits aliens from Cuba, Iran, Iraq, North Korea, Libya, Sudan or Syria from having access to certain restricted substances. A program utilizing such materials could not accept a student from one of the prohibited countries.

[153] Dept. of Homeland Security, DHS Ramps UP For Fall Semester, August 27, 2004, available at Lexis, News Library, All File (press release from Dept. of Homeland Security).

[154] Academic Freedom and National Security, supra note 4 at 50.

registration.[155] They also risk deportation without due process at any time during the course of their studies if they are convicted of a number of criminal offenses with possible sentences of one year or more.[156]

It is difficult to quantify the effect of these policies on the numbers of international student studying at U.S. colleges and universities. However, a number of factors tend to indicate that enrollments are dropping. The Institute of International Education ("IIE"), part of the U.S. State Department, reported that the number of foreign students declined in 2003 by 2.3% -- the first decline in over 30 years.[157] The National Science Foundation reported that first-time, full-time enrollment of foreign graduate students in science and engineering fields declined 7.9% in 2002 with some fields experiencing declines of 15%.[158] The IIE study indicated that while the enrollment of foreign students is up slightly (1%), the rate of enrollment of foreign students had slowed significantly.[159] Other statistics indicate weakness in foreign student enrollment. Thirteen of the twenty countries that send the most students to the U.S. showed declines in enrollment of up to 14%.[160] Forty-six percent of the 276 colleges and universities participating in the study reported declines in foreign student enrollment.[161] The IIE survey for 2004 continues to show

[155] Susan Martin and Philip Martin, National Security Discussion: International Migration and Terrorism: Prevention, Prosecution and Protection, 18 Geo. Immigr. L. J. 329, 334-35 (2004).

[156] See 8 U.S.C. §1101(a); John J. Frances, Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This be Grounds to Withdraw a Guilty Plea, 36 U. Mich.. J. L. Ref. 691, 698-99 (2003).

[157] Laila Weir, Slamming the Door of Higher Ed; Since 9/11, Foreign Enrollment Rates at Bay Area Colleges Have Declined Dramatically Because of Both New Restrictions and Changing Attitudes, East Bay Express, December 1, 2004, available at Lexis, News Library, All File.

[158] NSF: Graduate Student Enrollment And Post-Docs Reach New Peaks In Science And Engineering, But First-Time Enrollment Of Foreign Students Declines, M2 Presswire, June 29, 2004, available at Lexis, News Library,
All File.

[159] Institute for International Education, Open Door 2003 (2003).

[160] Id.

[161] Id.

significant declines in foreign student enrollments; the number of foreign students declined by nearly 14,000 for the 2003 school year.[162]

Anecdotally, admissions directors and recruiters at colleges and universities also report declines in international student enrollment.[163] One official at Stanford reported that "[t]he combined effect of SEVIS and tighter visa restrictions is creating high stress for universities and for the students themselves . . . .. For the geosciences, in particular, this increased anxiety among students and staff is affecting the earth science departments, which already are facing a dearth of domestic graduate students."[164] Significant declines in the numbers of foreign students threaten the integrity of some graduate research programs at U.S. universities. Officials point out that in disciplines, such as geosciences, there are simply not enough domestic graduate students to support existing research programs. Even small declines in the numbers of international graduate students threaten these programs.[165]

In addition to the expense, inconvenience and invasion of privacy represented by these regulations, they infringe on a university's academic freedom. The regulations limit the ability of universities to select their own students, to admit the most qualified students, and, in some instances, to even operate certain research programs. As such these regulations interfere with a university's ability to define itself. Few would argue that the government has the obligation to develop mechanisms for determining whether individuals are

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[162] Institute for International Education, Open Door 2004 (2004).

[163] Jennifer Jacobson, American Colleges Report a Decline in Foreign-Student Enrollment as Tight Consular Regulations Make Scholars Wait or Look Elsewhere, Chron Higher Educ Duc., Sept. 19, 2003, at 37, available at Lexis, News Library, All File; Kevin Kilbane, More Foreign Students Face Barriers Added Restrictions Have Decreased Foreign Enrollments At Local Colleges, Fort Wayne News Sentinel, October 8 2004, available at 2004 WLNR 3242475 (reporting steady declines in foreign student enrollments at a number of Indiana colleges since 2001); Lilly Rockwell, Number of International Applicants Decreases: New Post Sept. 11 Security Measures Strain Prospects, Daily Texan, May 5, 2005, available at http://www.dailytexanonline.com/media/paper410/news/2004/05/05/TopStories/Number.Of.International.Applicants.Decreases-678435.shtml?norewrite&sourcedomain=www.dailytexanonline.com (visited May 10, 2005) (reporting a 25% drop in applications from international students at the University of Texas).

[164] News Notes, Science Policy: Terrorism Puts Foreign Students in the Spotlight, GeoTimes, March 2003, available at http://www.geotimes.org/mar03/NN_sevis.html (visited March 10, 2005)(quoting John Perarson, Director of the Bechtel International Center at Stanford University).

[165] See GeoTimes supra note 164.

plotting terrorist acts. However, to the extent those regulations affect university decisions, they should be adopted with a sensitivity to academic freedom.

FERPA

One feature of terrorism investigations has been the use of previously private student records. In addition to the position of ICE that student privacy rules do not apply to international students, the USA PATRIOT Act provides for increased government access to any student's personal educational records.[166] Student educational records[167] are protected from disclosure to third parties with out the student's consent by the Family Educational Rights and Privacy Act of 1974 ("FERPA").[168] Such records include academic records, conduct files, information about campus activities, academic counseling records, emails and records about computer use.[169]

FERPA contains a number of exceptions to its general policy of non-disclosure. Most of these exceptions are necessary for educational reasons such as transferring schools or obtaining financial aid.[170] Beyond these educational exceptions, prior to 9/11 FERPA provided for disclosure of educational records to third parties only pursuant to a subpoena issued for good cause either by a

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[166] See U.S. Dept. of Homeland Security, Bureau of Immigration and Customs Enforcement (Ice): Ice Prepares U.S. Schools and Foreign Students for August 1, 2003 Sevis Deadline, July 29, 2003, at http://www.ice.gov/graphics/news/newsreleases/articles/sevis.pdf ("in accordance with § 642(c)(2) of IIRIRA, . . ., the Assistant Undersecretary for ICE is permitted to waive FERPA to the extent necessary to implement SEVIS"). IIRIRA §642(c)(2) is codified at 8 U.S.C. § 1372(c)(2).

[167] Student "educational records" are defined in FERPA as "records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational . . . institution or by a person acting for such . . . institution." 20 U.S.C. §1232g(a)(4)(A). The definition exempts personnel records, law enforcement records and records of students over the age of 18 created by a psychologist or professional counselor.
See id.

[168] P.L. 83-380, Title V, §513(b)(1)(i), 88 Stat. 574 (1974)(codified at 20 U.S.C. §1232g). For a general discussion of FERPA prior to 9/11 see Lynn M. Daggett & Dixie Snow Huefner, Recognizing Schools' Legitimate Educational Interests: Rethinking FERPA's Approach to the Confidentiality of Student Discipline and Classroom Records, 51 AM. U. L. Rev. 1 (2001).

[169] See Nancy Tribbensee, Privacy and Security in Higher Education Computing Environments After the USA Patriot Act, 30 J.C. & U. L. 337, 351-52 (2004).

[170] 20 U.S.C. § 1232g(b)(1)(A)-(H). FERPA also contains provisions permitting release of information to "protect the health or safety of the student or other persons." Id. at §1232g(b)(1)(I).

federal grand jury or for a law enforcement purpose.[171] FERPA also required a college or university to undertake reasonable efforts to notify a student before producing records pursuant to a subpoena unless the court order provided that the student should not be notified.[172] In addition, the record-keeping provision of FERPA required the educational institution to keep a record of any individual who had obtained access to student records including the legitimate interest of such a person in accessing the records. FERPA required that the record of access must be made available to the student.[173]

A new exception to FERPA's non-disclosure rule was added by the USA PATRIOT Act.[174] The revision lowers the requirements for FERPA subpoenas by federal law enforcement officials. Under the revision an assistant attorney general or other similar federal officer may apply to the court for and ex parte order permitting federal officers "to collect educational records that are relevant to an investigation or prosecution of domestic or international terrorism."[175] This requirement is very general. It permits access to records of any student regardless of whether she is a target of the investigation and lowers the standard for the issuance of such a subpoena from "good cause" to "relevance."[176] Moreover, the court's approval of the order is a ministerial act. The new FERPA provision merely requires that if the Attorney General certifies that the records are relevant "the Court shall issue an order" providing for disclosure of the records.[177] In addition to providing easy federal law enforcement access to student records, the amendments give the Attorney general the power to adopt guidelines providing for the further use and dissemination the records.[178] Finally the amendments to FERPA create an

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[171] 20 U.S.C. § 1232g(b)(1)(J).

[172] 1Id. at § 1232g(4); 34 C.F.R. § 99.31(a)(9)(2003).

[173] 173 20 U.S.C. § 1232g(b)(4).

[174] USA Patriot Act §508 (codified as 20 U.S.C. §1232g(j)(1)(A).

[175] 20 U.S.C. § 1232g(j)(1)(A).

[176] Compare 20 U.S.C. 1232(b)(1)(J) with 20 U.S.C. §1232g(j)(1)(A).

[177] 20 U.S.C. §1232g(j)(2); see ACLU, How the Anti-Terrorism Bill Puts Student Pirvacy at Risk, http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=9148&c=111 (October 23, 2001).

[178] 20 U.S.C. § 1232g(j)(1)(B). To date, the Attorney General has not proposed new guidelines pursuant to this section. Guidance dated April 12,2002, from the Director of the Family Policy Compliance Office within the Department of Education indicates that the department will be adopting such guidelines. See

exception to the record keeping provisions so that the educational institution need not maintain records of access to a student's file for terrorism investigations.[179]

BALANCING THE IMPACT ON STUDENTS AGAINST THE GAIN IN SECURITY

Despite the fact that one of the 9/11 bombers entered the U.S. on a student visa, there is little reason to believe that terrorists could only gain the knowledge to carry out their plans through higher education or that there is any special link between higher education and terrorism. Most of the 9/11 bombers were in the U.S. legally, or gained access by some means other than a student visa.[180] The 9/11 bombers are remarkable not because they were students hiding within the protective environment of a university, but because although a few pretended to be students, they never actively pursued educational programs in the U.S. There is simply no evidence that any of the heightened reporting by educational institutions would have resulted in reporting on terrorists. In fact, based on what we know, the only terrorist to enter as a student never showed up at the language school he was supposed to attend and melted into the fabric of American society.[181] Certainly increased reporting means that immigration officials may know when a student fails to enroll or when a student drops out of school. The problem is that U.S. policy is not focused on tracking students once they fall out of the system. If such a person is not arrested or does not apply for a government benefit, she or he could be in the U.S. for a long time. Rather we are pursuing a policy of tracking the students who are engaged, of

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http://www.ed.gov/policy/gen/guid/fpco/pdf/htterrorism.pdf (visited March 16, 2005).

[179] 20 U.S.C. § 1232g(j)(4). But See Jamie Lewis Keith, The War on Terrorism Affects the Academy: Principal Post-September 11, 2001 Federal Anti-Terrorism Statutes, Regulations and Policies that Apply to College and
Universities, 30 J.C. & U. L. 239, 295-96 (2004)(arguing that the PATRIOT Act revisions to the FERPA record-keeping section do not necessarily relieve colleges and universities of the responsibility to undertake reasonable efforts to notify a student before producing student records pursuant to a terrorism application because the terrorism application section is silent as to advance notice, but advance notice is require prior to disclosure pursuant to federal grand jury and law enforcement subpoenas..)

[180] All but one of the hijackers entered the U.S. on visitor (tourist) visas or business visas. See Ins Releases Status of Alleged Hijackers, CNN.Com, October 11, 2001, available at Lexis, News Library, All File; Jerry Speyer, Justice Probe Finds all hijackers entered U.S. Legally, Wash Times, Nov. 22, 2001, at A4, available at Lexis, News Library, All File.

[181] Id. See also Stacy Finz & Michael Taylor, Hijack Suspect Spent Time in Bay Area, San Fran. Chron., October 10, 2001, at A2, available at Lexis, News Library, All File.

circumventing the procedures for protecting the privacy of all students. The consequence is threatening academic freedom of universities to choose their own students and their ability to pursue their research agenda with little impact on the War on Terrorism.

The revisions of FERPA and the government's position that FERPA does not apply to foreign students raise the possibility of significant abuse. Secret rifling of students records can lead to erroneous and harmful conclusions. In the case of Sami Omar al Husssayen, for example, the government, having obtained copies of educational records from the University of Idaho,[182] (presumably pursuant to a application under FERPA as revised by the USA PATRIOT Act) incorrectly concluded that his graduate program was a sham,[183] bolstering the conclusion of investigators that al Hussayen was in the United States for illegal purposes. The government's conclusion was apparently based on two facts discovered in al Hussayen's educational file. First, al Hussayen, a doctoral student in computer science at the University of Idaho, had changed major professors partway through his doctoral program. Such a change is unusual and lead the government to conclude that al Hussayen was purposefully dragging out his studies rather than moving expeditiously toward completion of his Ph.D. In truth al Hussayen's original advisor had developed serious health problems which made it impossible for her to keep up her advising obligations. She arranged for a number of her students to change advisors so they could continue to make progress an appropriate pace on their research. This explanation for the change was not reflected in al Hussayen's student records. The second bit of information obtained by the government from al Hussayen's records was that he failed to pass the review of his thesis prospectus three times. Again, this is unusual. However, al Hussayen was working in a cutting edge area dealing with the protection of computers from outside security breaches. As he was attempting to formulate his thesis, the technology was changing and advancing at a constant rate and his work on his prospectus reflected his attempts to come to grips with and flexibly adapt to this

[182] Because of the secrecy surrounding the al Hussayen investigation, it is not clear how the government obtained al Hussayen's educational records. These records, used at trial to question al Hussayen's reasons for being in the country, had been obtained by the government prior when the case "went public" with al Hussayen's middle of the night arrest at student housing, were discussed at the government's press conference the morning after the arrest. Interview with David Z Nevin attorney for Sami Omar al Hussayen, Moscow, ID, April 25, 2005.

[183] See U.S. Links Saudi to Islamic Militants; Prosecutors Urge Court Not to Release Student Before Trial, Wash. Post, March 13, 2003, at A06, available at Lexis, News Library, All File. (quoting United States Attorney Kim Lindquist saying "[t]he doctoral program that is the basis of him staying here is illusory at best, if nonexistent.").

constantly changing research environment.[184] His advisor made clear that al Hussayen's was progressing at an appropriate pace on his graduate work.[185]

The PATRIOT Act revisions of FERPA threaten to make universities an arm of law enforcement because the certification process does not provide a sufficient barrier to access of records. Such a situation disrupts the relationship of trust between the academic institution and its students. It is likely that schools will decline to retain information in their records or will pad information with explanations and qualifications.

MATERIAL SUPPORT OF TERRORISM

Prior to 9/11 two sections of the U.S. Code criminalized providing material support for terrorism. The first section made it a federal felony to provide material support to terrorists.[186] This section was added to federal law in reaction to the first World Trade Center bombings as part of the Violent Crime Control and Law Enforcement Act of 1994.[187] It states that:

> [w]hoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of . . . [the U.S. Code provisions pertaining to terrorism] or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.[188]

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[184] Interview with David Z. Nevin, Lawyer representing Sami Omar al Hussayen in Moscow, ID (April 25, 2005).

[185] See John Dickinson, Visits with al Hussayen Open Eyes to the Twisting of Facts, Idaho Statesman, June 25, 2004, at t, available at Lexis, News Library, All File; Timothy Egan, Computer Student on Trial Over Muslim Web Site Work, N.Y. Times, April 27, 2004, at A16, available at Lexis, News Library, All File.

[186] See Robert M. Chesney, The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention, 42 Harv. J. on Legis. 1, 12 (2005)("Section 2339A is a narrow law, ... It avoids the criticisms associated with empowering the executive brancy to identify specific terrorist organizations and individuals to be sanctioned. Instead, it punishes the provision of material support or resources to anyone, regardless of the identity of the recipient . . .")

[187] Id. at 12 n.66 ("At least eight bills containing material support provisions were introduced . . . [after the 1993 World Trade Center Bombing in the Spring and Summer of 1993] during the 103d Congress.").

[188] 18 U.S.C. § 2339A(a).

The term "material support or resources" is defined as:

> any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.[189]

The language in the definition of "material support" regarding "monetary instruments" and "expert advice and assistance" was added to the statute by the USA PATRIOT Act.[190]

From the very beginning, policy makers were dissatisfied with the material support for terrorism crime, because it did not criminalize the provision of financial support for non terrorist purposes to organizations that also engaged in terrorism.[191] The Clinton Administration began almost immediately to seek a broader material support statute, and, with the Oklahoma City bombing, got the boost necessary to pass broader legislation.[192] This new statute, which criminalized the provision of material support to terrorist organizations was part of AEDPA.1[193] As originally adopted statute did not require proof that an individual intended to support terrorism or knew of their support for terrorist activity.[194]

Professor David Cole, one of the strongest critics of the material support for terrorism statute, characterized the ADEPA version of the statute as a "classic instance of guilt by association."[195] He explained that "[u]nder . . . [the criminal material support statute as adopted in AEDPA] it would

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[189] 18 U.S.C. § 2339A(b).

[190] 190 U.S.A. Patriot Act § 811(f) .

[191] See Chesney, supra note 186 at 13 ("Critics of the new law emphasized that it would not prevent the flow of support to terrorist organizations in situations in which the government could not prove the donor intended or knew the aid would facilitate the commission of a particular crime. A person could donate thousands of dollars to Hamas or Hezbollah, for example, so long as he or she thought the money might be spent on the political or social services those groups provided.")

[192] Id.

[193] Pub. Law 104-132, 110 Stat. 1214.

[194] Id.

[195] David Cole, The New McCarthyism: Repeating History in the War on Terrorism, 38 Harv. C.R.-C.L. L. Rev. 1, 10 (2003).

be a crime for a Quaker to send a book on Gandhi's theory of nonviolence – a "physical asset" – to the leader of a terrorist organization in hopes of persuading him to forego violence."[196] A number of constitutional attacks on the statute have generally failed. Designated foreign terrorist organizations have, with some success, challenged the process by which such designations are made.[197] But the law has been unsuccessfully challenged on the ground that it violates First amendment rights to expressive association,[198] and on the grounds of vagueness.[199] Due Process challenges arising from the absence of a men's rea standard in the material support statute have met with more success. The Ninth Circuit held that the statute had to be interpreted to require proof that "the donor had knowledge that the organization was designated by the Secretary as a foreign terrorist organization or that the donor had knowledge of the organization's unlawful activities that cause it to so designated."[200] These cases were responsible, in part, for late 2004 amendments to the statute providing: "a person must have knowledge that the organization is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . ., or that the organization has engaged or engages in terrorism . . .."[201] Inexplicably, however, the 2004 amendments will sunset on December 31, 2006 and the statute will revert to its earlier form.[202]

On their face these provisions, as revised, seem to provide important tools for fighting terrorism. Yet they do not address the core criticism of original statute. The individual in Cole's outlandish hypothetical would still be guilty of providing material support to terrorism since the person knew that the organization to which they were sending Ghandi's book was a terrorist organization. As Cole points out, the core problem is that the statute does not take into consideration the purpose or

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[196] Id.

[197] Chesney, supra note 186 at 48-53; Jennifer Von Bergen, In the Absence of Democracy: The Designation a d Material Support Provisions of the Anti-Terrorism Laws, 2 Cardozo Pub. L. Pol'y & Ethics J. 107, 131-135 (2003).

[198] Chesney, supra note 186 at 52-55.

[199] Id. at 55-58.

[200] See Humanitarian Law Project v. U.S. Dep't of Justice, 352 F. 3d 382, 403 (9th Cir. 2003); see also United States v. Al-Arian, 329 F. Supp. 2d 1294 (M.D. Fla. 2004).

[201] Intelligence Reform and Terrorist Prevention Act §6603(d), ("IRTPA"), Pub. Law No. 105-458, 118 Stat. 3638.(codified at 18 U.S.C. § 2339B(a)(1)).

[202] See IRTPA § 6603(g) (explained in note under 18 U.S.C. §2332b)

effect of the "support" provided to the terrorist organization.[203] Although the addition of intent language helps limit the impact of this legislation, it nonetheless has ramifications for academics, particularly given the addition of "expert advice and assistance" to the definition of terrorism by the PATRIOT Act. This language has the potential effect of criminalizing research and service activities of university faculty and graduate students if the organizations with which they are involved are designated as terrorist organizations or are found to engage in terrorism or terrorist activities.[204]

Material support of terrorism has been the basis for two prosecutions involving academics. In the most well known, United States v. Al-Arian[205]Sami Al-Arian a computer engineering professor at the University of South Florida ("USF"), was indicted on charges of conspiracy to provide material support to a designated foreign terrorist organization – the Palestinian Islamic Jihad ("PIJ").[206] While at South Florida, Al-Arian established a think tank associated with USF to study Islamic thought and political theory.[207] The indictment alleges that Al-Arian knowingly used the World Islamic Studies Enterprise to raise money that was eventually funneled to PIJ.[208] Jury selection in his case began on May 16, 2005.[209]

The second case involved Sami Omar al Hussayen. Al Hussayen, a computer science Ph.D. student at the university of Idaho was initially charged

[203] Cole, supra note 195 at 9-10.

[204] It is not at all clear whether a group will be designated as a "foreign terrorist organization." The designation process has bee criticized as motivated by politics and not the actual danger of the group. See Joanne Mariner, The EU, the FARC, the PKK, and the PFLP: Distinguishing Politics from Terror, Findlaw's Writ Column, available at http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/mariner/20020513.html (May 13, 2003) In addition a number of Due process concerns have been raised regarding the designation process such that it is. See VonBergen, supra, note 197 at 131-35; but see Chesney, supra note 186 at 48-53.

[205] 329 F. Supp. 2d 1294 (S.D Fla. 2004).

[206] United States v. Al-Arian, 329 F. Supp. 2d at 1296.

[207] Sharon Walsh, U. of South Florida Professor Indicted on Charges of Aiding Terrorists, Chron of Higher Educ. (February 28, 2003) available at http://chronicle.com/prm/weekly/v49/i25/25a01201.htm; John Wing, Feds' Silence Prompts USF to Reinstate Prof After Two Year Suspension, University Wire, May 29, 1998, available at Lexis, News Library, All file.

[208] See Von Bergen, supra note 197 at 122.

[209] See Al-Arian Jury Selection to Begin, St. Petersburg Times, May 16, 2005, at 3B, available at LEixis, News Library, All File.

with visa fraud.[210] The indictment was amended one year after his arrest to add allegations of providing material support to terrorists by setting up internet web sites and chat rooms that were used to recruit terrorists and to funnel money to terrorist organizations.[211] Al Hussayen was acquitted on the terrorism charges in June, 2004.[212]

The activities in which Al-Arian and al Hussayen were engaged appeared to be core service activities in which university faculty are expected to engage. al Hussayen's volunteered his computer expertise to a nonprofit organization in which he was involved. Likewise, Al-Arian founded an educational institute within his university and was speaking, writing and fundraising on behalf of that institute. These prosecutions, rooted in academic activities, have a chilling effect on academic undertakings. The activities of al Hussayen and Al-Arian are analogous to the activities of controversial academics in other times of controversy. During the McCarthy period, the investigation of academics focused on their teaching and reflected the fear that they were dangerous to the United states and would indoctrinate their students with communist ideology.[213] A key aspect of the allegations was that academics who outwardly hid their connection to communism, yet used their classroom podium to espouse the beliefs and values of Soviet Communism.[214] The allegations were rooted in an assumed interconnection between the Soviet Community Party under Stalin and the Communist Party in the United States signified that members could not be "honest" or "free agents" and could not, as a consequence, teach the truth.[215] Faculty members were suspect because of

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[210] See, John M. Hubbell, Saudi Held in Idaho Despite Judge's Ruling; Immigration Agency Holds Graduate Student, Wash. Post, March 15, 2003, at A5, available at Lexis, News Library, All File.

[211] See David Johnson, Feds Up Ante on UI Grad Students; al Hussayen Now Faces Charges of Providing Material Support to Terrorism, Lewistown Morn. Trib., Jan. 10, 2004, at 1A, available at Lexis, News library, All File.

[212] See Betsy Z. Russell, Al-Hussayen Acquitted in Terror Case; Verdict Seen as First Amendment Win, Spokesman-Rev., June 11, 2004, at A1, available at Lexis, News Library, All File.

[213] Schrecker, supra note 123 at 44-46 (1986); Lionel S. Lewis The Cold War on Campus: A Study of the Politics of Organization Control, 11 (1988).

[214] See Schreker, supra note 123 at 95-96 (describing the Canwell Committee investigation in Washington state inton "subversive" activities of University of Washington Faculty and quoting the President of the University urging communists to leave the faculty before they were "smoked out.")

[215] Lewis, supra note 213 at 299 (excerpt from an "Example of Formal charges" against a faculty member at the University of Washington).

their association with the community party in the past,[216] attendance at Academic conferences,[217] and leadership of academic "study groups" that were alleged fronts for the Communist party,[218]

It is certainly the case that academics can engage in activities, masked by the academic enterprise, that are criminal. Investigations and prosecutions of such activities are inevitable and, even where the allegations are substantiated, academic speech and inquiry will be chilled at the margin. It is always risky to debate the relative value of different types of speech. But risking the problems of such value judgments, the chilling of academic speech raises special and profound issues. The core idea of the university is was that only free thought and open inquiry could lead to the expansion of knowledge and the search for truth. If academic inquiry and thought is chilled, universities lose their identities. They become something more akin to "think tanks" or training academies – beholden to public opinion and the support of external entitles and individuals for their continued existence. The al Hussayen case and possibly the Al-Arian case illustrate the risks involved in clumsy and overbroad investigations of the academic enterprise. Both came to the attention of investigators because they were espousing vies rooted in Islamic though that are misunderstood and anathema to most Americans.[219] The center of both indictments was academically-related speech.. The concern is that the "material support of terrorism" offense could become the instrument of academic exclusion just as legislative inquiry into loyalty was the instrument of exclusion in the 1950's.

BIOTERRORISM REGULATIONS AND SCIENTIFIC RESEARCH

The USA PATRIOT Act contained provisions aimed at enhancing the ability of the United States to respond to bio-terrorism threats. These provisions, which have received little public attention, create a new crime of "knowingly possess[ing] any biological agent, toxin, or delivery system for other than

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[216] Id.at 283 (excerpt of testimony regarding communist affiliation .

[217] Lewis, supra note 213 at 294 (excerpting testimony before the Regents of the University Colorado alleging that a conference entitled "Scientific and Culture Conference for World Peace" was really a front for the communist party).

[218] Lewis supra note 213 at 202 (citing one faculty members leadership of a "Marxist study group" that was supposedly a "political action committee" for the Communist Party).

[219] Although Al-Arian had been investigated in the md 90's after the first World Trade Center bombing, he resurfaced in part as a result of an interview he did on the FOX television show, The O'Reilly Factor. See Barbita Persaud, Al-Arian Firing Compels Many to Take Sides, ST. Petersburg Times, December 21, 2001, at 1B, available at exis, News Library, All File

prophylactic protective, bona fide research, or other peaceful purposes."[220] This new crime make mere possession of a prohibited biological agent a crime if possession is not "reasonably justified." Law Enforcement officials and the courts will determine what types of purposes are reasonable justified.[221] Since 9/11, researchers have been subjected to serious criminal investigations for suspected violations of the new provision.[222]

The PATRIOT Act and a piece of related legislation -- The Public Health Security and Bioterrorism Preparedness and Response Act ("BPARA").[223] also impose significant limitations and restrictions on the "shipping, transporting, possessing or receiving of biological agents and toxins.[224] These restrictions may prevent support staff, shipping and receiving personnel and custodial staff from even having access to packages containing regulated substances. More importantly, the restrictions could preclude any researchers who are nationals of other countries (including those who have dual citizenship with the U.S.), who have been convicted of a crime with the possibility of a sentence of one year or more (including, in many jurisdiction crimes such as driving

[220] 18 U.S.C. § 175(c). Even prior to 9/11, 18 U.S.C. § 175(a) provided that anyone who "knowingly develops, produces, stockpiles, transfers, acquires, retains, or possesses any biological agent, toxin or delivery system for use as a weapon" or "who helps a foreign state or organization to do so, or who attempts to do these things is punishable by substantial fines and up to life in prison. See Jamie Lewis Keith,, The War on Terrorism Affects the Academy: Principal Post September 11, 2001 Federal Anti-Terrorism Statutes, Regulations and Policies that Apply to College and Universities, 30 J.C. & U. L. 239, 243-44 (2004).

[221] Keith, supra note 220 at 244-46.

[222] Id.at 245-46. Keith reports investigations involving a University of Connecticut student who was cleaning out a lab and retained an old bottle of anthrax., and a Texas Tech researcher who was prosecuted for erroneously reporting that 30 vials of bubonic plague were missing from his laboratory.

[223] Pub. Law No. 107-188, 116 Stat. 593 (2002).

[224] The USA PatriotAct and the BPARA provided that such materials may not be handled or accessed by "restricted persons." USA Patriot Act § 817(2), 115 Stat. At 385-86 (codified at 18 U.S.C. § 175b(a). A restricted person is defined as 1) an person convicted of a crime punishable by imprisonment of more than one year, 2) a fugitive from justice, 3) an unlawful user of a controlled substance, 4) an illegal alien, 5) a person who has been adjudicated a mental defective or has been committed to any mental institution, 6) an alien who is a national of Cuba, Iran, Iraq, North Korea Libya, Sudan, or Syria, or 7) a person who has been dishonorably discharged from the Armed Services of the United States. Id. at § 175b(d)(2). See also Knezo, supra note 146 at 17-19.

while intoxicated), or who has been committed to a mental institution (including those who have committed themselves to facilities such as a substance abuse treatment facility or to a mental facility for depression), from engaging in research involving prohibited substances.[225] The Congressional Research Service has recognized that the law could require "universities . . . to conduct background eligibility checks and perform drug screening tests on thousands of scientists and students who conduct research on regulated materials."[226]

The BPARA also imposes significant regulations on the operation and maintenance of laboratories conducting research using restricted materials: "The law restricts the free access of researchers to other researchers' laboratories and storage areas by isolating and imposing strict controls on research using certain biological materials and except with strict controls and oversight, by excluding individuals who are not cleared through Attorney General background checks . . . from areas where such materials are used and stored."[227]

Finally, the government is seeking ways to restrict "open access to scientific and technical information."[228] Proposals include placing limits on publication, and release of scientific findings that are classified by the government a "sensitive but not classified."[229] In fact, after 9/11, the Department of Defense proposed that scientists engaging in government-funded research obtain prior approval before publishing research or making presentations at conferences.[230] After substantial criticism, the general proposal was withdrawn but the Bush Administration expanded the agencies with approval to classify research.[231] The expanded

[225] Keith, supra note 220 at 247-48.

[226] Knezo, supra note 146 at 24. Keith provides examples of the responses different universities have made to this need to restrict access to laboratory materials. Keith, supra note 220 at 249-51 and appendix A.

[227] Id. at 254 (and sources cited therein).

[228] Knezo, supra note 146 at 32.

[229] Id. at 33.

[230] Academic Freedom and National Security, supra note 4 at 42.

[231] Id. at 42-43.

classification of research as secret threatens collaboration, exchanges and critiques of research..[232]

These restrictions are fundamentally inconsistent with the academic enterprise. They require that academic institutions block access to programs of study based on government intervention and non-academic factors, monitor the private lives of their employees and students, and not disseminate and share the results of their research. The restrictions have been justified based on the need to prevent terrorists from obtaining access to sensitive technical information. The problem is the lack of a connection between the regulations of academic laboratories and terrorism.

CLIMATE OF CENSORSHIP

In 2002, Kenton Bird and I cataloged activities aimed at censoring the speech and writings of academics in the year after 9/11.[233] This flurry of academic criticism was characterized most critically by the efforts by university administrations and boards of governance to distance themselves from the controversial statements and activities of faculty and students. These efforts reflect a number of underlying concerns – but certainly one of the major motivations of academic administrators who did not support or defend the legitimate, yet controversial speech of faculty was concern that these activities would jeopardize funding by alienating the public and driving away donors. The need for public support and the desire not to offend funders pushes universities to defend the academy as apolitical and try to make it so.
Although the pace of these incidents has slowed, they continue with enough frequency to be of concern.

Under pressure from legislators, the Ford Foundation and the Rockefeller Foundation have added troubling antiterrorism language to their grant agreements.[234] The pressure appears to have originated when Senator Charles Grassley was reported to be considering senate hearings into whether the tax laws adequately punished charitable organizations that support terrorism.[235] Government interest the activities of U.S. charitable foundations

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[232] Id. at 42,

[233] R. Kenton Bird & Elizabeth Barker Brandt, Academic Freedom And 9/11:How the War on Terrorism Threatens Free Speech on Campus. 7 Comm. L. & Pol'y 431, 449-56 (2002).

[234] The Ford Foundation was particularly vulnerable to outside pressure because of the public record of anti-Semitism of its founder Henry Ford. See Nolan Finley, Past Haunts Ford Name in New Anti-Jewish Controversy, Detroit News, October 26, 2003, at 15A, available at Lexis News Library, All File.

[235] Luiza Ch. Savage, Nadler Skeptical of Hearing on Ford, N.Y. SUN, Dec. 0, 2003, at 1, available at Lexis.News Library, All File.

and Palestinian non-governmental organizations had been brewing for some time. Part of the interest was in reaction to the protests by Palestinian groups funded by Ford, Rockefeller and others at a 2001 U.N. World Conference against Racism in Durban South Africa.[236] In early 2003, the State Department and the U.S. Agency for International Development ("USAID") began applying antiterrorism executive orders to American organizations working with Palestinian NGO's, requiring them to secure documents from their grant recipients disavowing financing of terrorism as a condition of providing funding.[237]

As a result of this pressure The Ford Foundation revised its grant agreements and included the following language: "[b]y countersigning this agreement, you agree that your organization will not promote or engage in violence, terrorism, bigotry or the destruction of any state, nor will it make sub grants to any entity that engages in these activities."[238] The Rockefeller agreement provides "[i]n accepting these funds, you . . .certify that your organization does not directly or indirectly engage in, promote, or support other organizations of individuals who engage in or promote terrorist activity."

The most troublesome aspect of the language was the word "promote" which could be interpreted to include writing that is ideologically supportive of terrorist thought, organizations or activities, among other things. The general secretary of the AAUP, Roger Bowen wrote to Ford and Rockefeller asking them to eliminate the language stating:

> [i]t is flatly inconsistent with academic freedom to hold universities and colleges responsible for the beliefs and publications of their faculty. If these institutions were responsible for the views of their faculty, they would be obligated to censor and sanction views they believed to be inaccurate or dangerous. For this reason, academic freedom can flourish only if institutions of higher education are deemed to be no more responsible for the diverse ideas of their faculty than they are for

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[236] Nota Bene, Academe, Sept. – Oct. 2004 available at http://www.aaup.org/publications/Academe/2004/04so/04soNB.htm; Marta Hummel, Ford Capitulates to Critics of its Stance on Israel, N.Y. Sun, November 19m 2003, at 1, available at Lexis, News Library, All File.

[237] See Edwin Black, Ford Foundation Draws Scrutiny as Terrorism Rules Begin to Bite, N.Y. Sun, October 21, 2003, at 1, available at Lexis, News Library, All File. (discussing the application of Executive Order No. 13224, 66 Fed. Reg. 49,079 (Sept. 25, 2001) to American charities supporting Palestinian Non-Governmental Organizations "NGO's").

[238] Nota Bene, supra note 236; Hummel, supra note 236.

> the diverse contents of the millions of books in their libraries. Basic principles of academic freedom require that faculty viewpoints be regarded as the ideas of individual professors, not as those of the institutions of higher education the employ them.[239]

The Ford Foundation ambiguously responded to the criticism stating that it "does not intend to interfere with the speech of faculty . . .. Our grant letter related to the official speech of the university and to speech that the university specifically endorses. However, wording for future grant agreements has not been worked out. Despite criticizing the language in the grant letters, most university grant recipients kept the money. The University pf Chicago Provost explained, "[i]n the end we accepted that we were not happy with the outcome . . .. We decided as a practical matter, that we could live with the language rather than forgo the grants."[240] Rarely has the corrosive effect of external funding on university intellectual independence been more clearly portrayed.

Steven Kurtz, an art professor at the University of Buffalo and Robert Farrell, chair of the Human Genetics Department at the University of Pittsburgh School of Public Health have been indicted for mail and wire fraud based on their activities of obtaining common bacterial samples for use by Kurtz in his artworks.[241] The incident came to light when emergency medical technicians responded to Kurtz's home after he awoke to find his wife of twenty-five was not breathing. Hope Kurtz was dead when EMTs arrived at the house, but one of the responders called local police when he observed a home laboratory.[242] The case was originally characterized as a "bioterrorism case."[243] When it appeared that neither Kurtz nor Farrell had any intent to use the bacteria as a weapon, the case was recast as a mail fraud case.[244] The government has insisted that it is prosecuting Kurtz and Farrell to make a point about sidestepping safety rules for obtaining bacteria.[245] Before 9/11, researchers

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[239] Nota Bene, supra note 236.

[240] Michelle Diament, Ford Foundation Strikes Compromise with Universities on Academic Freedom, Chron. of Higher Educ. February 4, 2005, at 24, available at Lexis, News Library, All File.

[241] Dan Herbeck, Bacteria in Home of Art Professor Spurs Indictment on Fraud Charges; Genetics Scholar from Pittsburgh Also Indicted, Buffalo, Evening News, June 30, 2004, at A1, available at 2004 WLNR 1629818 242 Id.

[242] Id.

[243] Jonathan D. Silver, Ex-CMU Art Prof Entangled with Feds, Pitt. Post Gazette, June 20, 2004, available at www.post-gazette.com/pg/04172/334808.stm; Robin McKie, Professor Faces Jail in Bio-Terror Scare, Observer, February 27, 2005 at 24, available at 2005 WLNR 3017401.

[244] McKie, supra note 243.

[245] Silver, supra note 243.

commonly shipped bacteria to each other through the mail.[246] But after the anthrax scares in New York and Washington[247] the government instituted new safety rules.[248] The samples involved in the Kurtz case were apparently relative common and harmless.[249] While it does appear that Kurtz and Farrell may have violated rules regarding the shipment of bacteria, a federal felony wire fraud indictment arising from the improper shipment of harmless bacteria seems an over reaction to the efforts of an art professor to incorporate harmless bacteria in an artwork.

Ward Churchill, a professor at the University of Colorado, wrote an essay after 9/11 in which he said that some of the victims of the World Trade Center bombings wherein small ways "little Eichmanns."[250] In the essay, Churchill argued that some of the "technocrats" who died on 9/11 were analogous to Eichman (who orchestrated the Holocaust) because of their role in furthering U.S. policies harmful to Arabs and indigenous people around

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[246] See Herbeck, supra note 241.

[247] See Robert Seigel, Noah Adams & Brian Naylor, Anthrax Case at Mail Handling Centers (NPR Radio Broadcast, Oct. 23, 2001), transcript available at Lexis, News Library, All File.

[248] See Herbeck, supra note 241; Geoff Brumfiel, Bacteria Raid May lead to trial for Artist Tackling Biodefence, news@nature.com (2004), available at http://www.nature.com/news/2004/040614/pf/429690b_pf.html. The federal law referred to is 18 U.S.C. §175(b) (reflecting amendments from § 817(1) of the USA Patriot Act). The law provides that "[w]hoever knowingly possesses any biological agent, toxin, or delivery system of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective, bona fide research, or other peaceful purpose, shall be fined under this title, imprisoned not more than 10 years, or both. In this subsection, the terms "biological agent" and "toxin" do not encompass any biological agent or toxin that is in its naturally occurring environment, if the biological agent or toxin has not been cultivated, collected, or otherwise extracted from its natural source."

[249] Herbeck, supra note 241 ("The two biological agents seized from Kurtz's home were bacillus astrophaeus and serratia marcescens, which are not alleged to be highly dangerous substances."); Brumfiel, supra note 248 ("Analysis showed that the biological materials removed from the Kurtz home posed no threat, and an autopsy of Hope Kurtz revealed she had died of a heart attack..")

[250] The essay, entitled Some People Push Back: On the Justice of Roosting Chickens is available at Dark Night Press http://www.darknightpress.org/index.php?i=news&c=recent&view=9. It appeared originally in a publication entitled Pockets of Resistance #11, (September 2001). The essay was expanded to a book. The "little eichmanns" reference is ound in the first chapter. See The Ghosts of 9-11, in Ward Churchill, on the Justice of Roosting Chickens: Reflections on the Consequences of U.S. Imperial Arrogance and Criminality(2003).

the world.[251] Although the essay did not gain much attention outside scholarly circles when it was originally published, it came under broader public scrutiny after Churchill spoke at Hamilton College in New York.[252] After an investigation, the University of Colorado decided it could not fire Churchill based on his speech. However, it recommended further inquiries into whether Churchill had committed plagiarism and had misrepresented his ethnicity as an American Indian.[253]

In November 2003, the government issued sweeping grand jury subpoenas to Drake University that demanded substantial information about an anti-war conferences held on campus and sponsored by the National Lawyers Guild.[254] The subpoenas sought information about the officers and activities of the student chapter of the NLG at Drake's School of Law. It also sought the

[251] Id. In a section of the original essay subtitled "They [the 9/11 bombers] did not license themselves to 'target innocent civilians", Churchill writes, "There is simply no argument to be made that the Pentagon personnel killed on September 11 fill that bill. The building and those inside comprised military targets, pure and simple. As to those in the World Trade Center . . . Well, really.Let's get a grip here, shall we? True enough, they were civilians of a sort. But innocent? Gimme a break. They formed a technocratic corps at the very heart of America's global financial empire – the "mighty engine of profit" to which the military dimension of U.S. policy has always been enslaved – and they did so both willingly and knowingly. Recourse to "ignorance" – a derivative, after all, of the word "ignore" – counts as less than an excuse among this relatively well-educated elite. To the extent that any of them were unaware of the costs and consequences to others of what they were involved in – and in many cases excelling at – it was because of their absolute refusal to see. More likely, it was because they were too busy braying, incessantly and self-importantly, into their cell phones, arranging power lunches and stock transactions, each of which translated, conveniently out of sight, mind and smelling distance, into the starved and rotting flesh of infants. If there was a better, more effective, or in fact any other way of visiting some penalty befitting their participation upon the little Eichmanns inhabiting the sterile sanctuary of the twin towers, I'd really be interested in hearing about it."

[252] Dan Elliott, Views of 9/11 Test Limits of Academic Freedom; Professor in Trouble for Equating WTC Victims to Nazis, Record, February 13, 2005; Scott Smallwood, Inside a Free Speech Firestorm: How a Professor's 3-Year Old Essay Sparked a National Controversy, Chron. of Higher Educ., February 18, 2005, available at http://chronicle.com/prm/weekly/v51/i24/24a01001.htm.

[253] Scott Smallwood, U. of Colorado Will Investigate Allegations of Misconduct Against Controversial Professor, Chron. Higher Educ.., April 1, 2005, available at http://chronicle.com/prm/weekly/v51/i30/30a03602.htm.

[254] Majorie Cohn, Government Withdrawal of Drake Protest Subpoenas Targeting National Lawyers Guild is Victory for Free Speech, Jurist, Feb. 16, 2004, available at http://jurist.law.pitt.edu/forum/cohn1.php.

names of all attendees at the conference.[255] Drake University resisted the subpoenas and they were eventually withdrawn.[256] Writing about the incident, Marjorie Cohn of Thomas Jefferson School of Law concluded, "[t]he subpoenas constitute a flagrant attack on constitutionally protected speech and association. They signal George W. Bush's strategy to make national security a centerpiece of his election campaign, and send a blunt message that dissent will not be tolerated."[257]

CONCLUSION

U.S. antiterrorism policy had affected the operation of libraries – making patron records and librarians instruments of governmental investigations. It has limited the ability of universities to accept qualified international students, has subjected those students to long delays and to significant, ongoing inquiries into their status and academic progress. As a result both of its regressive policies and of their clumsy administration, the number of international students and scholars in the U.S. is declining, threatening the diversity, financial strength, and even the ongoing viability of university research programs. In the service of terrorism investigations, the privacy of all students' educational records has been disrupted potentially undermining the relationship between schools and their students with little possible improvement in the effectiveness of terrorism investigations. Core academic speech and service activities are being

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[255] Id. ("[T]he subpoenas ordered Drake University to turn over documents relating to a November National Lawyers Guild conference. The conference presented nonviolence training for people planning to demonstrate the next day at an anti-war rally at the Iowa National Guard headquarters. Twelve protestors were arrested at the peaceful rally titled, 'Stop the Occupation! Bring the Iowa Guard Home!'").

[256] See Drake University News Releases: Statement of Drake University President David Maxwell, available at http://www.drake.edu/newsevents/releases/feb04/021004maxwell.html (February 10, 2004)("On Monday, February 9, 2004, Drake University counsel informed the United States Attorney's Office of the University's intention to file motions to . . . quash the existing subpoena. On February 10, 2004, the University received word from the United States Attorney that . . . the subpoena withdrawn. As a result, the University is now free to discuss publicly that which it had intended to inform the court through its motions and supporting affidavits. "Whatever one's views of the political positions articulated at that meeting, the University cherishes and protects the right to express those views without fear of reprisal or recrimination,' President Maxwell said in an affidavit drafted in support of the University's motions. 'The university in America is, by definition, a 'free speech' zone in which dissent, disagreement and multiplicity of views are not only tolerated, but encouraged. Rather than stifling the voices of those who disagree, we passionately believe that it is only possible to arrive at the truth through the rigorous examination of all options and all views.'"

[257] Cohn, supra note 254.

chilled by overbroad interpretation of statutes criminalizing support for terrorism. And the way scientific research is conducted is be altered significantly, decreasing the dissemination of knowledge and the open exchange of ideas. All of this is taking place climate of low level but demonstrable intolerance for criticism of U.S. national security policy. Some have commented that the invasion of academic freedom in the aftermath of 9/11 has been surprisingly minor.[258] Yet when the incursions on academic freedom are viewed as a who and in the context of the already weakened state of free thought and autonomy in the academy, the state of academic freedom appears dire. The academy cannot expect courts to provide a bulwark against further erosion. Rather, it is the responsibility of academy to rebuild the social compact that is academic freedom – to guard it internally, to defend it when appropriate, and to educate the world outside academia about what could be lost without it. Otherwise, de George's prediction of a passive citizenry and a stultified academy is our future.

[258] See Elliott, supra note 252 (quoting Robert O'Neil, Director of the Thomas Jefferson Center for the Protection of Free Expression who commented that although attacks on academic freedom have increased since 9/11, the challenges are mild compared with the McCarthy period.)