

Is academic freedom under threat in UK and US higher education?

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Introduction

This article is prompted by attending the 27th Annual National Conference on Law and Higher Education in February 2006 (an event organised by Professor Bob Bickel, Stetson University College of Law, Florida). The British observer could hitherto be excused for reasonably perceiving that the concept of academic freedom was better understood and protected in US higher education than in the UK, but now one has to pose the question as to whether US higher education is at the cusp of change and is about to slip into a new McCarthy-style ('Red Menace') era of external intervention in determining the content of the academic curriculum across the campus. Such external intervention is driven less from what at first sight might be assumed as the obvious factor (certainly in the UK, by way of Government reaction to the 9/11 terrorist attack) and more by what is, if anything, a more threatening and insidious process of political and social change. (It may also be on another cusp of change in terms of facing greater demands for accountability and value for money – see Appendix 2 on 'The Spellings Report' in 'Markets, Models and Metrics in Higher Education' as Item 29 at the Papers Page of the OxCHEPS website.)

What is academic freedom?

Academic freedom can be a difficult concept to define in theory, and one sometimes abused in practice when inappropriately invoked by academics/faculty in employment law disputes with their university (and occasionally by students in the context of

campus free speech). A useful definition is to be found courtesy of the Canadian Association of University Teachers:

The common good of society depends upon the search for knowledge and its free exposition. Academic freedom in universities is essential to both these purposes in the teaching function of the university as well as in its scholarship and research.

Academic staff shall not be hindered or impeded in any way by the university or the faculty association from exercising their legal rights as citizens, nor shall they suffer any penalties because of the exercise of such legal rights. The parties agree that they will not infringe or abridge the academic freedom of any member of the academic community. Academic members of the community are entitled, regardless of prescribed doctrine, to freedom in carrying out research and in publishing the results thereof, freedom of teaching and of discussion, freedom to criticise the university and the faculty association, and freedom from institutional censorship. Academic freedom does not require neutrality on the part of the individual. Rather, academic freedom makes commitment possible. Academic freedom carries with it the duty to use that freedom in a manner consistent with the scholarly obligation to base research and teaching on an honest search for knowledge.

The US equivalent is the 1940 AAUP Statement of Principles on Academic Freedom and Tenure, where it is clearly stressed that ‘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 that has no relation to their subject...’ See also its 1987 Statement on Professional Ethics: ‘... the obligation to exercise critical self-discipline and judgement in using, extending, and transmitting knowledge...’

intellectual honesty... the best scholarly standards... avoid any exploitation, harassment, or discriminatory treatment of students... acknowledge significant academic or scholarly assistance from [students]... show due respect for the opinions of others... seek above all to be effective teachers and scholars... a particular obligation to promote conditions of free inquiry... Academic freedom is a right and a responsibility; it has privileges and obligations.

What is the history of academic freedom?

If it is accepted that the University and Academe has to function as the conscience and critic of Society, with a duty to speak out if necessary against the political tide, then inevitably the institution, its academics and sometimes its students will clash with convention, orthodoxy and conservatism (or indeed, conversely and perhaps rather rarely, liberalism were the political tide in society generally to be to the left of that prevailing on campuses...). Such clashes have occurred in most countries over many decades (if not centuries), as illustrated by three Australian examples typical of their type. One was Professor Marshall-Hall, University of Melbourne, 1890s, who wrote to the HEI's Council: 'The notion that such expression by a Professor not ex cathedra but as a private citizen can be injurious to the University is possible only by forgetting that the greatest service a University can render to the community is to be the model of toleration in opinion and the champion of freedom of thought. There is no toleration, and no freedom where men must echo conventional views of life, religion, or politics, or hold their peace. I am aware, however, that there are some who think that freedom is inconsistent with the interests of the University; with them must rest the grave responsibility for a determination inimical to its highest functions.'

(This Australian example, and the two below also from Australia, rely on research by

Professor Jim Jackson as follows:

Legal Rights to Academic Freedom in Australian Universities, (unpublished PhD thesis, University of Sydney, 2002, especially chapters 3 and 4); as partly restated in

* Implied Contractual Rights To Academic Freedom In Australian Public University Employment (2006) 10 Southern Cross University Law Review (pending); see also his related articles...

* Express Rights To Academic Freedom In Australian Public University Employment (2005) 9 Southern Cross University Law Review 107;

* Orr to Steele: Crafting Dismissal Processes in Australian Universities (2003) 7 Southern Cross University Law Review 220;

* Express and Implied Contractual Rights to Academic Freedom in the United States (1999) 22 Hamline Law Review 467 – 499; and

* When can Speech Lead to Dismissal in a University? (pending publication in Australia and New Zealand Journal of Law and Education).

Another was Professor Wood, University of Sydney, also 1890s, who wrote to the University's Senate: 'I received my historical education at two great English universities, the Victoria University of the North of England, and Oxford University... It was therefore natural that I should take perhaps too much for granted those principles as to freedom of speech which have in modern times been respected in these and, I think, in most if not all other British universities. When I became a candidate for the Chair of History in Sydney University, I was a member of the University in which Professor Freeman was the Regius Professor of Modern History; and I was connected with two colleges, Balliol and Mansfield, presided over respectively by Professor Jowett and Dr Fairbairn. Under such circumstances it became a habit of mind with me to imagine that a University teacher was free to criticise the policy of the British Government; and it was not likely to occur to me that such criticism would be taken as evidence of lack of patriotism, and "anti-British sentiment". Even during the present heated controversies, the principle of liberty of speech has been guarded with the utmost jealousy in both of the two great English Universities with which I am connected.'

The third was Dr Heaton, University of Adelaide, 1920s, who wrote to ‘The Adelaide Advertiser’: ‘And if you ban teaching on controversial subjects outside the university, you must shut down such teaching inside as well, for ideas and books will get about, no matter how you try to prevent it. You must stop the teaching of philosophy, for it discusses questions which border on theology; you must abandon history, for people have theories and interpretations of history; chemistry must be taboo, for it teaches things which are of use in making poison gases for the next war; biological studies must be stopped, for they are groping round trying to upset our old ideas about the origin of life; and sixty years ago geology would have been anathema just as all talk of evolution is to some folk in Kentucky today. Even literature is a bit suspect, for Milton had strange views about freedom of speech, Carlyle and Ruskin said unpleasant things about modern industry, and most modern writers are socialists’.

Similarly, at the University of Birmingham (UK) Karl Wichmann, the Professor of German, in the midst of World War I ‘was effectively blackmailed into resigning his chair by a vote of the City Council Finance Committee, which made continuation of its regular payment of £13,000 a year to the University subject to the University Council ‘not retaining the services of any pre-war unnaturalised German’ ...’ (Ives, *The First Civic University: Birmingham, 1880-1980*, 2000, University of Birmingham Press, pp 169/170). Whatever unpleasantness may have occurred in modern times at Australian, US and UK HEIs, it is, however, not quite as dramatic as events at New College, Oxford (and at other Oxbridge colleges), in its interactions with Henry VIII, Mary and Elizabeth I, during the Reformation when Protestant Fellows were expelled (and, in one case, a Fellow, the Lutheran Peter Quinby, locked in the Bell Tower by

the Catholic Warden London until he starved to death!) and Catholic texts in the College Library were destroyed – the College C14th stained-glass in the Chapel was, however, not replaced with plain glass and hence survives to this day, but the Reredos was destroyed along with various altars and images. Similarly, at the time of the Civil War, Warden Pincke was arrested by Parliamentary forces (led, ironically by a New College alumnus, Lord Saye and Sele), but returned when the Royalists took control of Oxford and New College became the King's main arsenal (happily the Cloisters survived being a gunpowder repository to feature in the latest *Harry Potter* film!). The College duly suffered again when Oliver Cromwell triumphed and at least fifty Fellows were expelled, with a Parliamentary loyalist being imposed as Warden: but, then, of course, the Restoration of the monarchy in 1660 led to the expulsion of the 'intruded' Cromwellian Fellows and the restoration of some of the deprived Royalist Fellows... Meanwhile, also in the 1660s, the New College Fellow, Thomas Hobbes (but not a rather more famous namesake, he of *Leviathan*, 1651), presumably (and inappropriately) invoked academic freedom in refusing to get out of bed to perform teaching duties during the winter months! (See Buxton & Williams (1979), *New College, Oxford, 1379-1979*; and Rashdall & Rait, *New College*, 1901.)

In the USA, arguably, 'concern with academic freedom began at the end of the last century [19th] when Leland Stanford's widow demanded that the president of Stanford University should sack the economist E.A Ross... [whose great offence] was to urge that no more Chinese migrant workers should be allowed into California, and then to suggest that natural monopolies such as railroads should be taken into public ownership. Leland Stanford had made his money from railroads built with coolie labor. Ross was sacked...' (Ryan, *Liberal Anxieties and Liberal Education*, 1998). It

was a similar story at the University of Wisconsin (R.T. Ely ‘tried’ by the Regents in 1894 for speaking favourably of strikes), at the University of Chicago (E.W. Bemis), at Brown University (President E. Benjamin Andrews): ‘Economic nonconformity was the great and abiding sin of the professors who were involved in these key cases of academic freedom in the 1890s and early 1900s’ (Rudolph, *The American College and University: A History*, 1962, p 414; see also Hofstadter & Metzger, *The Development of Academic Freedom in the United States*, 1955). Better known in the US context, of course, is the threat to academic freedom arising under the McCarthy era where the issue was not economic nonconformity as half a century earlier, but political nonconformity in the context of America’s fear of the virus of communism and socialism infecting its youth via liberal academics and indoctrination within the university lecture theatre and classroom.

How is academic freedom protected in Law within the UK?

To what extent does English Law protect the ability of individuals and groups connected with universities/colleges (hereafter HEIs, higher education institutions) to express their views and opinions freely and without fear of reprisal from the HEI in terms of its power to use against students disciplinary procedures under the student-HEI contract to educate or similarly to use against faculty and other employees disciplinary procedures under the employee-HEI contract of employment. The British citizen has certain expressional rights protected either by the common law or by statute (notably the Human Rights Act 1998 (HRA) and its incorporation into English Law of the European Convention on Human Rights (ECHR) – specifically Articles 9 and 10 re freedoms of expression, of thought, of conscience and of religion – and the Public Interest Disclosure Act 1998 re ‘whistleblowing’). Moreover, a British citizen

is subject to common law constraints in relation to defamation and also to legislation restricting his/her freedom of expression where such expression would constitute, say, obscenity or sexual harassment, or be discriminatory, or incite racial hatred. There is no special treatment or protection for students, faculty or other HEI employees. Such individuals within the campus community have under English Law exactly the same expressional rights and precisely the same restrictions upon their freedom of expression as citizens beyond the campus, and as outlined above. The debate about such 'expressional rights' dates back to J.S. Mill's *On Liberty* (1859); with modern contributions notably from Barendt, *Freedom of Speech* (2nd Ed, 2005), along with Rawls, Dworkin, Hart, etc.

The key issue for this article is the extent to which freedom of expression *linked to academic freedom* is *specifically* protected against the HEI (perhaps itself under pressure from external, third-party sources) attempting to curtail such expression. So just what is 'academic freedom' and how is it protected under English Law? Does it extend to students or faculty or any HEI employee criticising the HEI's governance and management or, say, UK involvement in the War on Iraq; and can it cover a Professor of Physics challenging the HEI's outsourcing of the campus catering or a Chemistry Lecturer sounding off about UK Government policy on care for the elderly? (On the basis of the New Zealand case of *Rigg v University of Waikato* [1984] 1 NZLR 149 it would seem that the Professor of Physics can criticise the University management and invoke academic freedom in doing so: 'the concept of academic freedom applied to University affairs generally and not simply to the discipline in which the academic was engaged' (at 151), providing such criticism is 'reasoned and fair', and is expressed 'with integrity, scholarship and a sense of

responsibility’ – a somewhat subjective set of criteria!) The only formal protection of academic freedom in English Law is under s202(2)(a) Education Reform Act 1988: the HEI has a duty ‘to ensure that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions’. But s202 applies only to the ‘pre-1992’ royal charter HEIs as one half of the UK HE system and not to the former polytechnics that became the ‘new’ statutory universities of 1992. There is also s32(2) Higher Education Act 2004 which, in creating the Director of the Office for Fair Access, puts upon the Director ‘a duty to protect academic freedom including, in particular, the freedom of institutions – to determine the contents of particular courses and the manner in which they are taught, supervised or assessed; and to determine the criteria for the admission of students and apply those criteria in particular cases...’. (this wording, interestingly, echoes the US debate about institutional academic freedom or autonomy and the professional academic freedom of individual faculty members – see below...). See also, generally, Farrington & Palfreyman, *The Law of Higher Education*, 2006, Oxford University Press.

Tim Birtwistle (“Academic freedom and complacency: the possible effects if ‘good men do nothing’”, 2004 *Education and the Law* 16(4) 203-216) considers these (and other rather random) statutory references to be ‘nothing of substance that actually provides a definitive statement’. He notes the references to the significance of academic freedom in the 1988 Magna Charta of European Universities (www.cepes.ro) – and see Note 1) and in various UNESCO pronouncements, as well as detailing how a number of other countries seek to protect academic freedom either as itself a

constitutional right or by way of a right enshrined within a Higher Education Law, before calling for the UK to overcome its ‘complacency’ and ‘act now to give a proper statutory framework to academic freedom’ (perhaps as part of the Bologna Process creating by 2010 the European Higher Education Area; and citing as a model the wording within the higher education legislation in Latvia). See also Tim Birtwistle, ‘Are we collectively guilty of complacency? An update on the continued confusion over what is academic freedom and what may become a battle for academic freedom’, 2006 Education and the Law 18 (2/3) XX-YY, concerning the potential for conflict between the Race Relations (Amendment) Act 2000 (RR(A)A) and the notion of academic freedom.

The matter to hit the news headlines had been that of Dr Frank Ellis and the University of Leeds where the University has been reported as investigating whether Dr Ellis, in publicising his personal views on race and other matters, had acted in breach of the University’s equality and diversity policy, and had “recklessly jeopardised” the fulfilment of the University’s obligations under the Race Relations (Amendment) Act 2000 in suggesting one racial group is inherently inferior (or superior) to another. Section 2 RR(A)A amends the 1976 Act by stating that every body specified (and this does include universities) must have due regard to the need: a) to eliminate unlawful racial discrimination; and b) to promote equality of opportunity and good relations between persons of different racial groups. The UUK/SCOP publication *Promoting good campus relations: dealing with hate crimes and intolerance* (2005) states: ‘This general duty is known as a ‘positive duty’, as it requires public authorities to pre-empt discrimination before it occurs and to take steps to ensure it does not occur. If HEIs fail to comply, they could be issued with a

compliance order by the Commission for Racial Equality (CRE) and potentially face legal proceedings. The governing body of a HEI is responsible for ensuring compliance with the RR(A)A. The impact of this legislation obliges HEIs to take steps to promote good campus relations and the general duty should be a factor to take into consideration when dealing with incidences of hate crime and intolerance on campus'. Birtwistle notes a similar case to that of Dr Ellis in the USA: *Levin v Harleston* 966 F. 3d 85, 2nd Cir 1992, where a tenured professor at the City College of New York had written articles stating that 'blacks are less intelligent than whites', but where in the end free speech trumped other areas of law that were in conflict. There have been reports, since the article was written, that Dr Ellis has now taken early retirement from the University of Leeds.

There is also some protection for freedom of expression on the campus in the form of s22(4) Education Act 1994 which requires that HEIs issue students with a copy of the HEI's code of practice drawn up in accordance with s43 Education (No 2) Act 1986: HEIs must 'take such steps as are reasonably practicable to ensure freedom of speech for students and employees of the HEI and for visiting speakers'. The case of *R v University of Liverpool, ex p Caesar-Gordon* [1990] 3 All ER 821 clarifies that the HEI can ban a political group from holding a meeting and certain inflammatory speakers they may have invited if it has good reason to fear disruption on its premises, but the HEI should not take into account possible public disorder beyond the campus (that is for the Police to worry about). This legislation was prompted by the then Conservative Government believing that right-wing student political groups were being silenced on HEI campuses by the prevailing left-of-centre orthodoxy among students generally (and also among faculty). Similar legislation exists, and, for similar

political reasons, is still topical, in Australia; and is also a feature of the US 'Academic Bills of Rights' movement in the USA (see below and see also Cameron/Meyers/Olswang, 'Academic Bills of Rights: Conflict in the Classroom', [2005] *Journal of College & University Law* 31(2) 242-290). In E. Barendt, *Freedom of Speech* (2nd edn, 2005) the comment is made with reference to s43(1): 'Remarkably, the United Kingdom provides the clearest legal recognition of the distinctive responsibility of universities to promote freedom of speech' (p 501). That said, Barendt further comments (p 285): 'The provision is in some ways anomalous... there is no very persuasive reason of principle why strong access rights should be afforded in this context when they are not provided in others...'; and, with regard to members of the public who might want to enter the campus to hear the speaker, the HEI 'remains free to deny them access, even though their free speech interest as recipients is surely as strong as that of university employees and students.' But, as he also notes: 'The measure was, of course, formed to deal with a particular problem [students hassling Tory Ministers when speaking on campus in the 1980s 'Thatcher cuts' era] rather than to show commitment to a coherent free speech principle'.

How is academic freedom protected in Law within the USA?

In contrast, USA case law seems at first sight a bit more clear as to what academic freedom is; albeit rather less clear as to whether, if at all, it has a constitutional basis (especially for the public universities as legal entities) in terms of free speech or First Amendment rights. (See Note 2). The case law is significant for how academic freedom is protected in the private universities, where it has to be weaved into the contractual/employment relationship between the academic and the institution. The case law language is robust (albeit often dicta): Justice Frankfurter in *Sweezy v New*

Hampshire 354 U.S. 234 (1957) declaring ‘It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of university 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’ (at 263). Similarly in *Sweezy* we find (at 250):

‘To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilisation will stagnate and die.’

Justice Powell in *Board of Regents v Bakke* U.S. 265 (1978) reinforced Justice Frankfurter and specifically noted that the four essential freedoms ‘constitute academic freedom’ (at 312). Justice O’Connor in *Grutter v Bollinger* 539 U.S. 306 (2003) echoes these earlier cases concerning the special role of HEIs in American society. Similarly, see *Levin v Harleston* 966 F. 2d 85 (2d Cir. 1992) stressing the courts’ commitment to academic freedom – but not where it is being inappropriately invoked since ‘academic freedom is not a licence for activity at variance with job related procedures and requirements, nor does it encompass activities which are internally destructive to the proper function of the University or disruptive to the education process’ (in *Stastny v Bd. of Trs. of Cent. Wash. Univ.* 647 P. 2d 496

(Wash. 1982 at 504). Nor can academic freedom justify presenting the student with a hostile learning environment: *Bonnell v Lorenzo* 241 F. 3d 800 (6th Cir. 2001) where the professor's use of vulgar language was deemed 'not germane to the subject matter' and hence not protected constitutionally. (See also [2004] *Journal of College & University Law* 30(3) and the Hiers article re institutional academic freedom – or, perhaps better, institutional academic autonomy - along with the Stoner/Showalter one re judicial deference to educational judgement.)

It is worth re-iterating that there is indeed confusion over such terms as 'academic freedom' and 'institutional autonomy'. Perhaps a helpful analysis is to consider: (i) **institutional autonomy** (or, less usefully, 'institutional academic freedom') as embracing the HEI's procedures and processes in relation to (ii) **the four essential freedoms of a university** (autonomy to decide what to teach and to whom, and by whom and how it will be taught); this concept also then means the HEI itself creates an institutional context as an employer in which (iii) **faculty academic freedom** can best be utilised as a specially protected form of (iv) **freedom of expression** applicable to the academic profession and its duty to research and teach (and also sometimes to 'Speak Truth to Power'), bearing in mind that the academic's utilisation of this especially protected (partly by way of (v) **academic tenure**) form of freedom of expression has to be used responsibly and professionally; while none of this means that HEI autonomy trumps the academic freedom of the individual member of faculty in relation to research direction/publication and, to a lesser extent, in relation to his/her comments on the HEI's governance/management or on wider 'issues of the day' in Society, providing the academic concerned is indeed behaving (vi) **responsibly and professionally** (but the individual academic's professional freedom

is subject to the institution's (and perhaps more relevantly the academic department's) authority and control with respect to the curriculum and, to a lesser extent at least in the US, as to exactly how that curriculum is delivered within the lecture theatre and seminar room); and, finally, that (vii) the courts will display due **judicial deference** to the exercise of expert academic judgement by the HEI/its faculty if the academic decision has indeed been taken in accordance with the HEI procedures and, again, responsibly and professionally. Whether faculty academic freedom and HEI autonomy is protected in Law directly within a written constitution or indirectly via relevant legislation on HE, or 'only' by case law as a matter of judicial policy, will then vary country by country.

Put another way... What is **academic freedom**? How is it protected in Law? What are the limits of any such protection? It is a specially protected form of **freedom of expression** that applies to the academic profession in the context of the employment of academics within universities that themselves *may* also have **institutional autonomy** as a factor conducive to engendering the faculty utilisation of its academic freedom, and especially by way of the university-academic contract of employment in some countries being dominated by the concept and practice of **academic tenure**. The degree of protection in Law will vary from being directly written into the Constitution, through being worded into a specific HE Law, to case-law as a matter of judicial policy (perhaps linking to **judicial deference to academic judgement**). The limits of academic freedom are unclear in terms of its inter-action with other areas of law (eg defamation law and discrimination law) and also in relation to how an individual academic uses it (eg does academic freedom relate only to his/her subject area (and, even then, with respect to both teaching and research equally), or to the

subject area and the governance/management of the HEI, or simply to anything and everything that the academic elects to ‘speak out’ about; and, in speaking out, does it matter whether he/she does so responsibly and professionally or recklessly and polemically?).

What are the potential challenges to academic freedom?

Academic freedom is likely to be challenged for one of five main reasons: first, the HEI is too dependent on one key source of funding (usually the State/Government/taxpayer) and is compromised by needing to be politically accountable via external micro-management to the one who pays the piper being able to call the academic tune; second, the HEI being compromised by a commercial/market relationship with a financial sponsor of the HEI generally or of particular research which expects the ‘right’ academic output or to block output that is inconvenient/too revealing; third, and linked to reason two above, the HEI’s own management is compromised by being over-enthusiastic about ‘the entrepreneurial university’ model; fourth, the conflict between freedom of academic expression and any prevailing orthodoxy of political correctness; and, fifth, pressure upon the HEI to silence faculty or students speaking or acting against the political consensus as determined by powerful funders or politicians claiming to represent ‘the silent majority’. These reasons can, of course, overlap in some complicated cases/scenarios.

The first threat of the Government piper calling the tune (State control of higher education) has historically been greater in the mainland European higher education systems where higher education is seen as a State-provided public good/public service; and also since the 1980s in the UK, as indeed predicted when Lord Robbins

(the architect of 1960s expansion) wisely warned in a Lecture entitled *Of Academic Freedom* (6 July 1966, British Academy/Oxford University Press) that university autonomy and academic freedom ('a very special kind of freedom which, in some ways at least, transcends our normal conceptions of freedom in society and, because it involves exceptional privilege, also demands exceptional justification' – see also Kennedy, *Academic Duty*, 1997, Harvard University Press and Evans, *Calling Academia to Account: Rights and Responsibilities*, 1999, Open University Press) would be in danger if HEIs became too dependent on State subsidy and such funding increasingly came with demands for value-for-money and with ever-greater micro-management via excessive bureaucratisation ('men of goodwill who are inadequately informed of what is at stake... are apt to believe that academic freedom means academic anarchy... are prone to fall for all sorts of grandiose half-baked plans for alleged reform and reorganisation'). Back in 1922, H.A.L. Fisher, Warden of New College, Oxford, and sometime Minister of Education, had similarly commented: 'The State is, in my opinion, not competent to direct the work of education and disinterested research which is carried on by Universities, and the responsibility for its conduct must rest solely with their Governing Bodies and teachers'. Some three decades later after Lord Robbins, Lord Russell in *Academic Freedom* (1993, Routledge) saw recent legislation in the form of excessive bureaucracy that Robbins had predicted as 'a further significant erosion of academic freedom', and called for Oxford and Cambridge to break away from State-funding, to become truly private corporations, as 'the only way any universities [worth having] might continue to exist in Britain' (see the 2004 OxCHEPS Report on financing the privatisation of Oxford University at oxcheeps.new.ox.ac.uk, Papers Page, Item 14, for the same issue surfacing a decade later) – that said, Lord Beloff once commented that the best

benefactor for a college was a dead bishop rather than the taxpayer or alumni or corporations, as a donor both unlikely and unable to try and pull strings!

The paradox is that State micro-management of HEIs increases as taxpayer funding declines, and HEIs (in the UK at least) lack the political will and effective leadership to grasp their own collective destiny. In the USA, in contrast, higher education has until rather more recently been in a relatively privileged position in terms of fairly generous taxpayer funding and also State-government demands for accountability have been somewhat muted compared with the experience in Australia, New Zealand and (perhaps to a lesser extent) Canada. Moreover, the taxpayer seeking value-for-money does not necessarily threaten academic freedom, as opposed to challenging the cosy, producer-oriented delivery of higher education (see, for example, Bok (2006, Princeton University Press) *Our Underachieving Colleges: A Candid Look at How Much Students Learn and Why They Should Be Learning More* and Hersh & Merrow (2005, Palgrave) *Declining by Degrees*).

The second threat by way of inappropriate pressure from commercial sponsors is ever-present, as disputes in the USA, Canada, and Australia and the UK have shown and as discussed in Bok (2003, Princeton University Press) *Universities in the Marketplace*. The third reason is often linked to the second, and is explored in such critiques as that by Marginson and Considine (2000, Cambridge University Press) *The Enterprise University: Power, Governance and Reinvention in Australia*, as well as in the managerialism: collegiality or (in US terms) the shared values: corporatism debate (see the OxCHEPS Bibliography Page for several relevant texts and Chapter 1 of

Tapper & Palfreyman, *Oxford and the Decline of the Collegiate Tradition*, 2000, Woburn/RoutledgeFalmer).

The fourth and linked fifth reasons are explored in many texts, perhaps notably by Allan Bloom (1987) *The Closing of the American Mind: How Higher Education has failed Democracy and impoverished the Souls of today's Students*; and, rather more polemically, in A.C. Kors and H.A. Silverglate (1998) *The Shadow University: the Betrayal of Liberty on America's Campuses*. The current debate in a dozen US States about an 'Academic Bill of Rights', proposed by Horowitz and the Center for the Study of Popular Culture, and designed to protect students against allegedly force-feeding of liberal ideology in the lecture room, further illustrates the issue and links across to the fifth element explored below: see also the campaign 'Students for Academic Freedom' (source: *New York Times*, 25/12/05, p22, 'Professors' Politics Draw Lawmakers into the Fray'). More of this in the next section, but, for the moment, note the robust common-sense of Ryan's comments: 'If you don't like having your beliefs questioned, don't go to college' (*Liberal Anxieties and Liberal Education*, 1998).

Is UK academic freedom threatened by Government anti-terror legislation?

Professor Furedi (University of Kent, UK), writing in the *AUT Bulletin*, commented on demands from the UK Government that HEIs clamp down on extremist campus groups: 'Policing discussion is inconsistent with academic freedom and campus democracy. The issue is not whether or not we agree or disagree with the view of organisations like Hizb-ut-Tahir but whether we think that clarity can be gained from a clash of opinion. Academics must not allow themselves into becoming too scared to

defend free speech.’ This is politically charged territory, especially in the context of two opinions from the House of Lords (the UK’s Supreme Court) that, as Government would see it, tend to undermine the ‘War on Terror’ and the legislation passed since 9/11: one ruled that the detention without trial policy was contrary to the HRA/ECHR (*A and others v Secretary of State for the Home Department, X and another v Secretary of State for the Home Department* [2004] UKHL 56 (NB 9 Law Lords sitting rather than the usual 5), [2005] 2 AC 68 (downloadable, as is case below, from the House of Lords website: www.parliament/index.cfm - then click ‘Judicial work’ and next ‘Judgements’); and another found that evidence obtained by torture is not admissible in a British court (*A and Others v Secretary of State for the Home Department (no 2)* [2005] UKHL 71, 8 December 2005 (NB 7 Law Lords rather than the usual 5), on appeal from [2004] EWCA Civ 1123), (2005) *The Times* 9 December). In the latter, Lord Bingham noted: ‘From its earliest days, the English common law set its face firmly against the use of torture. That rejection, in contrast with the practice prevalent in continental Europe, was hailed as a distinguishing feature, the subject of proud claims by English jurists and admiring comment by foreign authorities’ (his Lordship was also clear that the use of torture contravened article 3 ECHR as well as public international law).

The 2005/06 Terrorism Bill proposes to create an offence of the ‘indirect encouragement’ (colloquially, the ‘glorification’) of ‘the commission or preparation (whether in the past, in the future or generally) of terrorist acts or offences’ and to ban the dissemination of terrorist publications. Many in HE worry that the teaching of certain courses and the supply of certain reference material could leave faculty and library staff exposed. At the same time as this row has unfolded, an academic

(Professor Anthony Glee, Brunel University) produced a controversial report ('When Students Turn to Terror') asserting that lax controls had turned UK HEIs into a risk to national security (see The Social Affairs Unit, www.socialaffairsunit.org) – this Report, of course, duly surfaced again following media coverage of the (alleged) foiled airline bombing plot of August 2006. Then the President of the Middlesex University Student Union was suspended by the University because the Union was organising a political meeting to which Hizb-ut-Tahrir, an Islamic political party, was invited. Writing in *The Times Higher* (30/9/05, p16) the President comments that his suspension 'raises all sorts of questions about the autonomy of student unions, academic freedom within universities and wider issues of Islamophobia and the role of vice-chancellors in the implementation of government policy'. Indeed, the UK vice-chancellors (HEI presidents, in US terms) were asked to be vigilant at a speech made on 15 September 2005 by the Rt Hon Ruth Kelly MP, Secretary of State for Education and Skills, in which she said:

'We all want universities all over Europe to be places where ideas and people of many opinions and nationalities mix and advance knowledge. Following the London bomb attacks in July, we are all having to re-examine certain policies. One is how to respond to those using the freedoms of our society to promote terrorism and violence. This is not straightforward. We value diversity and multicultural and free society. Freedom of speech or expression is one of the most fundamental rights that individuals enjoy. And Higher Education is a bastion of those values. Part of its reason for existence is to teach people to think for themselves, and express themselves, and to listen to and consider the opinions of others. However, freedom of speech does not mean tolerance of unacceptable behaviour. I believe the HEIs need to confront unacceptable behaviour on the premises and within their community. They

should be alert and be unafraid to set their own boundaries – within the law and with the law in support – in consultation with their own community and the wider community. That means informing the police where criminal offences are being perpetrated or where there may be concerns about possible criminal acts. HEIs have a duty to support and look after the moderate majority as they study and develop their own ideas and knowledge, to ensure that those students are not harassed, intimidated or pressured.’

Is academic freedom in US HE threatened by neo-conservatism?

Reference has already been made to the campaign for an ‘Academic Bill of Rights’ that would require ‘balance’ in the presentation of concepts and ideas in the classroom and in the hiring of faculty (as well as, along similar lines to the duty imposed upon the UK HEI by s22(4) Education Act 1994 referred to above, with respect to campus free speech). As in US society generally there are religious and socio-political tensions on the campus between groups of students, and between (usually conservative) students (along with their parents) and (usually liberal) academics. The result is the attempts to enact the ‘Academic Bill of Rights’ (ABR) as a means of balancing via legislation student and faculty academic freedom: such attempts have been made in some 20 States, with partial success in Massachusetts, Minnesota, New York, Tennessee and Washington (see text at Note 2). Similarly, an attempt has been made to introduce a Federal version. The AAUP and ACE strongly opposes any attempt to enact an ABR.

Moreover, the position in the USA is not helped by the tendency within HE (and education generally) to refer to ‘instruction’ rather than ‘teaching’, revealing ‘deep

and widespread mental confirm about the nature of what universities ought to do’ (Felipe Fernandez-Armesto, Professor History at Tufts University, writing in his column for *The Times Higher*, 14/4/06). Instruction is not education: the former ‘lays down rules to be obeyed’; the latter ‘strews ideas to be subverted’; the one is ‘regimentation’ by way of ‘data feeding into dull automata’ and the other is ‘liberation’ by way of ‘the stimulation of independent minds’ that can then ‘question and quarry and challenge and harry’ within the HE classroom as ‘an area of criticism, a nursery of the unpredictable’ – in short, ‘intellectual progress’. By wrongly assuming that US undergraduates are ‘dull automata’ awaiting ‘instruction’, and by further mistakenly assuming that such ‘instruction’ should (and indeed could) be effective as ‘regimentation’, the agitations and legislations behind the Academic Bills of Rights movement ‘misconceive education as instruction’ and then get so terribly over-excited about a few liberal/leftist faculty supposedly indoctrinating impressionable young minds – as Fernandez-Armesto concludes (potentially earning himself a place among the ‘most dangerous professors’!): ‘The best way to produce conservative students is to give them radical teachers. But those who think of teaching as instruction will never see that, now perceive the potential education has for changing lives and changing the world’.

It is precisely because that potential is sometimes actualised that totalitarian regimes (Hitler, Stalin, China until very recently) close down universities and censor faculty, and also why some politicians with totalitarian tendencies (Senator McCarthy in 1950s America and the evangelicals/neocons in the American of some half a century later) seek to control universities and their faculty. That said, Andrew Roberts in *A History of the English-Speaking Peoples since 1900* (2006) comments: ‘Since the

1960s the universities across the English-speaking world have seen department after department captured by the radical Left whose grip on appointments and tenured posts has been near impossible to loosen, even after the collapse of Communism across Europe in 1989.’ Whether the radical Left of academe is effective in filling academic posts with its stooges, it certainly appears to be pretty ineffectual when it comes to influencing liberal-democracy in elections over recent decades within the US, UK and Australia, let alone brain-washing the young student minds supposedly under its malign influence.

So, just what drives the political campaign behind the ABR? A close look at Horowitz’s *The Professors: The One Hundred and One Most Dangerous Academics in America* (2006) explains much: David Horowitz is described on the dust-jacket as ‘a nationally known author and lifelong Civil Rights activist’; he is the President of the Centre for the Study of Popular Culture. The dust-jacket screams in red ink: ‘coming to a campus near you’ university professors as a threat to US democracy and capitalism! The dust-jacket also tells us, perhaps unsurprisingly, that the book is ‘A Main Selection of the Conservative Book Club’. Inside the book, ‘Advance Praise’ is listed from various politicians who have sponsored the Horowitz Academic Bill of Rights in various States: typical of the comments is ‘the betrayal of our young people by professors who are defiantly unethical and contemptuous of academic standards’.

The Introduction sets out the charge sheet: these 101 dangerous professors are ‘but the tip of an academic iceberg’ as ‘America’s institutions of higher learning have become a haven for extremists’ where there is ‘the overwhelming prevalence of leftists (and ‘liberals’) on academic faculties’. These professors are indulging in a kind of

educational malpractice ‘the professorial task is to teach students how to think, not to tell them what to think. In short, it is the responsibility of professors to be professional – and therefore ‘academic’ – in their classrooms... The privileges of tenure and academic freedom are specifically granted in exchange for this professionalism... The activist agendas of today’s academics are not only a departure from academic tradition: they are violations of established principles of academic freedom dating back to 1915...’. So, how large is this iceberg of ‘sympathisers of Joseph Stalin and Osama Bin Laden’? Horowitz tells us that the US has some 617,000 college and university professors, of which he estimates that 5% are radicals/leftists/liberals. This gives, according to his calculator, a number ‘in the neighbourhood of 25,000-30,000’. From this figure, and stabbing furiously at his calculator, Horowitz extrapolates as follows: ‘The number of students annually passing through their classrooms would be of the order of a hundred times that, or three million. This is a figure that ought to trouble every educator who is concerned about the quality of higher education and every American who cares about the country’s future’.

The calculation of three million, of course, rather assumes that exposure to the indoctrination offered by these dangerous lefty academics is totally effective, even if the radical academic is only one of many academics (95% of whom are not nearly as dangerous) with whom the undergraduate comes into contact during a degree course. If the dangerous ones are that effective at teaching/indoctrination then they should clearly be of interest to the CIA and MI5, and whatever has replaced the KGB, in terms of how best to propagate propaganda. The book proceeds to list the ‘One Hundred and One Professors’, of which Columbia University manages almost 10%, with three at Berkeley, two at Stanford, and one each at MIT, Princeton, Cornell. The

rest are at rather less prestigious institutions. Each professor gets a mini charge sheet, the charges in some cases being slightly odd ('Former Poet Laureate of New Jersey') and the others somewhat mild ('Protests in celebration of Columbus Day').

In other cases one might think that the 5% of radical professors could be larger if the charge in the case of Naom Chomsky at MIT is sufficient to get him into Horowitz's 101: Chomsky is quoted as declaring 'The so-called War on Terror is pure hypocrisy, virtually without exception'. Similarly, David Cole at Georgetown University is alleged to believe that the 'Greatest threat to our freedom is posed not by the terrorists themselves but by our own government's response': on that basis the Law Lords in ruling against the UK Government in relation to detention at Belmarsh Prison would leave Horowitz describing them also as dangerous radicals. That said, however, it is obvious that Professor Mark LeVine (University of California, Irvine) is guilty as charged: 'rock musician'! Another academic's great sin was: 'Required students to view Michael Moore's *Fahrenheit 9/11* on the eve of the Presidential election'. The charges against others are nothing more than that, within 617,000 academics, there are bound to be ones that are utterly loopy and ones who are totally unprofessional, and, if anything of what Horowitz says of those particular individuals is at all accurate, then university management is indeed failing in its duty by not removing them from the classroom if not the campus, unless it takes the view that they serve a useful purpose by being the pathetic individuals that they are and hence giving students something to giggle over.

In the final part of the book Horowitz considers 'Why Administrators Fail to Maintain Academic Standards'. He devotes much space to considering the Laurence Summers

episode at Harvard: ‘The moral of the episode is that even the most powerful President of America’s most prestigious university cannot hold a radical professor like Cornell West to account in regard to his academic responsibilities or to the institution’s intellectual standards.’ With reference to the other Summers spat over the scientific ability of women, Horowitz comments: ‘Summers’s defeat demonstrated the chilling power of a radical minority on the university’s faculty. There were only 218 censure votes out of a Faculty of Art and Sciences of 941, and an overall university faculty of more than 2,100.’ (Of course, since then Laurence Summers has announced his resignation, or rather that he will not be continuing beyond his initial five year period of office.) So, Horowitz sees a weak governance/management structure faced down by a vociferous minority of academics who wield far more power than their numbers should suggest.

The book, however, ends with something of a whimper, given the sensationalist nature of the dust-jacket and the Introduction: ‘Thus, the problems revealed in this text – the explicit introduction of political agendas into the classroom, the lack of professionalism in conduct, and the decline in professional standards – appear to be increasingly widespread throughout the academic profession and at virtually every type of institution of higher learning’. It is as if Horowitz by the time he reaches the end of his charge sheet against the 101 ‘Most Dangerous Academics in America’ realises that it is all a bit thin and somewhat unlikely that American democracy and American capitalism could be undermined by typically inattentive undergraduates turning up now and again for a few lectures where (in many cases) an obviously politically biased if not also socially inept professor rants – indeed, contrarian youth may well anyway rebel against such professorial ‘authority’ being exercised, just as

they duly rebel against their parents. Surely US democracy and capitalism cannot be that fragile?

Conclusion: the ABR bark worse than the ABR bite?

The threat to academic freedom within UK higher education, albeit minimally protected in Law at present, from anti-terrorism legislation and its ramifications is probably not significant and is somewhat exaggerated – assuming that, even if the ‘glorification’ of terrorism gets on to the statute book as a crime, common sense will (hopefully!) not see academics prosecuted for discussing the Chartists or the IRA in seminars, or HEI librarians for supplying to students material about the Mau Mau or the South Africa anti-apartheid movement. The threat to academic freedom in US higher education is again not directly from anti-terrorism legislation but is far greater in the US than in the UK from the more insidious pressures of social and religious conservatism that are beginning to impinge upon the teaching and learning environment of the campus. Again, even where ABR wording finds its way on to the State statute book, one might assume (hope) that it is the result of political appeasement and fudge, and that nobody seriously expects the legislation to be invoked. But, as with UK anti-terror legislation, the risk is that, once theoretically available, it is in practice utilised by over-zealous enforcement agencies or by political pressure groups. For the moment it is a matter of ‘Watch this Space’ and trusting that the USA will avoid an early-C21st century version of its mid-C20th century McCarthy Era (see Notes 4, 5 and 6).

NOTES

1. The text of the **Magna Charta Universitatum** (Bologna, 18 September 1988)

reads as follows:

Preamble

The undersigned Rectors of European Universities, gathered in Bologna for the ninth centenary of the oldest University in Europe, four years before the definitive abolition of boundaries between the countries of the European Community; looking forward to far-reaching co-operation between all European nations and believing that people and States should become more than ever aware of the part that universities will be called upon to play in a changing and increasingly international society...

Consider

1. that at the approaching end of this millennium the future of mankind depends largely on cultural, scientific and technical development; and that this is built up in centres of culture, knowledge and research as represented by true universities;
 2. that the universities' task of spreading knowledge among the younger generations implies that, in today's world, they must also serve society as a whole; and that the cultural, social and economic future of society requires, in particular, a considerable investment in continuing education;
 3. that universities must give future generations education and training that will teach them, and through them others, to respect the great harmonies of their natural environment and of life itself.
- The undersigned Rectors of European universities proclaim to all States and to the conscience of all nations the fundamental principles, which must, now and always, support the vocation of universities.

Fundamental principles

1. The university is an autonomous institution at the heart of societies differently organised because of geography and historical heritage; it produces, examines, appraises and hands down culture by research and teaching. To meet the needs of the world around it, its research and teaching must be morally and intellectually independent of all political authority and economic power.
2. Teaching and research in universities must be inseparable if their tuition is not to lag behind changing needs, the demands of society, and advances in scientific knowledge.
3. Freedom in research and training is the fundamental principle of university life, and governments and universities, each as far as in them lies, must ensure respect for this fundamental requirement. Rejecting intolerance and always open to dialogue, a university is an

ideal meeting-ground for teachers capable of imparting their knowledge and well equipped to develop it by research and innovation and for students entitled, able and willing to enrich their minds with that knowledge.

4. A university is the trustee of the European humanist tradition; its constant care is to attain universal knowledge; to fulfil its vocation it transcends geographical and political frontiers, and affirms the vital need for different cultures to know and influence each other.

To attain these goals by following such principles calls for effective *means*, suitable to present conditions.

1. To preserve freedom in research and teaching, the instruments appropriate to realise that freedom must be made available to all members of the university community.
2. Recruitment of teachers, and regulation of their status, must obey the principle that research is inseparable from teaching.
3. Each university must – with due allowance for particular circumstances – ensure that its students’ freedoms are safeguarded, and that they enjoy concessions in which they can acquire the culture and training which it is their purpose to possess.
4. Universities – particularly in Europe – regard the mutual exchange of information and documentation, and frequent joint projects for the advancement of learning, as essential to the steady progress of knowledge.

Therefore, as in the earliest years of their history, they encourage mobility among teachers and students; furthermore, they consider a general policy of equivalent status, titles, examinations (without prejudice to national diplomas) and award of scholarships essential to the fulfilment of their mission in the conditions prevailing today.

The undersigned Rectors, on behalf of their Universities, undertake to do everything in their power to encourage each State, as well as the supranational organisations concerned, to mould this policy sedulously on this Magna Charta, which expresses the universities’ unanimous desire freely determined and declared.

2. Kaplin & Lee (*The Law of Higher Education*, 2006, Chapter 7 on ‘Faculty Academic Freedom and Freedom of Expression’ and within Chapter 8 a Section on ‘Student Academic Freedom’) note that the ‘the concept of academic freedom eludes precise definition’ (‘the law provides few firm guidelines for college and university administrators’) and see it as featuring in the following complex matrix of dimensions:

- i) as being applicable to three parties within HE – FACULTY MEMBERS, STUDENTS, and HEIs (they prefer the phrase ‘institutional autonomy’ to ‘institutional academic freedom’);
- ii) as being played out either EXTERNAL or INTERNAL to the institution;

- iii) with respect to faculty members as applying *internally* to TEACHING (the HEI's autonomy usually trumps the academic's freedoms in terms of curriculum, classroom teaching style, grading), RESEARCH & PUBLICATION (the faculty freedoms 'most ardently protected' by the US courts), and in HEI GOVERNANCE & MANAGEMENT (the academic's freedom to criticise the HEI's policies and operations is not especially protected);
- iv) again with respect to faculty members as applying *externally* by way of their comments ON CAMPUS concerning public affairs or OFF CAMPUS/IN PRIVATE LIFE when engaging in personal matters or politics (the latter aspects of off-campus personal freedoms being better protected by the Law (unless such off-campus speech is still disruptive and harmful to the HEI) than the former potential on campus mixing of professional academic freedom with private politics – especially if done in an intemperate way and in a way that again disrupts campus life/collegiality; and
- v) being in conflict in terms of the student academic freedom or Lernfreiheit ('not as well developed as faculty academic freedom') being trumped by faculty academic freedom and also institutional autonomy, especially in that the courts support the latter's power to decide all aspects of teaching and examining/assessment (the judicial deference to the exercise of expert academic judgement), while, however, accepting that students are entitled not to be confronted with gratuitously HOSTILE LEARNING ENVIRONMENTS or POLITICAL CORRECTNESS from faculty (albeit that the thin-skinned student should not expect to go through HE unchallenged by a comforting blandness of 'safe' teaching).

3. The text of **Washington's ABR...** To secure the intellectual independence of faculty and students and to protect the principle of intellectual diversity, the following principles and procedures shall be observed. These principles apply only to public universities and to private universities that present themselves as bound by the canons of academic freedom. Private institutions choosing to restrict academic freedom on the basis of creed must explicitly disclose the scope and nature of these restrictions.

- (1) All faculty shall be hired, fired, promoted, and granted tenure on the basis of their competence and appropriate knowledge in the field of their expertise and, in the humanities, the social sciences, and the arts, with a view toward fostering a plurality of methodologies and perspectives. No faculty may be hired, fired, or denied promotion or tenure on the basis of his or her political or religious beliefs.
- (2) No faculty member may be excluded from tenure, search, and hiring committees on the basis of the member's political or religious beliefs.

- (3) Students will be graded solely on the basis of their reasoned answers and appropriate knowledge of the subjects and disciplines they study, not on the basis of their political or religious beliefs.
 - (4) Curricula and reading lists in the humanities and social sciences should reflect the uncertainty and unsettled character of all human knowledge in these areas by providing students with dissenting sources and viewpoints where appropriate. While teachers are and should be free to pursue their own findings and perspectives in presenting their views, they should consider and make their students aware of other viewpoints. Academic disciplines should welcome a diversity of approaches to unsettled questions.
 - (5) Exposing students to the spectrum of significant scholarly viewpoints on the subjects examined in their courses is a major responsibility of faculty. Faculty will not use their courses for the purpose of political, ideological, religious, or antireligious indoctrination.
 - (6) Selection of speakers, allocation of funds for speakers' programs, and other student activities will observe the principles of academic freedom and promote intellectual pluralism.
 - (7) An environment conducive to the civil exchange of ideas is an essential component of a free university; the obstruction of invited campus speakers, destruction of campus literatures, or other effort to obstruct this exchange is prohibited.
 - (8) Academic institutions and professional societies should maintain a posture of organisational neutrality with respect to the substantive disagreements that divide researchers on questions within, or outside, their fields of inquiry.
4. See also C. Byse & L. Joughin, *Tenure in American Higher Education: Plans, Practices, and the Law* (1959): they review the concept of tenure in the context of the McCarthy Era and its 'unprincipled attacks upon institutions of higher learning and their faculties' ('the crass pressures of power-hungry politicians and 'know-nothing' elements of the public'); it is hoped America will 'do better' next time... (Foreword, by R. K. Carr, Dartmouth College and AAUP). The authors concede that: 'Tenure can become an instrument to perpetrate incompetence and mediocrity rather than to advance scholarship and talent' (p 5) – but only if HEIs fail to select carefully to whom tenure should be awarded and also neglect 'to weed out those who thereafter become professionally unfit'. That said, tenure, they assert, is crucial for presentation of 'the democratic ideal of intellectual freedom in American higher education' (p 131); and is not properly protected in Law ('Legal protection of tenure is unsubstantial... the hazards of reliance on judicial protection of tenure', p 136) and, specifically, 'The remedy for infringement of tenure should include an order of reinstatement' (p 138). In return for greater legal protection of tenure, its beneficiaries need to recognise their obligations ('conscientious discharge of research, teaching, and assigned administrative responsibilities... fidelity

and diligence... to act with restraint...’ (p 138). The authors quote (pp 143/144) with approval Judge Charles E. Wyzanski, Jr, onetime President of the Board of Overseers of Harvard University: ‘The men who become full members of the faculty are not in substance our employees. They are not our agents. They are not our representatives. They are a fellowship of independent scholars answerable to us only for academic integrity... [The University] is not and must not become an aggregation of like-minded people all behaving according to approved conventions. It is the temple of the open-minded. And so long as in his instruction [teaching], his scholarship, his relations with his associates and juniors, a teacher maintains candour, and truth as he [original emphasis] sees it, he may not be required to pass any other test’ (in ‘Sentinels and Stewards’, *Harvard Alumni Bulletin*, 23 January 1954, p 316). And so they conclude the book (p 160): ‘The present scene in American higher education is one of general peace except for re-evaluation of the situation created by the recent ‘security’ hysteria. The economy of education is not very rewarding to the individual, but he is not in acute distress and is at least receiving attention... [But if] a period of major strain should arrive, there is a strong likelihood... [it] would again produce a series of harmful controversies...’: plus ça change!

5. There is an interesting discussion in C.A. Cameron, L. E. Meyers and S.G. Olswang ‘Academic Bills of Rights: Conflict in the Classroom’, 2005 *Journal of College and University Law* 31(2) 243-290. They comment that the USA’s ABR movement ‘presents the possibility of a dramatic shift in the control of the classroom and curricular content from the institution and its faculty to students... [a process that might have] enormous unintended consequences on faculty and institutional autonomy’.

The comment of the American Civil Liberties University is noted: the ABR ‘would censor [HEIs] because [they] could be used to curtail academic freedom and to encourage thought policing in our institutions of higher education’; the academic bill of rights is an ‘academic bill of restrictions’. They recognise, however, that, here anticipating the reaction of the UK’s University of Leeds management in the Dr Ellis case as mentioned above, there are limits to the protection of academic freedom: ‘academic freedom cannot be used to compromise a student’s right to learn in a hostile-free environment since colleges and universities are legally required to provide such an environment’; faculty freedom of expression does not extend to disruption of the educational environment or process (they cite cases of US professors using gratuitously vulgar language in an English class, unreasonably importing personal religious beliefs into a physiology lecture and also a media class, injecting irrelevant sexual content into lectures and seminars – but note the emphasised words). Similarly, they note that a student’s freedom of expression does not extend to incorporating defamatory, insulting and unprofessional comments into an academic assignment: the student, like the academic, should not disrupt the educational process or protocols.

Moreover, if the ABR becomes State law or is adopted locally by an HEI, what, they ask, happens where the HEI then fails to deliver against the ABR

principles: Can the student sue for breach of contract, or seek judicial enforcement of statutory obligations upon the HEI? Will the Court in any such litigation be tempted to lift the veil of judicial deference to expert academic judgement? The authors conclude that the ABR is creating ‘enforceable rights’ could indeed shift the balance of academic decision-making from faculty to HEI, and then from HEI to Government/Courts.

Yet, as they also note, in *Yacovelli v Moeser* 324 F.Supp. 2d 760 (M.D.N.C. 2004) Chapel Hill students challenged the use in class of a text giving a positive portrayal of Muhammad and Islam: they were unsuccessful, the Court finding the use of this text as part of a comparative academic exercise to stimulate debate and quoted for *Sweezy*, the 1957 McCarthy Era case: ‘To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation... Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilisation will stagnate and die.’ Perhaps the Rule of Law and the good sense of the judiciary will once again prove to be the ultimate protector of academic freedom in the USA, in 2007 as in 1957...

6. See also B. Doumani, *Academic Freedom after September 11* (2006): E. Gerstmann, *Academic Freedom at the Dawn of a New Century: How Terrorism, Governments, and Culture Wars Impact Free Speech* (2006, forthcoming); and K. McGuinness, *The Concept of Academic Freedom* (2002).

SUPPLEMENTARY NOTE (21/4/07)

- a. Perhaps the most notorious McCarthy-era incident (1950/1958) is covered in Lewis, L.S. (1993), [The Cold War and Academic Governance: The Lattimore Case at Johns Hopkins](#). The University refused to sacrifice Professor Lattimore to political pressure from ‘moral entrepreneurs’ who alleged that he was a sinologist at least too sympathetic to Russia/China if not a Soviet agent (as denounced by McCarthy himself). The Johns Hopkins Faculty, Administration and even its Trustees (eventually) held firm – and despite the fierce media onslaught against the University, an onslaught that continued even in the context of the circuit court of appeals having firmly declared in 1955 the charges against Lattimore to be too vague for a trial. Lewis argues that a Board of Trustees usually defers to the Administration, and that this happened in the Lattimore case: the Board is dependent on the President/Administration for its flow of information and tends to back its selection of a President (unless the latter works too hard to destroy that trust!). Thus, the JH Board did, ‘albeit reluctantly’, fulfil a key purpose of such a Board: ‘to shield the campus from interference from the larger community’; and the Administration was a vital link between the Faculty and the Board, with so much depending on the wisdom, independent-thinking and resolve of the President (at many other US HEIs at this time the President/Administration tended to abandon awkward faculty, especially where the bond between faculty and administrators was weak within the HEI’s culture).

- b. The Doumani 2006 edited text referred to above arose out of a 2004 conference at Berkeley. It is argued that academic freedom is increasingly threatened by both Government ‘coercion’ following 9/11 and also the ‘privatisation’ of and the ‘commercialisation of knowledge’ within HE as an ever-more ‘corporatised environment’ – ‘The commercialisation of education is producing a culture of conformity decidedly hostile to the university’s traditional role as a haven for informed social criticism’ (p. 38).

Robert Post explores whether academic freedom is a right, individual to the member of faculty; or one that belongs to the profession of academe as a whole – he argues for the latter and hence that the individual academic is subject to the group norms/standards and the profession’s self-regulation (the individual academic must exercise his/her academic freedom in compliance with professional norms and subject to professional regulation of academic standards for research and teaching). Thus: ‘Academic freedom is conceived of as the price the public must pay in return for the social good of advancing knowledge’ (p. 73). The really difficult area is ‘freedom of extramural expression’ where the academic speaks out as a citizen on issues that are unrelated to his/her professional expertise (the physics professor comments on the politics of the Middle East and the Iraq War...). Has the academic a right to speak on anything because of being ‘a scholar’ with a ‘trained’ mind? Or because the University should not censor anything emerging from one of its academics for the practical reason that it can’t pick and mix in deciding what to censor and what not to censor? In relation to the commodification of HE, Post quotes John Dewey from 1902 (*sic*): ‘the financial factor in the conduct of the modern university is continually growing in importance, and very serious problems arise in adjusting this factor to strict educational ideals... if the university be a true university, money and all things connected therewith must be subordinate. But the pressure to get the means is tending to make it an end; and this is academic materialism – the worst foe of freedom of work in its widest sense’.

Philippa Strum (‘Why Academic Freedom? The Theoretical and Constitutional Context’) reviews US academic freedom cases and notes the fact that ‘the legal boundaries of academic freedom are in fact still somewhat unclear, and the extent to which courts will be protective of academic freedom claims post-9/11 is similarly uncertain’ (p. 143). She argues, contrary to the chapter by Robert Post, that the right of academic freedom belongs to the individual, not to the faculty as a professional group (or indeed to the university as a legal entity): the HEI’s institutional academic freedom derives from the right bestowed upon all the individuals as members of faculty as such. Strum worries that, post-9/11, the US Supreme Court, in having adopted ‘a pragmatic rationale in upholding the right to academic freedom’ (‘academic freedom benefits society’ by promoting the discovery and transmission of knowledge), could easily now concede that ‘society can decide that a greater benefit, such a security, must take precedence over academic freedom’ (p. 162).