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Controversial and Contradictory: Historical and Contemporary Apologies for (a Lack of) Faculty Academic Freedom

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ABSTRACT

Although academic freedom is considered a pillar of the academy in the United States, little legal precedent has been established to legitimize faculty academic freedom. Moreover, no legislation or case law outlines a hierarchy of academic freedom whereby institutional academic freedom may be positioned as authoritative over faculty academic freedom or vice versa. As a result, many institutions of higher education have violated academic freedom and then subsequently apologized for overstepping legal boundaries, stemming from infringing upon individuals' rights that have not been codified through law. These apologies include a very recent one, where a university president's remorseful remark regarding faculty academic freedom contradicted the university system's own definition of faculty academic freedom, further blurring the concept. In this instance, the Texas Attorney General filed a brief stating faculty academic freedom did not exist, provoking an apologetic statement from the state flagship's president. This case, along with others surveyed in this paper, illustrate a perennial struggle to outline freedoms and protections for individuals working within institutions of higher learning. These cases highlight an unresolved tension between institutional and faculty academic freedom which continue to blur the concept of academic freedom. Ultimately, balancing institutional and faculty academic freedom may require neither freedom positioned as authoritative over another. However, it is important for faculty to be aware of the specifics of their academic freedom at their institution. In this paper, we outline how one institutional system (The University of Texas) grants faculty certain freedoms but does not explicitly guarantee academic freedom, forcing apologetic institutional rhetoric.

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Controversies over academic freedom for professors working in educational institutions are as old as Socrates and as current as this week's edition of the *Chronicle of Higher Education*. Often, educational controversies such as academic freedom have been surrounded by apologetic rhetoric on behalf of scholars, institutional leaders, and other educational stakeholders. As educational institutions have developed, there have been countless attempts to limit academic freedom.

Challenging Church doctrine, Friar Giordano Bruno was imprisoned for 8 years during the Inquisition because he proposed that the Earth was not the center of the universe and that life might exist on other stars. Refusing to recant and apologize, he was charged with heresy and

burned alive (White, 2002). In line with Bruno, Galileo also advocated that the sun, not the Earth, was the center of the universe. He was forced to apologize, recant his views, and subsequently spent the rest of his life under house arrest. However, the Vatican later issued an apology, reinforcing the necessity for scholars to pursue truth (Finocchiaro, 2010). In Nazi Germany, it is well known that some teachers—both secondary and postsecondary—were judged unfit to teach because of their race and their racial ancestry (Gordin, 2012), and in apartheid South Africa of the 1950s, teachers and students were excluded from working at or attending most universities if they were Black. Additionally, biologists in Russia were required to follow a strict code to ensure that their research findings agreed with Communist ideology. Disputed biologist, Trofim Lysenko, was put in charge of the Russian science agency, and he supervised purges of hundreds of scientists who did not align their research with Communist priorities (Gordin, 2012).

Faculty academic freedom in the United States has remained a contentious issue, as numerous legal cases have rendered this type of freedom ambiguous and have not conclusively settled the issue. Subsequently, when institutions of higher education have violated this form of freedom according to case law, institutions have often apologized for denying what has not been codified by law: faculty academic freedom. These apologies underscore the tension surrounding institutional versus faculty academic freedom, two freedoms that have not been well defined by law or by practice. To elucidate this issue, we discuss the history of academic freedom and relevant case law. We then transition to notions of institutional academic freedom beginning in the 1980s in the U.S. context. Finally, we conclude with the University of Texas at Austin campus carry case in 2015, where the Texas Attorney General asserted that there is no academic freedom for faculty, and that only institutions have academic freedom. For educational stakeholders from a variety of groups, the overarching purpose of this paper is to provide a better understanding of how case law has forced institutional leaders to deny faculty academic freedom without much guidance, thrusting the credibility of all forms of academic freedom into flux.

A Brief History of the Development of the University and Academic Freedom

While there were centers of advanced learning in China, the Indus River Valley, Egypt, and Iran, the university came of age during the medieval era, most prominently in Europe. As the Goths and Norse retreated north, people began moving to the cities, fueling the demand for advanced training for the church elite, civic leaders, and other functionaries. A city offered the opportunity to bring together a much larger group of scholars and students, and the *universitas* was born (Fuchs, 1963).

Two structural models were followed in forming the university. First, guilds were developed to administer the daily working of the educational institution. Most of the guilds were run by the scholars and the University of Paris (nicknamed the University of Masters) was the model. However, at the University of Bologna in Italy, a student guild ran the university. The students oversaw hiring, firing, paying the faculty, and providing candles for the classrooms. The second structural form was the residential model versus the graduate-only model. Oxford and Cambridge represented the residential model, admitting undergraduates only, while residences were organized into smaller living-learning quads. The second model, developed by the

Germans, focused on graduate training and research production located away from undergraduate programs (Fuchs, 1963).

The beginnings of academic freedom began “in the philosophy of intellectual freedom, which originated in Greece, arose again in Europe, especially under the impact of the Renaissance, and came to maturity in the Age of Reason” (Fuchs, 1963, p. 431). During the Age of Reason, scholars were simply not hired, and in other cases, they were dismissed because of challenging the established orthodoxy, practicing a religion that was against the local tradition, and holding liberal political beliefs (Fuchs, 1963). In this era, scholars were terminated at the first sign of independent thinking unless they recanted and showed remorse toward their institution (Fuchs, 1963). As a result, the Age of Reason introduced one of the great power struggles in higher education and one that continues to this day: the power of the institution versus the power of the faculty.

Perhaps no other country’s higher education system influenced the United States as did Germany, as Heidelberg University (est. 1386), Leipzig University (est. 1409), and the University of Munich (est. 1472) were founded to educate both undergraduates and graduates. This institutional framework provided the foundation for an expansion from undergraduate to graduate programs in the United States, starting with Johns Hopkins University in 1876 (Lucas, 2006). As the U.S. developed more graduate programs in the late 1800s and early 1900s, many of the U.S. faculty sought the more established and prestigious doctoral degrees from German universities. Upon returning to the U.S., the faculty members expected the freedom to teach and research afforded at German institutions, most prominently Heidelberg University (Fuchs, 1963). They were vexed to learn of the absence of protections to perform their jobs properly in the United States, where graduate programs that were much more research-intensive were not nearly as established as their German counterparts. In this regard, the seeds of modern academic freedom had been planted (Lucas, 2006).

Challenges to Academic Freedom and Subsequent Apologies

With the expansion of the U.S. system of higher education from the Morrill Land Grant Acts and private universities established by large donors in the late 1800s and early 1900s, several academic freedom cases gained national attention (Lucas, 2006). These academic freedom cases were signs that the U.S. system of higher education was maturing, evidenced by professional faculty organizations emerging and gaining considerable power, such as the American Economic Association, American Sociological Society, and the American Political Science Association. Moreover, early academic freedom cases highlighted the considerable financial implications of faculty power, as large endowments by robber barons who lobbied for a more conservative Academy highlighted the tension between institutions, faculty members, and sources of philanthropic funds. Additionally, institutions were experiencing increased scrutiny of university financial operations by government officials who levied public taxes to support the institutions, including funding faculty salaries (Lucas, 2006).

In this section, we discuss four of the most blatant, controversial cases concerning academic freedom that precede the formation of the American Association of University Professors (AAUP). All four cases specifically address academic freedom for professors and discuss the

subsequent apologies provided by the institutions of higher education for faculty violations of academic freedom or institutional censure of faculty members.

The Stanford Controversy

Stanford University was founded in 1885 and endowed by Jane and Leland Stanford, Senior in honor of their son, Leland Junior, who died at the age of 15. After Leland Senior's death, Jane took responsibility and managed the early operations of the university. Ed Ross was hired to teach at Stanford in 1893 after obtaining a Ph.D. from Johns Hopkins University and teaching at Cornell University and Indiana University. As a result of his political views, Ross was fired in 1900, clashing with Jane Stanford on two major issues: economic reform and Ross' views on race suicide (Bromberg, 1996). However, before he was fired, Ross received considerable support from Stanford's President, David Starr Jordan, who was praised for being a staunch advocate for faculty academic freedom and free speech (Bromberg, 1996).

In support of Ross, William Jennings Bryan, the Democratic candidate for President of the United States, asked Ross to join him on the campaign trail as a public speaker and advocate, providing Ross a large public platform to espouse his beliefs. When campaigning for Bryan, Ross implied that he spoke as a Stanford professor and not as a private citizen. Though he was not sanctioned by the university for his political affiliations, it seems Ross's eventual dismissal stemmed from his eugenicist views and divisive rhetoric below:

The Oriental can elbow the American because he has fewer wants...to let this go on, to let the American be driven by coolie competition...is to commit [white] race suicide... We are resolutely determined that California, this latest and loveliest seat of the Aryan race shall not become...the wolfish struggle for existence as prevails throughout the Orient. (Bromberg, 1996, p. 116)

Jane Stanford wrote angrily to President David Starr Jordan, a fellow eugenicist alongside Ross, objecting to Ross' speech, stating, "The teaching of violence is inconsistent with the Founding Grant [of Stanford University]" (Bromberg, 1996, p. 116). Subsequently, Ross was fired and eight of his colleagues resigned in protest after the chair of Stanford University's History department, George Howard, refused to show remorse and apologize in writing for Ross' firing (Eule, 2015, para. 46). This case illustrates that faculty academic freedom may not supersede institutional freedom. Moreover, institutional exercising of that freedom may have wide reaching consequences, such as the resignation of nearly an entire faculty department over the treatment of one faculty member, despite that faculty member's xenophobia.

However, the legacy of Stanford President David Starr Jordan was honored in the state of California after several primary and middle schools were named after Jordan in the mid-20th century. Given Jordan's controversial views on eugenics and his association with a divisive figure such as Ed Ross, the Burbank Unified School Board recently voted to change the name of David Starr Jordan Middle School (Sahakyan, 2019). Burbank Unified School Board members apologized to the Burbank community, stating, "Were he alive, David Starr Jordan would have no place in Burbank" (Sahakyan, 2019, para. 6). Ultimately, the Burbank Unified School Board

felt compelled to apologize for a university president whose rigorous defense of faculty academic freedom and free speech was at one time admired, but now has been reflected upon and is viewed as controversial, xenophobic, and racist.

The University of Chicago Controversy

Edward Bemis began his career at the University of Chicago as a tenured Associate Professor in the Extension Division in 1892. He left the University in October of 1896 under duress. Rumors of the reason for his firing still abound, as years earlier he criticized Chicago's public utilities and the "gas trust" and supported the Pullman strike in Chicago, which could have led these local businesses to lower their philanthropic support of the institution (Berquist, 1972). There were also rumors that he was incompetent, he did not make enough money for the institution, and had angered trustees and donors over his support of the Pullman strike (Berquist, 1972).

William Rainey Harper, president of the University of Chicago publicly weighed in, asserting, "It is hardly safe for me to venture into any of the Chicago clubs. I am pounced upon from all sides" (Berquist, 1972, p. 389). Ultimately, Harper issued Bemis' termination in 1895 but gave him until October 1896 to leave the University, attempting to save face and preserve the institution's reputation. Bemis was very successful after leaving Chicago, publishing widely and opposing the privatization of public utilities. However, by that time, Harper had raised considerable funds from John D. Rockefeller and had greatly expanded the University of Chicago, in part by hiring vocal faculty members such as Bemis. Harper also expanded the University's reach by catering to public sentiment and allowing the dissemination of anti-Christian ideology, something Rockefeller and Harper felt uneasy about given their devout Christianity.

Against Rockefeller's wishes, Harper defended faculty academic freedom and allowed anti-Christian theatre performances to take place on the University of Chicago's campus. After internal pressure from local officials and institutional stakeholders, Harper apologized to Rockefeller. Of the anti-Christian theatre performance, Harper remorsefully wrote to Rockefeller, "The whole event must be regarded as a mistake" (Olasky, 2019, para. 23). Here, Harper may have apologized due to the institutional or political pressure he was facing, but there was no case law to compel his apology, and Harper never addressed the legal protections he did or did not have regarding the decision to allow anti-Christian theatre performances.

In this instance, institutional founders and powerful public figures, such as John D. Rockefeller, have provoked institutional apologies from institutional leaders allowing a free flow of (at times) controversial ideas and faculty academic freedom. The Chicago apology came at the expense of the apologist, President William Rainey Harper, who had ironically terminated a faculty member (Bemis) for outspoken views and exercising faculty academic freedom mere years before Harper himself allowed outspoken, non-Christian views on campus in an effort to advance the university by engaging with both Christian and non-Christian philanthropists and businesses. Recently, the University of Chicago reaffirmed their support of academic freedom, free speech, and free expression, with President Robert Zimmer issuing a statement in March 2019 urging that, "Failing to provide an education of deep intellectual challenge supported by an environment of

free expression is selling students short and would fail to live up to our highest aspirations as educators” (Zimmer, 2019, para. 2). However, Zimmer did not specifically cite academic freedom, nor did he delineate institutional from faculty academic freedom.

The Wharton Eight Controversy

Scott Nearing received his doctoral degree in Economics from the Wharton School of Business at the University of Pennsylvania, where he began teaching as a tenured faculty member in 1909. He was one of the “Wharton Eight,” faculty members whose goal was to contribute to society, as well as to the students and university. In 1915, despite faculty endorsement, Nearing was the only Assistant Professor who was not promoted and tenured. University trustees had noted Nearing’s progressive views, particularly those on child labor laws. Nearing sued the university and won, which was a significant victory for faculty tenure rights. He then went to the University of Toledo, a municipal university. He lasted there two years before his opposition to World War I led to his termination.

In later years, Nearing was charged with violating the Espionage Act and the Sedition Act but was exonerated on both counts. Of his firing, he observed that “those who tell the truth or try to tell the truth are among the first victims of any war” (Nearing, 1919, p. 33). Nearing founded and directed a pacifist group during the war, gave lectures, and traveled to and lived in communist countries. In the 1930s and 1940s, he and his partner bought a farm and forested area in Maine and embraced a simple rural life. In the 1960s, anti-war activists and potential homesteaders flocked to Maine to learn from him, as he appeared in the movie *Reds* (1981) as a “witness” to the Russian Revolution. Ultimately, the University of Pennsylvania apologized to Nearing years later, reversed his termination, and named him an Honorary Emeritus Professor of Economics given his profound impact on the field and advocacy of academic freedom. Combined with the lawsuit, this was the most extensive reparation for a faculty member fired for an academic freedom transgression.

The University of Wisconsin Controversy

Richard Ely received a doctorate in Economics from the University of Heidelberg and a Doctorate of Laws from Hobart College. He was a progressive and part of the Social Gospel Movement which applied Christian principles to social problems. He was professor and head of the Department of Political Economy at Johns Hopkins University. In 1892, he became a professor of Political Economy and Chair of the School of Economics, Political Science and History at the University of Wisconsin-Madison. In 1894, an ex officio member of the University of Wisconsin Board of Regents attempted to oust Ely from his position for teaching “utopian, impractical and pernicious doctrines” (Tiede, 2015, p. 64).

At the time, the University of Wisconsin was well known in academic circles for its Wisconsin Idea, or the guiding principle that university work should benefit the citizens of the state of Wisconsin (Board of Regents of the University of Wisconsin, 2019). Citing the Wisconsin Idea and the necessity for faculty members to exercise academic freedom (Board of Regents of the University of Wisconsin System, 2019), the University of Wisconsin Board of Regents made an

unprecedented and controversial decision in the wake of calls for Ely's termination. Instead of giving into the whims of an ex-board member, the Board apologized to Ely and gave a ringing endorsement of academic freedom acknowledging that competing claims of truth are subject to the process of "sifting and winnowing" over time, echoing the verbiage of the Wisconsin Idea. Subsequently, Ely and Wisconsin were celebrated as strong defenders of academic freedom (Tiede, 2015), with the Ely case highlighting an instance where faculty academic freedom was defended by not only a single institution but an entire Board of Regents even though no Constitutional law or case law compelled such a defense.

Professional Associations and Academic Freedom

Before the AAUP's development of codified faculty academic freedom, there is no accurate accounting of how many faculty members were fired or forced to resign during the years of Ed Ross, Edward Bemis, Scott Nearing, and Richard Ely. Many terminations were of single faculty members, but other cases involved groups of faculty members. Some faculty members left in protest when a colleague was fired or left quietly rather than being outspoken about censorship, referred to as "academic asphyxiation" (Tiede, 2015, p. 38). Ed Ross once remarked, "The only wonder is that there ever was any case that presented the question of academic freedom. Nothing but honesty or the blundering of a college president could ever allow such a case to show itself" (Tiede, 2015, p. 39). Ross' words were prophetic, as many years passed without such a case being heard in a court. Yet, these aforementioned cases were hotly discussed and debated by faculty members across the country who measured and calculated their own behavior and exertion of faculty academic freedom (Tiede, 2015).

The first discussion of a national professional association for faculty members was in 1912. That spring, Arthur Lovejoy, a philosophy professor at Johns Hopkins University, sent a letter to faculty at nine elite research universities (Tiede, 2015). The letter, which came to be known as the Hopkins Call, outlined three objectives for the proposed association: a forum for discussion of problems common to universities and professors, a source of information for the profession, and a method to harness collective action. The call also suggested possible issues for discussion such as university governance, educational policy, tenure, dismissal, professional ethics, and finally, a "representative judicial committee" to investigate academic freedom and tenure violations (Tiede, 2015, p. 76). There were immediate cautions from professors at several universities that the group might become a radical trade union. An organizational meeting was held in November 1913 with 18 delegates from nine universities. The delegates discussed the terms of membership for the group and recommended individual memberships for faculty who had taught at least 10 years but not instructors, as instructors taught but usually did not conduct potentially controversial research or participate in public forums. A Committee on Organization was formed and had 34 members by the end of 1914 (Tiede, 2015).

After considerable discussion, the mailing list for the inaugural meeting consisted of 1,300 names from 149 institutions (Tiede, 2015). The call for the meeting listed many issues for the professors to consider, including investigation of serious violations of academic freedom (Tiede, 2015). The Inaugural meeting of AAUP took place on January 1 and 2, 1915. Unsurprisingly, the

first year was focused on one issue: academic freedom. In that year, 30 complaints of violations of academic freedom were filed and five investigations were conducted (Tiede, 2015).

The 1915 Declaration of Principles

The AAUP Declaration of Principles (American Association of University Professors, 1915; see also Wilson, 2015) was drafted by a group of senior faculty members. Walter Metzger, who chronicled the modern history of academic freedom, described the document as “Utilitarian in temper and conviction, as the theorists of 1915 did not view expressional freedoms of academics as a bundle of abstract rights” (Bastedo et al., 2016, p. 36). Metzger continued:

[Academic institutions] must be prepared to tolerate a broad range of issues. . . Academic institutions that sought repress or silence such views simply did not deserve the respect of the higher education community. . . Thus, concluded the declaration, any university that placed restriction on the intellectual and expressive freedom of its professors [is] a proprietary institution and should be so described in making appeals for funds. (Bastedo et al., 2016, p. 36)

However, the principles were not without their detractors. A *New York Times* editorial criticized the principles by saying, “Academic freedom...the inalienable right of every college instructor to make a fool of himself and his college by . . .intemperate, sensational prattle . . .and still be kept on the payroll” (Bastedo et al., 2016, pp. 36-37).

The principles were groundbreaking and controversial in that they included tenure and a recommendation for due process (written notice, hearing, and written decision). A faculty member who believed that her or his institution violated the principles could ask for an AAUP investigation that could lead to censure, and a censured university could take enough remedial action to be taken off the list. The group gained power in the 1920s and 1930s, and by 1940, the American Association of Colleges and Universities had gained the support of 150 scholarly groups and many research and liberal arts institutions as co-sponsors (Bastedo et al., 2016).

Ultimately, the AAUP and its principles took the first national step toward codifying a sense of academic freedom with substantial backing power of hundreds of institutions and tens of thousands individual faculty stakeholders. The AAUP also helped to establish mass support of faculty academic freedom with the power of mass faculty strikes and other forms of protest and advocacy to protect faculty academic freedom in the absence of any law supporting such a freedom.

World War I, the Red Scare, and McCarthyism

With the 1917 entry of the U.S. into World War I, opposition to the war and any form of support of German culture or unpatriotic behavior became the focus of many academic freedom cases (Tiede, 2015, p. 147). AAUP conducted several investigations, and in a report titled, “Academic freedom during war time,” the AAUP retracted some of the 1915 principles. AAUP’s committee chairperson, A. A. Young, acknowledged several cases that had arisen, but said that “we have to

recognize that some things are just at present vastly more important than is academic freedom” (Tiede, 2015, p. 150), suggesting that faculty academic freedom may come secondary to national priorities, far superseding any form of institution-level freedoms or priorities. In the years that followed the war, Tiede (2015) noted that the AAUP did little to push against restrictions to academic freedom during the war, and subsequent cases of faculty academic freedom highlighted the AAUP’s loss of power.

During the first Red Scare, the national office of the AAUP was asked to investigate the firing of Professor Eduard Prokosch, a German professor at the University of Texas at Austin. He was terminated in 1919 because his textbook compared a German legislative assembly to federalism in the U.S. The University of Texas at Austin AAUP chapter opposed his reinstatement “because it would be misleading and unfair to the University of Texas” (Tiede, 2015, p. 169). Perhaps prior to World War I, the AAUP may have more staunchly defended Prokosch, but given the prioritization of nationalism and the pressure the AAUP may have been facing to position itself as patriotic in the wake of major world wars, the AAUP never advocated for Prokosch, and he was not reinstated.

The McCarthy hearings (and the state equivalents of the McCarthy Commission) that targeted communists took the greatest toll on faculty academic freedom. However, there were mostly accusations of subversiveness by informants without evidence (Tiede, 2015). Of the faculty called to testify in front of state or federal legislators, many of them refused to speak, refused to identify other faculty as communists, or told vague stories of their experiences that didn’t indict them. Many states required faculty members working at public institutions to sign a loyalty oath to the state and the United States, famously highlighted by the *Sweezy v. New Hampshire* (1957) and *Keyishian v. Board of Regents of Univ. of State of N. Y.* (1966) cases. Both cases involved faculty members who either rejected national loyalty oaths or who lectured about Communist topics, likely violating loyalty oaths. Some of the best-known research universities such as Harvard, Michigan, Rutgers, and University of Washington were responsible for the dismissals, with the estimated number of faculty members fired during McCarthyism being about 170 (Schrecker, 1986).

Yet, the *Sweezy* case and Justice Frankfurter’s opinion most directly commented on the freedoms of the university—not the faculty member—by introducing the four essential freedoms to the understanding of academic freedom. Frankfurter wrote that the university—not individual faculty members—have the freedom to “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 v. New Hampshire*, 354 U.S.). It is important to note that a Justice’s opinion does not constitute case law and that Justice Frankfurter very clearly indicated that the four freedoms belong to the institution, not the faculty member. Since the *Sweezy* decision and Justice Frankfurter’s opinion, no other case law or opinion has made such an open statement defining what is or is not academic freedom and for whom (Goldberg & Sarabyn, 2011; Hiers, 2007).

Given the lack of case law and ambiguity surrounding institutional versus faculty academic freedom, faculty repression has continued through 9/11 and into the 21st century. Just as in WWI and WWII, fear and xenophobia combined to fan the flames of patriotism in the wake of the

September 11th terrorist attacks on New York’s Twin Towers. The reaction was swift, with confrontations occurring the evening of September 11 between peace activists and those wanting immediate military intervention before all of the facts were clear. One well-known peace activist and University of Texas at Austin Journalism faculty member, Bob Jensen, wrote an op-ed for the *Houston Chronicle* urging restraint until other options than war was chosen. Jensen was inundated with hate mail, phone messages, and threats. In addition, the president’s office was flooded with phone calls. In response, the UT President Larry Faulkner wrote in the *Chronicle* that “Jensen is not only misguided but has become a fountain of undiluted foolishness on issues of public policy” (Nichols, 2001, para. 3). In this regard, Jensen had spoken in his official capacity as a UT faculty member and recognized public policy expert, yet institutional leadership was libeling Jensen and deterring his faculty academic freedom in the process. Although cases such as *Sweezy* and *Keyishian* were argued and decided in support of academic freedom and the avoidance of chilling First Amendment protections, UT President Faulkner, in this scenario, directly contradicted this case law. Faulkner never issued Jensen an public apology.

Case Law and Ambiguous Notions of Academic Freedom

Decades of case law and legal research has posited that institutional academic freedom—if it truly exists—does not supersede the individual academic freedom of faculty members (Hiers, 2004, 2007; Tiede, 2015; Wilson, 2015). In fact, some legal scholars have suggested both federal and Supreme Court rulings have not entitled institutions to their own academic freedom or institutional autonomy under the First Amendment (Hiers, 2004,2007). However, an argument can be made for separate but equal institutional and faculty academic freedoms, with neither freedom superseding the other. Instead, these separate freedoms serve different ends and educational stakeholders. This nuanced understanding of academic freedom is critical for the future of higher education in the United States.

Understanding that Frankfurter’s opinion in *Sweezy* laid groundwork for academic freedom limited to institutions, legal scholars have indicated that a presence of one freedom—institutional freedom—does not necessarily cancel out another, such as faculty academic freedom. Hiers (2007) pointedly asserted that until 1978 (*Bakke*), no court ruling had supported the notion of “constitutional institutional academic freedom” (p. 4). In *Regents of University of California v. Bakke* (1978), the only mention of constitutional institutional academic freedom was in concurring opinions and not expressly stated in the case law or majority opinion of the court (Hiers, 2007). In *Bakke*, Justice Powell’s solo opinion (non-concurring) held that prior institutional academic freedom cases—namely *Sweezy v. New Hampshire* (1957) and *Keyishian v. Board of Regents of Univ. of State of N. Y.* (1966)—granted universities academic freedom under the First Amendment, echoing of the four essential freedoms quoted from Justice Frankfurter’s opinion in *Sweezy*. Yet, Hiers (2007) argued that Justice Powell’s statement incorrectly conflated constitutionally permissible goals, such as attaining a diverse student body, with institutional academic freedom. Lost in the argument was the role of the faculty member as they relate to any form of academic freedom.

Ultimately, Hiers (2007) reasoned that Justice Powell’s opinion was not case law and did not suggest institutional academic freedom ought to outweigh faculty academic freedom, which had

been deemed constitutional in previous rulings. Moreover, Justice Powell's opinion ignored the fact that *Keyishian* addressed teachers' academic freedom, not institutional academic freedom or institutional autonomy. Justice Powell's opinion also misappropriated Justice Frankfurter's *Sweezy* opinion by applying Frankfurter's quote from a South African educational context and inserting it into a United States-specific discussion of institutional academic freedom. In short, Powell's misattributed concurring opinion—despite originating in the Supreme Court—does not serve as case law nor ratify institutional academic freedom.

Discussing a later case related to *Bakke*, Hiers (2004) positioned *Grutter v. Bollinger* (2003) as a case that has ultimately perpetuated the constitutional misconception of institutional academic freedom, especially as it relates to First Amendment protections. Again, citing Justice Frankfurter's opinion in *Sweezy* and Justice Powell's misappropriation of Frankfurter's opinion in *Bakke*, Hiers focused on the language of the First Amendment, arguing, "The First Amendment protects speech or viewpoint expression, but not institutional decisions or actions" (p. 577). At its surface, Hiers' argument hinges on *Grutter*'s involvement with the First Amendment and whether admissions policies are "institutional decisions or actions," which they undoubtedly are. Following this logic, *Grutter* did not reason that the University of Michigan's admission policies were protected by the First Amendment. Rather, *Grutter* supported the University's decision to use affirmative action admissions policies within constitutional limits. This nuance is important to understand as it relates to faculty academic freedom: In both *Bakke* and *Grutter*, institutional academic freedom was conflated with constitutional guarantees, namely First Amendment rights. However, *Bakke* and *Grutter* did not ratify institutional academic freedom—they tailored any sense of institutional academic freedom around the First Amendment. In short, *Bakke* and *Grutter* upheld institutional practices if and only if they did not violate the First Amendment.

Hiers (2004) then reasoned, "And while the First Amendment protects private persons, public colleges and universities are not persons" (p. 577). Hiers' second argument, that of public colleges and universities not being persons, is important in its relation to faculty academic freedom. In *Grutter*, the Supreme Court ruled that an institution had the right to cater its admission policies to support affirmative action in ways that did not violate any single person's constitutional rights. Again, echoing of *Bakke*, the institution has never been granted protection by the First Amendment. Instead, *Grutter* and *Bakke* reaffirmed the notion that institutions cannot violate the First Amendment. Moreover, *Grutter* offered no hierarchy of Justice Frankfurter's four essential freedoms, meaning that if institutional academic freedom did indeed exist, it existed alongside faculty academic freedom, which had been supported in prior case law, as long as such freedom did not violate the First Amendment. The difference here is one between First Amendment protection and First Amendment violation: institutional and faculty academic freedom cannot violate the First Amendment and is not protected by the First Amendment.

Some believe academic freedom can be applied to an institution in order to keep government from impacting certain units of the academy (Goldberg & Sarabyn, 2011), while others argue academic freedom belongs entirely to the institution and not individual faculty members (Hiers, 2004, 2007; Wilson, 2015). In *Grutter v. Bollinger* (2003), the Supreme Court's unambiguous declaration that courts must give a "degree of deference to a university's academic decisions,

within constitutionally prescribed limits” (Goldberg & Sarabyn, 2011, p. 220). From here, however, there has been no legal guidance—from case law or the legal research community—as to what “constitutionally prescribed limits” means when considering institutional academic freedom compared to student or faculty academic freedom. Complicating the discussion of institutional versus faculty academic freedom is that the *Grutter* decision primarily addressed the constitutionality of an institution’s ability to diversify its student body, not protect itself against government intrusion or grant any of the four essential freedoms power over each other. If *Grutter* affirmed the institution’s essential freedom of who may be admitted to study, it surely did not in any way deny faculty academic freedom.

If institutional academic freedom does exist and does so on the same plane as faculty academic freedom, perhaps the best argument can be found in *Trustees of Dartmouth College v. Woodward* (1819). Therein, the Supreme Court famously ruled that a public entity, the state of New Hampshire, could not compel a privately-funded institution (Dartmouth College) to become a public institution: The court ruled such an action unconstitutional. The Dartmouth case was the origin for the rationale behind institutional academic freedom, namely that a government could not—and still cannot—interfere in contracts between private parties. This sense of government intrusion is what many scholars have pointed to as a crux of institutional academic freedom, mainly a freedom from government intrusion. To be clear, as a private institution, Dartmouth enjoyed institutional academic freedom from government intrusion but could not violate any one person’s First Amendment rights: Institutions are granted freedom from government intrusion but not the power to override constitutional protections. Dartmouth in no way positioned institutional academic freedom above faculty academic freedom, especially considering public institutions and the relevant case law associated with public institutions (*Bakke*, *Grutter*, *Sweezy*).

Campus Carry, Academic Freedom, and a Presidential Apology

The political divide caused by the 2016 elections has prompted hate speech, hate mail, beatings, and killings over political beliefs, many of which have been directly witnessed on the campus of The University of Texas at Austin (UT Austin), Texas’ public flagship (Broyles, 2016). Perhaps the most controversial contemporary issue facing many institutions of higher education is the forced adoption of campus carry laws. These laws allow anyone with a licensed firearm to carry the firearm on public campuses with few exceptions (e.g., private and individual faculty offices).

Speaking against campus carry and its potential impingement of academic freedom and admitted students’ right to learn, Jessica Jin, a UT graduate, organized the anti-campus carry group Cocks not Glocks. Jin led Cocks not Glocks by brandishing dildoes rather than firearms for protection. Soon after, Jin fell victim to doxxing, or, the researching of private information to be published online with malicious intent. As a result of her activism, Jin was forced to relocate frequently, living out of her car or sofa surfing around the nation (Broyles, 2016). Along with other anti-gun activists, she was parodied in a series of online videos depicting activists being shot in the head by a burglar (Broyles, 2016).

At every anti-gun rally in Austin, most which are family events (Najmabadi, 2018), the pro-gun lobby often stations itself along the parade route decked out with as many guns as they can muster. A pro-carry group organized protests very close to university property in 2018 (Bongiovanni, 2018) and 2021 (Hall, 2021). The gun toting individuals symbolically “murdered” individuals dressed in Gun-Free UT shirts (Haurwitz, 2018). A few gun rights advocates carried automatic weapons and paraded up and down the sidewalk across from elementary schools (Hall, 2021). These tactics by gun supporters are designed to frighten and intimidate school children, college students, and adults alike (Story, 2017). The stakes for free speech and academic freedom are higher than they have ever been as a result of these intimidation tactics, and unclear case law regarding academic freedom has exacerbated the problem and anxiety surrounding the issue.

At UT Austin, the ongoing legal debate surrounding campus carry, or concealed carrying of a firearm on campus, illustrates the tension between ambiguous institutional academic freedom and codified faculty academic freedom. In the wake of the 2015 state law allowing concealed carry on campus, three UT Austin faculty members challenged the legal standing of university’s concealed carry policy. The faculty members—Jennifer Lynn Glass, Lisa Moore and Mia Carter—filed a lawsuit against State of Texas Attorney General Ken Paxton and leaders of the University of Texas System, alleging that the campus carry law infringed upon their First Amendment right to faculty academic freedom, as carrying a firearm into a classroom or learning space could and would produce a chilling effect. At the time of the pending lawsuit in 2018, Moore was quoted as saying, “I hope we don't have to have more deaths and school shootings to convince people that guns don't belong in the classroom” (Choi, 2018, para. 11).

Supporting Jessica Jin’s activism, two national student activist groups spoke against the professors’ lawsuits, also citing academic freedom. The groups, Students for Concealed Carry (SCC) and the Students for Concealed Carry Foundation (SCCF), filed a joint amicus brief in support of the campus carry law, arguing that allowing professors or any academic staff member autonomy from state-mandated gun laws in the name of academic freedom could set a precedent for many institutional employees to use academic freedom to reject any institutional or state policy on the grounds of academic freedom violations (Choi, 2018). However, it is critical to note that Jessica Jin and Clocks not Glocks, as well as the pro-gun groups SCC and the SCCF, used the broad term “academic freedom” to justify their position(s), failing to delineate between institutional and faculty academic freedom.

Soon after the UT Austin professors filed the suit, Ken Paxton and leaders of the University of Texas System issued a joint brief justifying their own position and using academic freedom as a crux of their argument. In the brief, Paxton wrote, “The right to academic freedom, if it exists, belongs to the institution, not the individual professor,” thus justifying the state’s campus carry law (Haurwitz, 2018, para. 2). Later, Paxton rephrased his earlier statement regarding academic freedom, explaining that “plaintiffs have no individual right to academic freedom, because the right to academic freedom is held by their institution” (para. 14). When asked about Paxton’s controversial opinion, U.S. District Judge Lee Yeakel explained that he could find no legal precedent for the professors’ academic freedom argument and that academic freedom falls under First Amendment. Subsequently, in July 2017, Yeakel dismissed the UT Austin professors’ case,

citing a lack of constitutional grounds (Haurwitz, 2018). This stands in stark contrast to the widely held belief that faculty indeed have some degree of academic freedom per the AAUP and its vast membership, built upon decades of legislation and Justice Frankfurter's opinion in *Sweezy*.

Confusing matters further, Marc Rylander, an official spokesperson for Texas Governor Greg Abbott asserted,

There's a difference between privileges a university uses its discretion to give and legal rights a person can sue over. Academic freedom is a privilege the University of Texas System, like so many universities, has given to its faculty. But the courts have not recognized academic freedom as a legal right an individual can sue over. (Haurwitz, 2018, para. 14)

For Rylander and the Governor of Texas, academic freedom is a right possessed by an institution of higher education and passed onto faculty. In this regard, faculty do not hold academic freedom independent of the institution. As a result, faculty academic freedom cannot be used in legal arguments against the institution for having violated faculty rights to that freedom.

Amidst this debate, there was a single, important individual who had not explicitly voiced their concern or opinion: UT Austin President Greg Fenves. Both as President and a tenured faculty member on UT Austin's staff, Fenves had represented the University of Texas System against the UT Austin professors in the campus carry lawsuit, but Fenves later issued a letter clarifying his own personal stance. In the letter, Fenves apologetically affirmed the importance of academic freedom to the mission of the university, reasoning that handguns on campus are "contrary to our mission of education and research, which is based on inquiry, free speech, and debate" (Fenves, 2018, para. 3). Fenves then bluntly supported a specifically delineated notion of faculty academic freedom, writing: "Faculty members at The University of Texas at Austin have academic freedom to conduct research and publish their findings. All faculty members have academic freedom in the classroom to teach and discuss their subjects as they see fit" (Fenves, 2018, para. 4). Fenves urged that "faculty members" have "academic freedom," even if implying or failing to state that the institution granted that freedom to the faculty. Here, it seems Fenves argued the exact opposite of what the University of Texas System and state's attorney general argued in court. A lack of legal precedent or political pressure, in this case, forced Fenves' hand.

Regardless of what institutional presidents (such as Fenves) or government officials say, no case law has positioned institutional academic freedom above faculty academic freedom (Hiers, 2007). Here, President Fenves' doublespeak misinterprets institutional academic freedom as somehow superior to faculty academic freedom, thus faculty rights can be impinged upon given the purview of state law. Moreover, institutional academic freedom has never been suggested to be held "by the institution" as UT Austin's first statement posited (Haurwitz, 2018, para. 2). Harkening back to Justice Frankfurter's ill-quoted but insightful discussion of the four essential freedoms, it is critical to acknowledge these four freedoms as separate and—without legal contest—equal. As a result, case law from *Bakke*, *Grutter*, *Borden*, and *Dartmouth* only comment on the academic freedom of a certain stakeholder, whether institution or individual,

and the necessity for that freedom to avoid violating the First Amendment. In the case of institutional or state-mandated concealed carry policies at a public institution, the separate academic freedoms of the institution and faculty member must be weighed equally, with subsequent legal action taken if and only if First Amendment rights are violated. As a result, President Fenves may have felt compelled to apologize or clarify his own personal views and those of the Office of the President because he is both a tenured faculty member and institutional leader, possibly confusing the very notion of academic freedom entirely.

Conclusion: The Controversies and Apologies of Academic Freedom

Across history, evidence suggests institutional academic freedom and faculty academic freedom have consistently been confused, misinterpreted, and controversial. This confusion has since resulted in institutional leadership feeling coerced into apologizing for what has not been made clear through legislation, case law, or policy. For instance, the disagreement among the plaintiffs about institutional versus faculty academic freedom in the University of Texas campus carry case starkly demonstrates the difficulty in arguing for a singular definition that only universities can claim, urging university leadership to apologize for what they, perhaps, cannot control and what has not been settled through case law or constitutional precedent via the First Amendment.

The argument that the State of Texas defense has presented is clearly a trial balloon for future cases, arguing that institutional and faculty academic freedom may be separate and unequal liberties. Although the case has not been argued in a legal setting, the State of Texas' defense seems to be doublespeak or perhaps some kind of code in an attempt for institutional leadership to avoid contradictory statements or forced, awkward apologies to any stakeholders involved. After all, remorse may be considered an admission of guilt or wrongdoing in a court of law. Apology or not, doublespeak or otherwise, the decision to elevate institutional academic freedom above faculty academic freedom—if it even exists at all—seems a deliberate attempt to erode or eradicate faculty and student rights.

Institutional academic freedom serves an important purpose to protect public universities from interference from government agencies, as illustrated by *Trustees of Dartmouth College v. Woodward* (1819). Historically, outside actors have attempted to diminish the power of students and faculty through making public what has been established as private or vice versa. In light of this fact, faculty and institutions alike need to be vigilant about arguments on overarching power to censor debate and discovery.

Some critics argue that Texas's lawyers do not understand academic freedom and its key role in learning and discovery of new knowledge (Gun Free UT, 2021; Haurwitz, 2018). Either way, faculty academic freedom is supported by the AAUP, professional tradition, work rules, and the First Amendment. Faculty members must also not forget that scholars years ago—such as Friar Giordano Bruno—received multiple apologies from institutional authorities, yet still paid the ultimate price for exercising academic freedom. To continue exercising academic freedom, collective and legal action must confront challenges to academic freedom to prevent potential loss of life over such challenges, such as a campus carry law being adopted to allow firearms in scholarly, academic spaces. We must recognize intimidation tactics and any attempt at negating

these protections, even if that means provoking decades of institutional apologies to remedy this longstanding, controversial issue in higher education. And if faculty academic freedom does not exist, why is U.S. higher education history laced with apologies for trampling or eliminating faculty members' academic freedom?

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