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Managing academic freedom: recent cross-Atlantic developments

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This paper charts the legal and institutional status of academic freedom in America after Garcetti v. Ceballos, a key First Amendment case decided by the US Supreme Court in 2006. It also addresses, in comparative compass, academic speech protection in the UK and the EU more broadly. Although a managerial ethos of university governance has reshaped academic freedom on both sides of the Atlantic, the shaping process has not been uniform. Differences in policy formation and institutional structure have produced significant variations in the safeguarding of faculty speech. Policy groups on the Continent have been particularly active in drafting aspirational statements on academic freedom. Both the UK and the EU also have legislation outlining the rights and responsibilities of university teaching and research. No such legislation exists in the US, where the courts have played a central role in determining the legal status of academic speech. Statutory provisions in Europe, by contrast, remain judicially untested. It is anticipated that academic freedom on both sides of the Atlantic will increasingly be defined in contract, with varying degrees of third-party appeal.

> The responsibility of the university teacher is primarily to the public itself, and to the judgment of his own profession; and while, with respect to certain external conditions of his vocation, he accepts a responsibility to the authority of the institution in which he serves, in the essentials of his professional activity, his duty is to the wider public to which the institution itself is amenable. (American Association of University Professors, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*)

From status to contract

The task this paper sets itself is two-fold. First, it aims to chart the American legal and institutional status of academic freedom in the wake of *Garcetti v. Ceballos*, a key First Amendment case argued before the US Supreme Court in 2006.[1] Second, it addresses, in comparative compass, academic speech protection in the UK and the EU more broadly. A market-managerial ethos for university governance has undeniably reshaped academic freedom on both sides of the Atlantic. The shaping process, however, has been far from uniform. Although European higher education has been 'Americanized' in recent years, variations in institutional topography have reinforced regional differences in the management of universities and the safeguards accorded traditional (and not-so-traditional) forms of faculty speech. Identifying key

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points of similarity and difference allows us to better understand current controversies and chart the next generation of academic freedom disputes.

One of the idiosyncrasies of academic freedom protection in the US is the historical centrality of the courts and the subordinate role of targeted legislation. In an already highly litigated society, the professoriate's legal right to engage in controversy has traditionally been a question of constitutional adequacy. It was the US Supreme Court, therefore, not state or federal government, that established the rudiments of both individual and institutional academic freedom in the 1819 corporate charter case, *Dartmouth College v. Woodward*, made famous by Daniel Webster's lachrymose expression of his love for his scrappy but deserving *alma mater*.[2] Judicial examination in any rigorous sense, however, is largely a post-WWII phenomenon. Initially in the loyalty oath cases of the 1950s and 1960s, subsequently on tenure rights and campus speech codes, and most recently on questions of grade issuance, promotion portfolios, and grant applications, American courts have sought to refine what, exactly, universities and university-based intellectuals are free to do.

Examination has not always meant clarity. Institutional autonomy, to begin with, is not the same as an individual faculty member's right to question orthodoxy. Tenure has been defined as property, but property of a different kind than the First and Fourteenth Amendments envisioned at their construction. The margins of institutional deference have sometimes been strictly, at other times laxly, observed. Nowhere have ambiguities raised greater uncertainty – and nowhere are the stakes in resolving them higher – than in the recent First Amendment employment case, *Garcetti v. Ceballos*. Together with an expanding arsenal of lower court cases citing it as precedent, *Garcetti* signals an important redefinition of the scope and status of intellectual freedom on American campuses.

Curiously, the dispute in *Garcetti* was not about academic speech at all. Rather, the case turned on constitutional protection against workplace retaliation in the public sector. The controversy played out as follows. From 1989, Richard Ceballos served as an assistant deputy prosecutor with the Los Angeles County District Attorney's Office. In February 2000, he was alerted to material flaws in a crime scene affidavit filed by a colleague and challenged by defense counsel. Judging the latter's demurral valid, he advised his superiors to drop the case. This recommendation led to heated exchanges with his superiors, resulting in allegedly demeaning reassignments and other retaliatory acts. Ceballos subsequently brought suit in California District Court (Central District), alleging a violation of his First/Fourteenth Amendment rights to free speech and equal protection.[3] The State of California moved for summary judgment. This was granted, dismissing Ceballos' suit. He then appealed to the Ninth Circuit Court of Appeals, which reversed on precedent and classified his memo as work product but 'inherently a matter of public concern'. On 30 May 2006, the US Supreme Court reversed again, arguing in a 5–4 decision that 'when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline' (at 421).[4]

In his majority holding, Justice Kennedy remarked that the court recognized the special provenance of speech in academic contexts, but entered no judgment regarding university faculty as public employees. In his dissent, however, Justice Souter addressed what the majority chose not to consider: the invitation to policy creep. In Souter's words, '[t]his ostensible domain beyond the pale of the First Amendment [i.e. employer control of employee speech] is spacious enough to include even the

teaching of a public university professor' (at 438). His remark has been prophetic. In a line of cases that have followed, *Garcetti-Stronach v. Virginia State University* (2008), *Gorum v. Sessoms* (2009), and *Hong v. Grant* (2007, 2010) among them, First Amendment claims have failed on the grounds that public university faculty do not have a constitutional right to academic speech in the course of carrying out their contractual duties.[5] In almost every instance, *Garcetti* has been enthusiastically adopted as precedent. At times, enthusiasm has escalated into aggressive, even slightly fanatical advocacy: the California District Court in *Hong*, for example, concluded that *Garcetti* permits 'unfettered employer control over speech within an employee's official duties' (*Hong* at 1165). Distinctions between universities and other corporate bodies, public or private, are eroded: the University of California Irvine, we learn, 'is entitled to unfettered discretion when it restricts statements a [faculty member] makes on the job and according to his professional responsibilities' (*Hong* at 1168).

To anyone who believes in the university as a marketplace of ideas, the relegation of teaching and research to the unfettered control of administrators is a serious violation of professional autonomy. It substitutes a draconian version of corporate governance, its hierarchical protocols and habits of deference, for the standards of the academic guild, fostered in the graduate school and oriented by the meritocratic push and pull of argument. Forty years before the *Hong* District Court published its holding, in fact, Justice Brennan famously issued his injunction in *Keyishian v. Board of Regents* (385 US 589) against government casting 'a pall of orthodoxy' (at 602) over the classroom. More than half a century ago, in perhaps the most famous of the Supreme Court oath and allegiance cases, *Sweezy v. New Hampshire* (354 US 234 [1957]), Justice Frankfurter opined that 'the dependence of a free society on free universities … means the exclusion of governmental intervention in the intellectual life of a university … [t]his kind of evil [i.e. intervention] grows by what it is allowed to feed on' (at 262–64). If mere intervention was once considered evil, how can 'unfettered control' by the same agent now be thought proper and necessary?

It would appear that one of the two cases – *Sweezy* or *Hong* – simply misapplied First Amendment law. If governmental interference violates that amendment's free speech clause, unrestricted control of faculty expression must likewise. Even those who advocate a living Constitution would be hard pressed to defend so absolute a genetic makeover; yet, there is here an all-important catch. The First Amendment only covers the relationship between citizens *as* citizens and government. The government intended by Brennan and Frankfurter, in turn, is clearly not the university, but state legislatures and other public policy-making bodies whose edicts restrict both the university as institution and its participating faculty. Hence, the constitutional problem with loyalty oaths: they are clear instances of political interference in the sovereign operation of the university or university system by restricting the ability of faculty to work within it.

The interference in faculty speech in *Hong*, on the other hand, is an intra-institutional affair. There is no 'political' action in the direct sense of legislative incursion. Because state universities are also government by virtue of the Fourteenth Amendment's extension clause, one might conclude that the difference between university and legislature, and again between faculty member and employee, should be irrelevant for purposes of constitutional protection; yet the US Supreme Court has consistently held – and this well before *Garcetti* – that First Amendment protection is restricted where government is also the employer of the party seeking constitutional

redress. In such a case, the aim of effective public service justifies limiting safe harbor to those instances in which the public interest in the given speech outweighs the efficient operation of the department in which the conflict arose. A substantial curtailment of First Amendment protection in a master/servant context is therefore constitutionally defensible as it would not be where the government is not simultaneously the employer.

The problem raised by *Hong*, therefore, is not that the case produces bad law but that it points to an area of particular elasticity in constitutional jurisprudence. Absent some standalone constitutional right to academic speech, one enters an open field in which faculty work can be considered wholly within an employer/employee context, entirely outside this relationship, or as any possible combination of the two. Everything rests upon where one places one's marker. If the whole of paid teaching and research falls under master/servant doctrine, then academic freedom can no longer be said to constitute a special interest under First Amendment jurisprudence and all claims against its violation under constitutional color will fail. While this would not close out legal redress for perceived restriction of academic speech, it would dramatically alter the landscape in which academic freedom finds itself, with tangible consequences for institutional policy.

System-internal considerations may help explain the *Hong* District Court's treatment of faculty work as wholly within the ambit of employer–employee relations. The recent, by all rights astonishing, verdict of the Ninth Circuit Appeals' Court in upholding the initial *Hong* decision suggests exactly this.[6] More interesting for our purposes, however, is an external factor: the intensification of a managerial ethos, with its attendant vocabulary and decision-making hierarchies, in the so-called 'corporate' or entrepreneurial university. From this perspective, what distinguishes Frankfurter's and Brennan's university from Kennedy's and Scalia's is not so much a change in legal philosophy as a shift in the role of higher education, for what the corporate university names is a *de facto* realignment of post-secondary education as private good. This realignment affects institutions across the spectrum of types, sizes, and funding sources. It influences both teaching and research, not only in an enhanced sensitivity to student interests and the prerogatives of corporate sponsorship, but in a distinct vocabulary of outcomes, productivity, and performance metrics. While elite liberal arts colleges may still uphold an older, pastoral ideal of public service, they are increasingly outliers in an industry characterized by dramatic reductions in public subsidies for state colleges and universities, market-driven tuition increases, expansion of sponsored research agreements, sharper differentiation between status-rich and status-poor disciplines, and a disproportional increase of administrative personnel *vis-à-vis* full-time teaching staff (see Bok, 2003; Kirp, 2003; Geiger, 2004; Engell and Dangerfield, 2005; Newfield, 2006).

To the extent that American universities have recast themselves on the model of what might be called a market-oriented bureaucracy, employment relations on campus will also shift to reflect norms appropriate to this type of organizational structure. Students thereby become consumers, professors line managers. Although faculty are nominally hired for their subject-matter expertise, there is also a clear, and clearly articulated, chain of command to be followed by all those who wish to 'rise in the company'. Where tenure protection has been eroded, employment mobility restricted, and the discipline deprived of consistent external funding, deference to institutional control becomes a prerequisite for professional success. In fact, one's ultimate authority in many cases ceases to be professional at all, no longer an

appeal to quality of mind or thoroughness of training, but a reliance on internal performance reviews that place correspondingly greater emphasis on institutional fit and loyalty.

As a reflection of organizational life, First Amendment jurisprudence has simply taken the university at its own valuation. To do otherwise would be to practice a species of judicial activism currently viewed as meddling in the internal affairs of other branches of government and institutions in the private sector. It matters little that judicial deference is invariably a disguised form of judicial activism. It does not even matter very much that the corporate model advanced in higher education is itself moribund in many sectors of the business world – the marketplace of ideas transmogrified into the widget factory of old while the widget factory has reinvented itself as the innovative corporate campus. This lack of isomorphism is something for the universities themselves to resolve through the mechanisms of market accountability. Also to be submitted to the crucible of quantifiable supply and demand is the question of academic freedom. If much of what the university does, even in teaching and research, is no longer seen as independently academic, why should legal protection exist for its freedom? If higher education does not principally supply a public good, there can be no special status for professorial speech that purports to do so.

The coordination of legal and institutional philosophy on the question of academic freedom suggests, therefore, that barring the kind of third-party government interference seen in the 1950s, First Amendment protection will cease to play a significant role in the development of the doctrine. This will not remove the courts altogether as a forum for rights violation. As both *Garcetti* and *Hong* point out in their holdings, whistleblower statutes and existing state law covering employer–employee relations may provide would-be litigants with additional avenues of redress. The patchwork nature of these provisions, however, suggests that future litigation is likely to focus less on administrative code than on breach of contract. Unions may have an expanded role to play here, but the emphasis is likely to settle on another, and potential more powerful, source of protection for academic freedom raised at the beginning of this essay – faculty handbooks.

This new emphasis is already observable. Parallel to the academic freedom suits in the wake of *Garcetti*, and partly in response to them, American universities have begun to embed more definitive protections in what are viewed as campus faculty conduct guides.[7] The advantages of internalizing such disputes are clear. If the university as institution is to be accorded maximum deference in managing its affairs, this is one 'affair' that it can be expected to manage carefully. Attracting the best faculty will require organizational concessions to what academics have traditionally valued. Because handbook provisions related to academic freedom will in most cases be introduced, and in all cases ratified, by faculty senates, new hires will also be able to gauge the strength and balance of campus shared governance. Accreditation bodies might usefully include, as they infrequently do today, an examination of faculty handbooks in their program and institutional review.

To sum up: changes to the perceived function of higher education in the United States over the past 40 years have affected the jurisprudential view of academic freedom in important ways. As the university becomes both more bureaucratically complex and increasingly market oriented, the argument for faculty speech as integral to the making of a good society, rather than necessary for carrying out routine employee tasks, weakens. Courts, in turn, are less likely to extend constitutional

protection to alleged violations of free speech, opting instead for a more rigorous application of the doctrine of institutional deference. In the absence of statutory protection for academic freedom, and in the face of patchwork legislation covering whistleblower claims in the workplace, faculty handbooks have increasingly become the vehicle for determining the status of academic freedom on campus. There are financial benefits to an internalization of academic freedom disputes, though one likely consequence will be a Balkanization of rights and responsibilities across the American higher education spectrum. What faculty are free to do, in other words, will arguably be determined more and more by contractual negotiation rather than the application of a uniform professional standard.

Decentralized steering

To what extent are these features of academic freedom in American law and higher education observable elsewhere, either by direct influence or by parallel response to common circumstance? The framework is in place: an American-style campus governance model, designed to render university life more efficient, more accountable, in some ways more businesslike, has been taken up as a reform initiative internationally. As Simon Marginson and Mark Considine (2000) conclude, '[t]here is gathering evidence ... that university systems (always prone to powerful exemplars and global imitation) are moving closer to each other'. In the UK and Europe especially, the ensuing confrontation between tradition and innovation, an older clerical sodality and a new managerial elite, has been dramatic and in many respects destabilizing. What are the consequences of this tension for the status of academic freedom, both as a variant of what we see in North America and as a regionally specific development?

In many respects, the UK has followed the US closely in its policy objectives for higher education over the last half century. Both systems were characterized by a deliberate democratization of entry after WWII, its impetus broadly meritocratic.[8] A Cold War emphasis on science and technology as the hot core of a newly exfoliated 'knowledge economy' provided funding and fueled ambition (see Bell, 1973; Gouldner, 1979). The strategic interest of the nation-state mandated public subsidy of the best and brightest, not merely the wealthiest and best connected, through competitive university programs. In Britain, the *Robbins Report* (Committee on Higher Education, 1963) encapsulated the twin ideals of expanded access and rigorous training. As Martin Trow (1989) and others (for example, Soares, 1999; Anderson, 2010) have remarked, however, the mood of openness and accommodation that characterized the *Robbins Report* recast rather than abandoned the model of elite education: privilege remained, but now as a specifically academic or intellectual cadre.[9] Robbins, therefore, envisioned a steady increase in enrollments without a clear sense of the ideological and infrastructural changes this would entail. As it happened, expansion was also more dramatic than had been expected. Full-time student matriculation rose by a factor of 2.5 between 1954 and 1969, then tripled again in the 1970s. By 1994, after the creation of new universities from the polytechnics, student enrollments in England exceeded one million, with more full-time teaching staff than there had been undergraduates 50 years earlier (Court, 1998).

Principal among the infrastructural factors that 'trapped' Robbins was the unarticulated need for an expanded bureaucracy to manage accelerated enrollments. The assumption that universities had the internal resources for expansion proved illusory,

not merely because no pool of trained support staff existed, but also because the 1960s and 1970s saw an increase in institutions as well as matriculants. The so-called plate-glass universities might have been founded on optimism and good intentions, but their very newness, with higher concentrations of non-traditional students and junior faculty, counseled rigorous accountability. The mix of recent and established universities also placed a heightened premium on system steering that exceeded the traditional advisory role of collegial organizations such as the University Grants Committee (UGC). In the publicly funded system of higher education that Britain had adopted after WWII, government was the natural choice to provide the requisite oversight and direction, yet at the very moment when the clamor for programmatic guidance was loudest, the philosophy of effective public service went abruptly in the other direction: with the Thatcher revolution in 1979, smaller, cheaper, decentralized government was touted as the antidote to a putatively bloated entitlements system. As with any other public entity, higher education funding would be rationalized, and where possible reduced.

The upshot of this disarticulation between sector needs and government policy was a compromise in which universities would initially agree to reform themselves. Unsurprisingly, the model for reform was borrowed from the theory of the firm. If only universities could be run like businesses, with well-modulated internal command and incentive structures, much of the accountability and steering problem would resolve itself. Government might then step in, as it did with the first Research Assessment Exercise in 1986, to provide the performance-based metrics for institutional self-auditing.[10] The *Jarratt Report* (Committee of Vice Chancellors and Principals, 1985) provided the blueprint for the new organizational vision. As Roger Buckland (2004, p.251) aptly remarks, '[p]ost-Jarratt, UK universities were expected to become more like businesses'. Some institutions, Warwick among them, had already embarked on entrepreneurial revenue-generating strategies of their own (Clark, 1998).

In the space of a quarter century, therefore, an 'audit culture', as Stefan Collini (2004) has referred to it, entrenched itself as campus orthodoxy. Whereas Robbins still envisioned the university in Newmanesque terms as a place where 'cultivated men and women' developed 'general powers of the mind', the Higher Education Act of 1988 explicitly sought to codify the rights and offices of managed learning. A decade later, the *Dearing Report* (National Committee of Inquiry into Higher Education, 1997) retained only the odd mention of the 'dignity of thought' in its foursquare appeal to 'the central role of higher education in the economy'. Both new tenure and the UGC had been abolished in 1988, and the *Dearing Report* focused on the reform of another key stakeholder, the student-consumer. Famously, student fees were broached for the first time since WWII as a mechanism for monetarizing the value of a university education to its principal beneficiaries. In 1998, David Blunkett, the education secretary, duly scaled back student grants and introduced a graduated fee schedule for first-degree seekers.

The adoption of rationalized education services that Dearing advocated shows its colors nowhere more spectacularly than in a tortuous metaphor yoking the public and private (economic) costs of university study. According to Dearing, a too-scrupulous adherence to mental cultivation for its own sake fails 'to recognise value that is properly recognised in normal commercial accounts, [leading] to costly arrangements for securing that value by sale of the loan book, which can be ill afforded'. Higher education as mortgage portfolio: a more undonnish comparison could

scarcely be imagined, or one more consistent with what the *Dearing Report* elsewhere calls its mission to 'continual[ly] search for more cost-effective approaches to the delivery of higher education'. Subsequent white papers have doggedly pursued this mission in other precincts, from the *Lambert Review* (Independent Review of Business–University Collaboration, 2003) on business–university partnerships to the most recent *Browne Report* (Independent Review of Higher Education Funding, 2010) on fees. Browne, in fact, explicitly downplays the public interest role of tertiary education – its coffin, perhaps, not entirely dissimilar to the famous egg-bespattered Rolls hurrying Charles and Camilla to the theatre as student protests raged in Parliament Square.

Viewing these events in retrospect, two things stand out – the speed of the transition from public good to private investment and the comprehensiveness of change. If UK tertiary education gives the impression today of being even more commercialized than what we find across the Atlantic, this is the pendular effect of a sector long able to keep the market at arm's length. After WWII, access was effectively decoupled from student financing: Oxbridge entry might still have been skewed toward the privileged, but once accepted, students were not required to hunt for loans or bursaries. Scientific research became increasingly important in UK institutional budgets with the Cold War, but private sector partnerships played a negligible role in developing research funds. Then, too, Britain has never developed a standalone equivalent to the American liberal arts college, which has in many instances been able to distance itself from the least desirable intrusions of a commercialization ethos.[11] In fact, with the integration into the university system of the polytechnics in 1992, the British higher education sector became more isomorphic than at any other point since 1830. Uniformity, in turn, facilitates the flow of policy objectives through the system with less adjustment or dilution.

What effect has this accelerated rationalization of higher education in Britain had on academic freedom protection in the UK? The question is somewhat difficult to answer. Formal discussion is rare, and legislation non-existent, on academic freedom in Britain prior to 1988, when the Education Reform Act eliminated academic tenure. The implication, of course, is that secure employment serves as an effective safeguard for controversial opinion, yet it is also the case that collegial self-governance, to the extent it existed in British universities in the earlier post-war period, would have tended to mitigate a formal articulation of principles.[12] The need for codification arises, one might argue, only once the threat of repeated violation is foreseen.

This leaves us with post-1988 material. Here the record is much fuller. Cases of alleged violations of academic freedom have been widely reported: the Chris Brand controversy at Edinburgh, for example, the insufficiency of Sam Richards' apology in Darlington, the Nottingham Two episode, Frank Ellis' outspoken defense of variances in intelligence by race, current calls to sack Satoshi Kanazawa for his claim that black women (but not black men) are hormonally disposed to inferior attractiveness, and so forth (see Corbyn *et al*., 2010). Behind many of these controversies is faculty anger over perceived misapplications (or non-applications) by university administrators of academic freedom protections set forth in another provision of the 1988 Education Act. A post-tenure consolation, Part IV, Section 202(2), instructs the new body of University Commissioners to 'have regard to the need' for the following:

> (a) 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;
>
> (b) to enable qualifying institutions to provide education, promote learning and engage in research efficiently and economically; and
>
> (c) to apply the principles of justice and fairness.[13]

For their part, individual universities, principally those of pre-1992 charter, have incorporated some or all of these protections into their statutes. Sussex, Nottingham, and Loughborough reproduce them verbatim. Bath University (2011) does also, but adds a separate 'code' on academic freedom that outlines both rights *and* responsibilities. Among the expanded protections is the right accorded any member of the university '[t]o discuss the University's affairs, in appropriate media'. This is to be balanced against the corresponding obligation to 'enter into such discussion with integrity and charity [!], not representing personal opinions as those of the University'. Statutory provision is extended by implication, if not explicitly, to employment contracts.

What is conspicuously absent here is any involvement of the courts. Although this lack of judicial review is not as puzzling as American observers might think, it has inhibited the clarification of language that is appropriate to policy documents and legislative statutes but that remains ambiguous in application. How is one to decide what counts as 'charitable' criticism under Bath's academic freedom code? Where does one draw the line between fair and unfair in Section 202(2)(c) of the 1988 Education Reform Act? Are 'controversial and unpopular' opinions limited to those within one's field of scholarly expertise, or do they include protection for commentary on general matters of public concern? Is pointed criticism of institutional practices included, or public airings of the incompetence or dishonesty of one's colleagues? What does it mean, finally, that the commissioners in the transitive phrase in Section 202(2) should 'have regard to the need' of certain protections of academic speech: that they are required to enforce these protections wherever and whenever possible, or simply that (a) through (c) should be kept in mind under a best practices model of good governance?

This lack of judicial review is the sharpest contrast in a common reorientation of academic freedom in the US and the UK. The incorporation of academic freedom provisions in university statutes and codes, however, is similar in many respects to current attempts to revise academic handbooks on American campuses, with the important proviso that the latter tend to be less top down in their drafting. The legal climate in the US suggests that the First Amendment will continue to be viewed unfavorably as a safe harbor for academic speech. In the absence of targeted state legislation, new avenues of legal redress might be opened through the more precise definition of faculty rights and obligations in university employment contracts. With adequate internal review procedures in place, contractual specification would then also serve as a pre-emptive tool. That this tool has not always worked in the UK suggests that a layer of safeguarding between the macroeconomic policy orientation of courts and legislatures, on the one hand, and the microeconomic concerns of individual universities on the other, may be the key to a longer term balancing of interests between faculty and institutional claims to autonomy. To investigate the possibilities of such a middle-range solution, we

need to have a quick look at the current status of academic freedom in the EU as a whole.

Charta and charter

In common with the US and the UK, a push to rationalize university operations has taken hold on the Continent. User fees are now the norm in most EU state university systems as they were not 20 years ago. In Germany, first degrees have been shortened, universities given greater autonomy in selecting students, and the privatization of institutions bruited. While a standardized degree length is mandated for all signatories of the Bologna Declaration, institutional autonomy and funding initiatives have been undertaken at the level of the *Laender*. In the lapidary formulation of the Minister of Higher Education in Baden-Wuerttemberg, '[w]e're moving from a Republic of Professors to an entrepreneurial university' (Landler, 2006). While there has long been resistance to Anglo-Saxon models of reform, and while the German university system remains in many respects more academic and less demand-driven than its Anglophone counterparts, the stress on enterprise signals a commitment to organizational management very different from faculty self-governance.

Jacques Attali's report, subtitled with Gallic bravado '300 decisions for changing France', proposes, among its many recommendations for economic and social restructuring, radical alteration in a heavily subsidized, but also highly decentralized, higher education landscape (Attali, 2008). As in Germany, competition among universities is to be introduced through government grants and institutional tiering. Ten 'poles of excellence' are to propel France nearer the top of the global higher education pyramid. These 10 core institutions, in turn, are to generate 80% of their funding through commercial partnerships and sponsored research.

These modernizing initiatives may turn out to be ephemeral – French employment law is notoriously detailed, and accords both individual institutions and their faculty explicit protections from external control. On the question of academic freedom, Section L952-2 of the *Code de l'Education* allows academic staff independence of speech in teaching and research subject to '*les principes de tolérance and d'objectivité*', a provision similar in formulation (and of equal vagueness) to Section 202(2) of the 1988 Education Reform Act.[14] Most striking in both the French and German contexts, however, is the concentric arrangement of statements on the rights and obligations of university faculty. Many of these statements are hortatory in nature, their power soft rather than hard, imitative instead of coercive. Central among these is the *Magna Charta Universitatum*, drafted in 1988 for the 900th anniversary celebration of Bologna University and signed by some 80 European university rectors (European University Association/University of Bologna, 2011). Here, under 'Fundamental Principles', we find an emphasis on institutional autonomy from state interference as well as a statement advocating research and teaching as 'morally and intellectually independent of all political authority and intellectually independent of all political authority and economic power'.

The safeguarding of research integrity from industry special interests is clearly aspirational. A strong defense of academic freedom in European universities, however, is more than compensatory rhetoric. It supplies a discursive architecture through which future policy is shaped. In the event, the Salamanca Declaration of 2001 and the Charter of Fundamental Rights of the European Union incorporate

these principles as well as parallel statements in the European Convention on Human Rights and Fundamental Freedoms (1950) and (in the case of the revised Charter of Fundamental Rights) the failed European Constitution (European Union, 2000; European University Association, 2001). The Charter of Fundamental Rights is of particular note insofar as its 2009 ratification in the context of the Treaty of Lisbon allows for judicable claims in European courts provided that these fall within the ambit of the enforcement of existing European Union law.[15] This brings the charter into closer formal alignment with yet another circle of academic freedom protection on the Continent: statutory and constitutional frameworks. As Terence Karran has shown, these frameworks are uneven but broadly overlapping. Thirteen EU members, including Italy and Germany, have enshrined some form of academic freedom in their Constitutions. With the exception of Greece and Malta, moreover, all EU countries have national legislation relating to 'individual faculty freedom and/or university autonomy' (Karran, 2007). Several (Finland, the Czech Republic, Hungary, and Slovakia among them) have articulated protections at both constitutional and statutory levels.

No discussion of academic freedom in Europe would be complete, however, without mention of the administrative structure that grants tenure to civil servants generally. Tenure as an institutional grant in the US has long operated as formal protection against angry presidents, benighted trustees, and manipulative colleagues. Its absence might therefore be expected to increase the need for compensatory safeguards, legal or statutory. This can be seen in the US and to a lesser extent in the UK. Where tenure remains a civil service prerogative, as is the norm on the Continent, conflict is encouraged to remain in-house. At the same time, however, civil servant status submits academics to long-arm control by central planning bureaux and education departments to an extent no longer seen in the Anglophone context. This combination of greater direct control over conditions of employment and greater security against retaliation for controversial speech helps account for the curious legal status of academic freedom rights in the EU. Historically aspirational, academic freedom is also nominally protected through targeted legislation; yet the degree to which safe harbor can be enforced through the courts is unclear.

By way of conclusion, a commercialization ethic has demonstrably affected the tone and delivery of higher education on both sides of the Atlantic over the last 40 years. An aggressive focus on operational efficiency, on the one hand, and demand-driven consumerism, on the other, has eroded faculty self-governance and with it, certain features of academic freedom. Whereas US courts have recently adopted a philosophy of stronger institutional deference, the statutory patchwork of academic freedom protections in the UK and the rest of the EU has yet to undergo a judicial testing. Evidence suggests a preference for internalizing academic freedom disputes on both sides of the Atlantic in response to the restriction of constitutional safe harbor in the US, as an implementation of statutory law in Britain, and as the traditional form of conflict management in civil service bureaucracies on the Continent. The growing importance of institutional negotiation in the determination of academic freedom on American campuses may trigger very different degrees of protection by type and status of university in the coming years. Differentiation of this kind is also underway in the UK.

It is worth considering whether or to what extent conflicts between administrative control and faculty opinion can be defused by rethinking academic freedom in the framework of responsibilities as well as rights. This might include what Jan

Currie *et al*. (1996) identify in *Academic Freedom in Hong Kong* as the Confucian tradition of intellectual investment: one in which the clerisy takes seriously its civic duty to speak for, and with, the community in public debate. Along similar lines, Andre du Toit (2001, 2005), a South African education policy analyst, proposes a republican interpretation of academic freedom, one invested in the preservation of values instead of rights. One might think that republican solutions must fail if there is no republic of letters to shape. What may also emerge, however, are new perspectives and a new vocabulary to jog us out of dogmatic slumber, identifying alternatives to textbook models of performativity that the business world itself has long abandoned.

Notes

1. *Garcetti v. Ceballos*, 547 US 410 (2006).
2. *Dartmouth College v. Woodward*, 17 US (4 Wheat.) 418 (1819).
3. More precisely, a 42 USC §1983 claim as vehicle for asserting substantive rights contained in the First and Fourteenth Amendments. Because states cannot be sued for damages, a USC filing is the conventional mechanism where monetary awards are sought rather than declaratory or injunctive relief.
4. And therefore that the Pickering test no longer applies. See *Pickering v. Board of Education* (391 US 563 [1968]), establishing a two-stage analysis for constitutional protection of public employee speech that: (1) the speech in question 'be a matter of public concern', and (2) the public interest in the exercise of such speech outweigh the state's interest in promoting efficient service. Note that the Pickering test is itself an erosion of the strict scrutiny standard used to invalidate government regulation of constitutionally protected rights. See the famous footnote 4 of *United States v. Carolene Products Company* (304 US 144 [1938] at 155).
5. *Hong v. Grant*, 516 F. Supp. 2d 1158 (2007); *Stronach v. West Virginia University*, 631 F. Supp. 2d 743 (2008); *Gorum v. Sessums*, 561 F. 3d 179 (2009).
6. Astonishing, because the District Court's ruling was upheld on Eleventh Amendment grounds that did not form the basis of Hong's appeal (though it was raised by plaintiff at trial in 2007). See *Hong v. Grant*, docket number: 07-56705 (2010) [Ninth Circuit Appeals' Court: unpublished].
7. An American Association of University Professors report (2009) identifies the development and dissemination of 'policy statements that could be adopted at the institutional level' (p.85) as a first step in reformulating protection in such handbooks.
8. I use 'UK', 'Britain', and 'England' interchangeably, despite the legal and administrative distinctness of higher education provision in Scotland, Wales, and Northern Ireland. This convention sacrifices exactness, but avoids otherwise unnecessary footnoting.
9. This is not to say that social privilege does not influence assessments of intellectual merit; quite apart from supposed bias in assessment mechanisms, superior access to education resources will provide a head start for those with the greatest amount of social capital.
10. It is worth noting here that while the initial Research Assessment Exercise was overseen by the University Grants Council, that body was subsequently eliminated and replaced by the Higher Education Funding Council of England (HEFCE), most of whose senior managers come from outside academia.
11. The closest organizational match for a Williams or a Kenyon is a Balliol or Trinity Hall. Oxbridge colleges, however, do not have degree-granting charters.
12. Significantly, this remains the case for the majority of the six ancient universities.
13. *Education Reform Act 1988*, IV.202(2)(a)(b)(c).
14. *Code de l'Education*, 952-2, available from http://www.legifrance.gouv.fr/home.jsp [accessed July 2011].
15. For instance, where state exercise of an existing law violates a charter provision. A number of significant exemptions are also written into the Lisbon document: in the UK,

for example, courts are prohibited from hearing challenges to existing national law where it conflicts with charter provisions.

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