Undermining Academic Freedom from the Inside:
On the Adverse Effects of Administrative Techniques and Neutral Principles
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The legal framework within which academic freedom is understood and applied is fairly well understood (e.g., here, and here). I speak today to that part of academic freedom that tends to be overlooked; that part of academic freedom that is bound up with the sausage making that is the everyday life of developing and implementing rules systems and structures for the operation of the university; that part of academic freedom that appears to embrace the appearance of fairness, of even handedness, but which does not deliver its promise; and that aspect of academic freedom that provides the appearance of protection even as its substance is undermined in the service of other values. I focus today particularly on how these aspects of academic freedom adversely impact faculty from traditionally underrepresented groups.

To some extent academic freedom has been undermined by the active by both administrators and faculty. Institutions increasingly appear to encourage its use as a fetish object. Like other broad concepts that are accepted as foundational to the ideology of group cultures, academic freedom has been turned into an abstraction of the sense of institutional self-consciousness--like free enterprise in the United States. But in the process the concept has been stripped of much of its substance and focus. One invokes academic freedom often, if one is an administrator. But one does so to cover a multitude of re-formulations of the relationship between faculty and institutional administrative structures *in which the actual character of what is applied as academic freedom can be substantially reshaped*. And faculty have been complicit in its transformation from a more robust focus on substance, to its use as a slogan. Over the course of this conference I have heard academic freedom invoked over and over, but shorn of any real substance, and scarcely capable of any disciplined application. The AAUP standards are invoked with far greater regularity than they are studied and applied in the shifting contexts of evolving U.S. academic cultures and operations. That complicity is made easier for two reasons. The first is that the mechanics of the transformation of academic freedom appear neutral and that appeals to the basic premise of fairness as a legitimacy enhancing evaluation tool. The second is that these techniques tend to divide faculty by rewarding some at the expense of others. I have spoken to this aspect especially in the context of faculty from traditionally under represented groups (Larry Catá Backer, Being a Part and Standing Apart: On the Culture of Law Faculties (Nov., 2007).

More troubling, perhaps, university administrative groups, individually and collectively through their trade organizations (e.g., the AAU (see here), CIC (see here) and the NACUA (see here)), appear to be creating managerial structures that preserve the forms of academic freedom even as its objectives are undermined—or as might be suggested in the language administrators tend to use to mask their activities--*to re-frame academic freedom to complement changes in the market for consumption of those goods universities and their employees produce*. Here especially faculty become complicit mistaking the outward appearance of neutrality for the imposition of systems strategically structured to shift power relationships and give greater effective control over the "output" of faculty "resources" from the apparatus of faculty self regulation to the administrative apparatus of the university. For minority faculty this re-framing, this move toward the reduction of academic freedom to fetish, poses heightened danger. It is to the mechanics of that reshaping of academic freedom, with the sometimes enthusiastic complicity of faculty, that I now briefly explore.

Academic Freedom might be most usefully understood in its three traditional components, each of which invokes academic freedom principles in sometimes very different ways (e.g., AAUP 1940 Statement as interpreted). . These three components consist of academic freedom:

1. In the *classroom;*
2. Touching on *research and its dissemination;*
3. Relating to activity that constitutes *shared governance;*

The three might be approached differently in terms of the crisis of austerity, academic freedom, and diversity in the legal Academy, which is the focus of this panel. And the three must be approached

differently with respect to the techniques used to undermine each in turn, especially for minority faculty (rather faculty from traditionally marginalized groups).

1. In the classroom:

Here faculties across the U.S. academy find themselves squarely in the middle of pedagogical revolution they no longer lead and usually ineffectively resist. Here one is witness to the most exposed evidence of shifts in authority over the classroom, from faculty elsewhere to administrators or regulators of every stripe. The central notion, one echoed recently with approval by CIC provosts in its form as so-called "adaptive instruction" (CIC Ad Hoc Committee for Online Learning, CIC Online Learning Collaboration: A Vision and Framework (June 15, 2013)), *is the imperative to de-center faculty from the processes of scholarship and teaching*. But equally, the state, and those who seek to use it to leverage their factional power, has also become much more involved in the shaping of the classroom and the disciplining of instruction.

The techniques of managing classroom have become a battleground not just for control over the classroom environment, but also as a site for the great cultural contestations that have been a part of U.S. discourse over the last half century (e.g., here). Among the most recent and perhaps contentious are trigger warnings, sensibility, offense (e.g., p. 19 ¶ 9), civility, conformity to faculty standards. All can be used to silence minority faculty voices (e.g., Chesler and Young, *Faculty Members' Social Identities and Classroom Authority; A Survey of Academic Incivility at Indiana University*, Bloomington (Preliminary Report, June 14, 2000). For the minority group faculty member, the promise of these movements toward protection can be as easily turned on them as they seek to discuss issues or consider questions from new or unconventional perspectives. Where these techniques might well have started as application of principles to which there could hardly be objection, they might well become instruments for disciplining faculty who fail to conform to the expectations or prejudices of students or administrators (e.g., "Sandusky's Ghost" and the Weaponizing of Scandal--Administrative Disciplining of Faculty at the University of Colorado (Dec. 24, 2013).

As important, these managerial techniques have now spilled over to the management of course content and program delivery in way that tend to empower middle level (deans) and senior level (provosts) administrators. There are a number of tactics that are increasingly used. What makes these potent is the way that administrators have appropriated the rhetoric of neutrality and fairness to mask instrumental policy choices. And the object--to ensure that faculty will not assert their authority, founded in expertise, to serve as an accountability mechanism for administrative policy choices. In law schools, and in the spirit of never letting a good crisis go to waste, has been the rise of campaigns to revamp the curriculum to "get back to basics" in light of crisis in business of legal education (consider e.g., here). There are several consequences that may impact traditionally underrepresented faculty more acutely. The first is the development of course hierarchies in which basic (traditional and conventional) courses are favored, and others are disfavored or marginalized. Some are re-cast as "fluff" (especially courses touching on theory or jurisprudence), others are segregated as "advanced" or "specialty" courses that may be taught only after the basics are covered.

It is in the construction and maintenance of this hierarchy that mid level administrators (deans and their growing number of assistant and associate deans, plus staff) acquire authority over both courses and programs to study that tend to adversely impact academic freedom, especially for traditionally underrepresented groups. The courses on feminism, on critical race theory, on poverty law, on international and comparative law tend to get short shrift in favor of those courses traditionally part of the law school curriculum. Faculty from traditionally underrepresented groups, effectively, may be shut out of representation on the curriculum as the views and knowledge they bring is marginalized in accordance with the apparently neutral criteria applied to select among course offerings. And advocacy courses, clinics especially, might suffer as well, despite those who seek to note their utility (see e.g., here). All of these techniques, and their implementation undermine academic freedom by using neutral categories to increase the transaction costs of certain behaviors--direct prohibitions and control are unnecessary when neutral appearing criteria may be used instrumentally to achieve a particular objective.

That objective of control through neutral categories and processes may be in evidence as well in the imposition of substantial procedural hurdles to rolling out disfavored courses. Inter-disciplinary courses, for example, my be subject to substantially more work than others and discourage busy faculty from investing the time. Cross listing courses may pose similar obstacles. And beyond that, course assessments may be used as a management tool to discipline the assertion of academic freedom and discipline faculty "outliers" for classroom engagement that is deemed worthy of suppression or control (e.g., Timothy Reese Cain, *Assessment and Academic Freedom: In Concert, Not Conflict* (National Institute for Learning Outcomes Assessment Occasional Paper No. 22 Nov. 2014)). The movement toward neutral sounding learning objectives strategies provides an important emerging case in point (e.g., On the Uneasy Relationship Between Learning Outcomes Assessments, Shared Governance and Academic Freedom--A View from Beneath the Administrative Apparatus at Penn State (April 16, 2015)). That these are not understood for their potential threat to academic freedom if misused undermines a faculty's ability to preserve its hard won prerogatives in the face of emerging new bureaucratized techniques of management and control.

2. Research and its Dissemination:

Though research and its dissemination may be a special concern of the U.S. Constitution, as enshrined in principles of academic freedom (see, e.g., here), like classroom conduct, academic freedom in research embraces principles of non-interference subject to very broad limits (AAUP 1940 Statement as interpreted). But like classroom conduct, it is subject to undermining through the application of neutral appearing bureaucratized practices that appear to advance fairness but may not. Some of these techniques may be especially threatening to faculties from traditionally underrepresented groups.

In particular, assessment matrices have become quite popular both in the United States and elsewhere. These tend to marginalize work and produce a “neutral” method of reducing the value of scholarship. These tactics include creating value structures for measuring placement, “impacts” analysis”; using “data” to manage the sorts of scholarship that are valued. Related issues include the ownership and control of creative work.

The objectification of the assessable individual is itself an inevitable product of the embrace by universities worldwide of a self conception increasingly described in terms of production, of learning factories (see here, here, here and here). Impact analysis, hierarchies of publication, indeed all of the techniques of assessment, are capable of instrumental use that have adverse effects on academic freedom while appearing to do the opposite (see generally here).

The objectification of value measures creates value hierarchies in faculty work reflecting the tastes of the institutional master over that of the servant. At many universities the differences in valuation strategies among faculties and the institutional masters they serve (at least to the extent of their legal relationship; it being assumed that faculty are not deemed comprehensively under the control of their institutions with respect to the sum of their lives and creative activities) are evident in a number of ways. Most universities measure the value of scholarly production in a number of ways that tend to skew the result in ways that advance quite particular and arbitrary institutional interests. Consider the popularity of measuring research effectiveness principally by the amount of funds secured through grants and other sources of outside funding. Those measures tend to increase the value of faculty in fields where such outside source ecologies are well established as against faculty in fields where outside funding is either irrelevant to production or within which lower aggregate funds are available. But the measure does more than produce uneven spaces for measurement of effectiveness across fields, it also signals the sort of behaviors that are valued as against alternatives. (("Faculty Assessment--From "Man is the Measure of All things" to "The MEASURE is Man"" (April 2, 2015)).

These measures tend to have a particularly adverse effect on faculty which are measured against standards that tend to reinforce conventional values and approaches. Law schools that establish measures grounded in hierarchies of prestige of publication venues will tend to reinforce a system in which minority faculty face substantial obstacles. Emerging scholarship in new areas, theoretical articles considering new and experimental ideas, and sometimes the specific concerns of people in traditionally marginalized groups,

may not be the sort of material that is easily placed in traditionally highly ranked journals. The problem is not necessarily the contribution but the means of measuring its quality and use. Data generation and interpretation has not been sensitive to those issues and contribute, in subtle ways to undermine academic freedom by creating the appearance of a neutral site within which academic research might be assessed. But there is an added element, one reinforcing exclusion that has been well described elsewhere, for example through the work of Richard Delgado (see e.g., here). Academic freedom here faces a double bind--it must assert accountability as against administrators seeking to use neutral assessment techniques instrumentally, and it must work against the prejudices of conventional disciplinary communities that might be consciously or not using the rules of academic prestige markets to manage power relationships within a discipline.

3. Activity that Constitutes Shared Governance:

It is in the context of shared governance that much media attention, and discussion, appears to have risen to cultural consciousness beyond the narrow confines of law schools or the greater community of university academics. I will not spend much time on this aspect of academic freedom except to note some of the more subtle techniques through which academic freedom may be undermined in this context.

Retaliation and reprisals loom large as techniques for undermining academic freedom (see, e.g., here). But retaliation and reprisal becomes far more effective where the academic enjoys fewer protections (under law, university rules or academic custom). De-professionalization--the rise of non-tenure and tenure track faculty produces a larger class of faculty that may be chilled in the exercise of shared governance obligations. That chilling effect can be direct--the fear that deans or other administrators may terminate contracts--or indirect, the fear that administrators will constructively burden a faculty member by the manipulation of everything from course load and course assignments, to teaching times and resources available to teach. Administrators are sometimes good at producing pain that does not cross a line, and the connection with particular conduct may not be provable as a matter of law, but which may be read as such by those affected and taken as a "warning" with sometimes dramatic effect.

Participation in shared governance may be affected through structural innovation as well. One of the most interesting issues facing universities, as institutional actors, is the future of shared governance, especially in the effectiveness of shared governance with the institutional voice of the faculty. Universities have sometimes succumbed to the temptation of invoking formal institutional structures to mask efforts (deliberate or unconscious) to undercut the role of faculty in university governance. (Backer, Larry Catá, Between Faculty, Administration, Board, State, and Students: On the Relevance of a Faculty Senate in the Modern U.S. University (February 10, 2013)). I have considered, for example, the academic freedom in shared governance adverse effects of reliance on "task forces" to end run institutional faculty shared governance organizations (e.g., here), or compromise it (see, e.g., here), though they might sometimes serve a useful role in administrative accountability (see, e.g., here).

More insidious, perhaps, and especially at some law schools, is the trend to expand the scope of administrative prerogative and shrink the scope of matters with respect to which governance is "shared." This has been the case, for example, in contemporary battles over the power to impose conditions on benefits for faculty (see, e.g., here, here, and here). Some of this is structural and a reflection of the changing obligations of faculty--with respect to teaching and research, for example. Some is a function of fear--of retaliation. And some is a function of the growing specialization in university administration that may require substantial investment of time in matters over which faculties may play only a marginal (and perhaps usually couched as consultative) role. But some is a function of the sense that faculty have no business sharing governance with what is increasingly seen as the exclusive domain of administrative masters of educational institutions.

And even more insidious, and frankly beneath the dignity of the administrative offices from which this sort of nonsense originates, are insinuations that faculty role in shared governance must be discounted because faculty are “interested” in the object of governance shared. This is usually couched in terms of the faculty's conflict of interest—perhaps the old issue of labor representation on boards of directors of enterprises.

What can be done and how might the AAUP be useful? I can offer five very preliminary suggestions.

First, the AAUP must seek to overcome its marginalization, at the hands of institutional administrators and their trade organizations, as irrelevant as nothing more than an interest group or union organizer for at risk faculty. It may be less common than assumed, among administrators, to view the AAUP the way they might view a labor union--adversarial, narrow interest oriented, and easy to detach from the majority of the faculty. Some institutions might seek to create a "pet" or "tame" faculty organization as an alternative to the AAUP and to encourage competition between institutional faculty governance organizations and local AAUP chapters. AAUP might have to do a better job of telling its story in a more contemporary way to contemporary faculties.

Second, the AAUP might have to deal with the much more delicate issue of the privilege of faculty elites who tend to resist AAUP involvement to protect their own status. At one law school that will remain unnamed, a motion to permit full participation and voting by all faculty regardless of tenure status was defeated with only the proponent voting in favor. Afterwards, and in private, some expressed support but fear of appearing to vote in favor because of potential retaliation. Others were quite sincere in their belief that if tenure (and tenure privilege) meant anything it must have to mean the right to vote and to exclude non tenure faculty from substantial or full participation in shared governance, even at the level of the law school. The result was a grudging compromise in which contract faculty were permitted to attend an vote on some but not all matters. More generally, administrations have become quite adept in pealing key faculty by privileging some faculty and pitting groups of faculty, hierarchically arranged in terms of privileges, against each other.

Third, the AAUP might consider putting more and perhaps sharper teeth in the governing documents and standards. The AAUP Standards and interpretive statements are worthy and indispensable statements of principles, principles that may bind together the major and critical stakeholders in university operations. Yet for faculty with no where to turn, they offer much that can be invoked as ideology and little that can be used to combat the subtle and technocratic incursions on academic freedom that appear to be on the rise today. The AAUP might do faculties everywhere a great service were it to develop substantial applied glosses to the standards and interpretive statements that provide simple and direct advice for faculty facing issues on the ground and in the course of dealing with increasingly bureaucratized administration more often resorting to the techniques of management than to the assertion of control through rules.

Fourth, the AAUP might broaden the availability of remedial procedures. AAUP investigations are well regarded and influential, even when they might not be directly enforced. They produce a large body of "caselaw" that serves to instruct faculty and administration on the state of the rules of engagement in relations between university stakeholders and the application of "industry" rules. Expansion of this mechanism and broader availability might provide greater impact in the discourse and debate about academic freedom and its application. The AAUP's willingness to tackle the new forms of undermining, including facially neutral rules, would be a step in that direction, though a difficult one, and one not without risk.

Fifth, the AAUP might do well to devote substantially more resources to technical assistance. An AAUP that is known only for advocacy (generally), formal investigations (specifically), and standard setting (institutionally), provides little of value to the faculty whose daily lives rarely brush up against any of these. *The ready availability of technical assistance*--the availability of AAUP experts (volunteers recruited and trained from across the academic universe) and available for quick response to issues, may do more to socialize faculty and deepen respect for academic freedom cultures than much of the formal work of the AAUP that has been its hallmark activity to date. Technical assistance teams could serve as the eyes and ears of the organization, develop solidarity at the local level, effect efficient socialization, and provide advance warning of potential trouble. It would also serve as a means of mitigating adverse effects of university policies by intervening at a point where education, engagement and compromise might be more likely to succeed.

I appreciate the opportunity to speak with you about some of the more current challenges that face faculty as they seek to move with the times int he defense of a reasonable application of shared governance, of the way in which contemporary crises may affect the ability of faculty to meet these challenges, and of the particular difficulties that faculties of traditionally underrepresented groups, especially in law schools may face in the emerging environment of managed and bureaucratized challenges to academic freedom in the classroom, in research and its dissemination and in exercising shared governance.

Thank you.