ALLIANCE DEFENDING FREEDOM

FOR FAITH. FOR JUSTICE.

THE FREE SPEECH AND ACADEMIC FREEDOM OF FACULTY AT PUBLIC UNIVERSITIES

This memorandum analyzes the free speech and academic freedom protections of faculty at public universities.[1] It focuses on the right of faculty to speak freely in and outside the classroom. Other state and federal laws may provide additional protection against religious discrimination.[2]

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I. There Is No "Right" to Academic Freedom, But There Is a Right to Free Speech for both Universities and Professors

In 1940, the American Association of University Professors released a Statement of Principles on Academic Freedom and Tenure. The "purpose of [the] statement [was] to promote public understanding and support of academic freedom and tenure and agreement upon procedures to ensure them in colleges and universities."[4] "Judge Posner of the [U.S. Court of Appeals for the] Seventh Circuit has explained that the term academic freedom 'is used to denote both the freedom of the academy to pursue its end without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy; and these two

[1] For a discussion of First Amendment protections available to public school teachers, please consult our memorandum on "Teachers' Religious Expression in Primary and Secondary Schools."

[2] For a discussion of these protections, please consult our memorandum on "Religious Employees in the Workplace."

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[4] American Association of University Professors, 1940 Statement of Principles on Academic Freedom and Tenure 3 (10th ed. 2006), *available at* http://www.aaup.org/file/1940-Statement-of-Principles-on-Academic-Freedom-and-Tenure.pdf (last visited Feb. 7, 2013).

freedoms are in conflict.'" *Parate v. Isibor*, 868 F.2d 821, 826 (6th Cir. 1989) (quoting *Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 629 (7th Cir. 1985)). Today, most people understand academic freedom to mean a professor's right to teach, research, write, and discuss any topic of his choosing. Many people even believe it to be a "right" enshrined in the United States Constitution. But typically academic freedom is a promise provided by a university to its faculty through faculty contracts, collective bargaining agreements, or handbooks.

Faculty who work at public colleges and universities are employees of state government, and they do not forfeit their constitutional rights upon entering the public workplace. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). But no court has ever held academic freedom to be a constitutional right per se.[5] Instead, academic freedom embodies the best of what the First Amendment seeks to protect in institutions of higher education.[6]

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). "Because academic freedom rights must ultimately flow from the First Amendment, claims of their violation are subject to all the usual tests that apply to assertions of First Amendment rights." *Omosegbons*, 335 F.3d at 676-77.

At the same time, academic institutions retain a right to their own academic freedom; however, that right is limited to selecting curriculum, hiring professors and setting academic standards.[7] There is a required balance between the institution's academic freedom and that of the professors it employs to teach.[8] If employed to teach biology, for example, the professor must teach

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[5] *Urofsky v. Gilmore,* 216 F.3d 401, 412 (4th Cir. 2000); *see Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991) ("we do not find support to conclude that academic freedom is an independent First Amendment right."); *Parate*, 868 F.2d at 827 (discussing the *First Amendment* concept of academic freedom); *Stastny v. Bd. of Trs. of Cent. Wash. Univ.*, 647 P.2d 496, 504 (Wash. Ct. App. 1982) ("Although academic freedom is not one of the enumerated rights of the First Amendment, the right to teach, inquire, evaluate and study is fundamental to a democratic society.").

[6] *See Omosegbon v. Wells*, 335 F.3d 668, 676 (7th Cir. 2003) ("Academic freedom rights are rooted in the First Amendment.").

[7] *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); *see also Bishop*, 926 F.2d at 1076 (finding a university may impose reasonable restrictions on in-class speech of professors).

[8] *Id.* at 250; *see Peacock v. Duval*, 694 F.2d 644, 647 (9th Cir. 1982) ("Although we recognize the necessity for the efficient functioning of a public university, such efficiency cannot be purchased at the expense of stifling free and unhindered debate on fundamental educational issues.") (citations omitted).

the prescribed material and not creationism.[9] Likewise, if a professor is employed to teach exercise physiology, he may not interject his personal religious views on that topic unless a student asks him a question about those views.[10] However, so long as the professor stays on topic, the First Amendment gives her the creative ability to communicate the curriculum to her students.[11] "A teacher's teaching is expression to which the First Amendment applies." *Wilson v. Chancellor*, 418 F. Supp. 1358, 1362 (D. Or. 1976).

The balancing of an institution's academic freedom with that of the professor naturally spans a spectrum.[12] Typically, whenever the courts have examined the amount of protection a college professor should receive when discussing the curriculum with her class, the courts have supported the professor's free speech right.[13] For example, the Ninth Circuit held that a public college violated a professor's First Amendment rights when it punished him for using sexually explicit topics in an English class.[14] The Sixth Circuit held that a public college professor's use of racial and sexual slurs during a class on social deconstructivism and language was constitutionally protected speech.[15] But when a professor veers outside the curriculum, his free speech erodes quickly.[16]

II. The First Amendment Protects Professors' Speech

Public college professors retain a right to free speech in their teaching, research, writing, and extracurricular activities. As the Supreme Court said so eloquently:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by

[9] *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994).

[10] *Bishop*, 926 F.2d at 1068 & 1076-77.

[11] *See Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1055 (6th Cir. 2002) (holding elementary school teacher's instruction in uses of industrial hemp was protected by First Amendment even though the topic was not contained in the curriculum).

[12] *See Developments In The Law: Academic Freedom*, 81 HARV. L. REV. 1048, 1050 (1968) ("The principal reason for this is the vast difference between the functions performed by the school and by the university. The function of the school has traditionally been viewed as the transmission, rather than the discovery, of knowledge.").

[13] Some courts have not "determined what scope of First Amendment protection is to be given a public college professor's classroom speech," *Cohen v. San Bernardina Vall. Coll.*, 92 F.3d 968, 971 (9th Cir. 1996), but others have, *see, e.g., Cockrel*, 270 F.3d 1036; *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671 (6th Cir. 2001); *Parate*, 868 F.2d 821.

[14] *Cohen*, 92 F.3d at 973.

[15] *Hardy*, 260 F.3d at 682; *see also Dube v. State Univ. of N.Y.*, 900 F.2d 587, 598 (2d Cir. 1990) (finding college officials not entitled to qualified immunity because punishment of professor based on his classroom discourse would violate First Amendment).

[16] *See Piggee v. Sandburg Coll.*, 464 F.3d 667, 671-72 (7th Cir. 2006) (holding college had right to restrict free speech of cosmetology professor who shared religious beliefs with students); *Bishop*, 926 F.2d at 1076 (finding university could stop interjection of religion into physiology course).

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

Keyishian, 385 U.S. at 603 (quoting *Sweezy*, 354 U.S. at 250) (internal quotation marks omitted). The Court has repeatedly recognized the special role public school teachers – especially professors – play in our democratic system and the necessity of keeping them free:

> To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion . . . . They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government.

Wieman v. Updegraff, 344 U.S. 183, 196-97 (1952) (Frankfurter, J. concurring). Thus, Supreme Court precedents "leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large." *Healy v. James*, 408 U.S. 169, 180 (1972).

These principles are not mere platitudes but reflect an understanding that the inherent job duties of college professors require protection by the First Amendment. Colleges assign professors to the classes they will teach and set the curriculum for those classes, but ultimately, the professors assign reading, write and grade exams, lead daily classroom discussions, and answer students' questions.[17]

[17] *Keyishian*, 385 U.S. at 603; *Sweezy*, 354 U.S. at 250; *see also Parate*, 868 F.2d at 828-30 (holding professor has First Amendment right to assign grades and evaluate students based on his independent professional judgment); *accord Brown v. Li*, 308 F.3d 939, 952 (9th Cir. 2002) (holding faculty had First Amendment right to not approve student's thesis).

III. Professorial Speech Protected by the First Amendment

Generally, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). But the government may to some extent regulate the speech of its employees because of its interest in performing its functions efficiently and effectively. *Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006); *Connick v. Myers*, 461 U.S. 138, 147 (1983). To receive First Amendment protection a public university professor must show (1) she was speaking as a citizen; (2) "on a matter of public concern;" and (3) when balancing the university's interest in efficiency and effectiveness against her speech, her right to speak wins out.[18]

A. Speaking as a Citizen: Professors Are Not Your Typical Public Employee

At the outset, one must ask how a professor can speak as a "citizen" when he is teaching, researching, or writing as a faculty member. These are, after all, his job duties. In almost every instance, when a public employee speaks pursuant to his job duties, he does not receive First Amendment protection. This rule comes from the Supreme Court's 2006 case, *Garcetti v. Ceballos*, in which the Court held "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." 547 U.S. at 421.

Public university professors, however, are not governed by this general rule, because in *Garcetti*, the Court said its ruling does not apply to public college and university professors so long as they are engaged in teaching or scholarship. *See id.* at 425 ("We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."). The lower federal courts have come to varying conclusions on what constitutes "scholarship or teaching."[19] And just because the Supreme Court

[18] Typically, public employees punished for their speech make free speech retaliation claims against their employers. In these cases, the courts ask (1) was the professor engaged in constitutionally protected activity; (2) would the employer's conduct discourage employees of ordinary firmness from continuing to do what they were doing; and (3) was the professor's exercise of constitutionally protected rights a motivating factor behind the employer's conduct? *See, e.g.*, *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 337 (6th Cir. 2010). Some courts add a fourth step that considers whether the employer would have made the same employment decision in the absence of the protected activity. *Powell v. Gallentine*, 992 F.2d 1088, 1090 (10th Cir. 1993).

[19] *Compare Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 564 (4th Cir. 2011) (holding *Garcetti* does not govern professor's academic work); *and Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007) (holding *Garcetti* does not apply to public school teachers); *and Caruso v. Massapequa Union Free Sch. Dist.*, 478 F. Supp. 2d 377, 383 (E.D.N.Y. 2007) (suggesting *Garcetti* does not apply to teachers); *and Sheldon v. Dhillon*, 2009 WL 4282086, *3 (N.D. Cal. Nov. 25, 2009) (holding in-class speech of professor fell within *Garcetti*'s exception); *with Savage v. Gee*, 665 F.3d 732, 739 (6th Cir. 2012) (holding state university librarian's book recommendation was not protected speech); *and Evans-Marshall*, 624 F.3d at 343-44 (holding high school teacher's speech is not protected); *and Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 967-68 (9th Cir. 2011) (finding in-class speech of teacher does not fall within *Garcetti*'s exception); *and Renken v. Gregory*, 541 F.3d 769, 773-75 (7th Cir. 2008) (finding professor's complaints about administration of college were not protected speech).

said that professors have a right to free speech in their scholarship and teaching, that does not mean the right is unlimited.[20]

Doctrinally, the protection of faculty scholarship and teaching supports the courts' general view of higher education. While the Supreme Court has not "determined what scope of First Amendment protection is to be given a public college professor's classroom speech," *Cohen*, 92 F.3d at 971, "[i]t has long been recognized that the purpose of academic freedom is to preserve the 'free marketplace of ideas' and protect the individual professor's classroom method from the arbitrary interference of university officials," *Parate*, 868 F.2d at 830 (citing *Keyishian*, 385 U.S. at 603). A college may not straightjacket professors and eliminate their ability to teach in the classroom, because "[t]he First Amendment guarantees wide freedom in matters of adult public discourse,'" *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), and "discussion by adult students [and their professor] in a college classroom should not be restricted," *DeJohn v. Temple Univ.*, 537 F.3d 301, 315 (3d Cir. 2008). In light of this, "the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction, is *totally unpersuasive*." *Hardy*, 260 F.3d at 680 (emphasis added).

Public college and university professors engage in speech that differs remarkably from the typical government employee. For example, one does not stand in line at the Department of Motor Vehicles to receive science lectures from desk clerks. Professors, however, are hired precisely to teach a subject and answer students' questions—and in many cases effective teaching requires that student views (including world views) be challenged. If *Garcetti*'s general rule that public employees have no First Amendment rights when acting pursuant to their job duties applied to the academy, professors who have been trained as experts in particular subject areas would have essentially no freedom to use their expertise to add to public knowledge in those subjects. Their speech warrants a special degree of protection to ensure the pursuit of truth and advancement of knowledge in the "marketplace of ideas." "[A] teacher's in-class speech deserves constitutional protection." *Hardy*, 260 F.3d at 680. So long as professors stay within the subject required by the curriculum, they are entitled to free speech.

B. Matters of Public Concern

Assuming that a professor's speech is scholarship, teaching, falls outside his job duties, or is speaking as a citizen, the next inquiry is whether the professor is speaking on a matter of public concern. A public employee receives greater speech protection when speaking "as a citizen upon matters of public concern" than he does when commenting on employment matters of personal or internal interest. *Connick*, 461 U.S. at 147. Courts must look to the "content, form, and context of a given statement" to determine whether a public employee has spoken as a citizen on a matter of public concern. *Id.* at 147-48.

[20] *See Bishop*, 926 F.2d at 1076 (public university may restrict professor's teaching if it veers outside the curriculum).

A matter of public concern is one that touches upon "an issue of social, political, or other interest to a community." *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 316 (4th Cir. 2006) (citations omitted). Speech will generally be considered a matter of public concern unless it falls within that "narrow spectrum" of speech that is purely of "personal concern," such as a "private personnel grievance." *Piver v. Pender Cnty. Bd. of Educ.*, 835 F.2d 1076, 1079 (4th Cir. 1987). The quintessential example of protected speech is the teacher who criticizes her public school's policies and reveals official misconduct, like criticizing the school's misinformation about and mismanagement of public funds.[21] But the federal courts have found that such matters also include topics ranging from academic freedom,[22] race discrimination,[23] and violations of civil rights,[24] to sex and gender,[25] hemp,[26] abortion,[27] homosexuality, and religion.[28]

C. Balancing a Professor's Right to Speak Against the University's Efficiency and Effectiveness

Once a professor shows that her statements touch on a matter of public concern, "the burden shifts to the defendant to show that its legitimate administrative interests outweigh the plaintiff's First Amendment rights." *Bauer v. Sampson*, 261 F.3d 775, 784 (9th Cir. 2001). One of these interests is the university's interest in "efficient provision of public services." *Ridpath*, 447 F.3d at 317. "The government employer must make a stronger showing of the potential for inefficiency or disruption when the employee's speech involves a 'more substantial[]' matter of public concern." *Love-Lane*, 355 F.3d at 778. And this is even more difficult for universities as "the University community as a whole, is less likely to suffer a disruption in its provision of services as a result of a public conflict" than other public agencies. *Mills v. Steger*, 64 Fed. App'x 864, 872 (4th Cir. 2003).

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[21] *Pickering*, 391 U.S. at 569-70; *see Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 412-13 (1979) (racial discrimination); *Perry*, 408 U.S. at 594-95, 598 (college administration and policies); *Daulton v. Affeldt*, 678 F.2d 487, 491 (4th Cir. 1982) (same); *Ridpath*, 447 F.3d at 317 (NCAA violations at state university).

[22] *See Keyishian,* 385 U.S. at 603 ("[A]cademic freedom . . . is of transcendent value to all of us and not merely to the teachers concerned.").

[23] *See Love-Lane v. Martin*, 355 F.3d 766, 782 (4th Cir. 2004) ("[P]rotesting race discrimination in a public school, [is] speaking out on a matter of public concern.").

[24] *See Campbell v. Galloway*, 483 F.3d 258, 270 (4th Cir. 2007) (holding First Amendment protections not limited to conduct that violates Title VII).

[25] *See Roth v. United States,* 354 U.S. 476, 487 (1957) (stating that "sex . . . is one of the vital problems of . . . public concern."); *see Hardy*, 260 F.3d at 679 (gender is public concern).

[26] *See Cockrel*, 270 F.3d at 1049 (guest speaker on hemp is teacher's protected speech).

[27] *See Hennessy v. City of Melrose*, 194 F.3d 237, 246 (1st Cir. 1999) (holding that the appellants' anti-abortion sentiments "clearly related to a subject of . . . public concern.").

[28] *See Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 257 (6th Cir. 2006) (ruling plaintiffs "speech on his religious views and on homosexuality are matters of public concern . . . .").

Balancing the professor's and university's interest is called *Pickering* balancing, which derives from the seminal case on public employee free speech. The Ninth Circuit applies *Pickering* balancing by analyzing five factors:

> (1) whether the employee's speech disrupted harmony among co-workers; (2) whether the relationship between the employee and the employer was a close working relationship with frequent contact which required trust and respect in order to be successful; (3) whether the employee's speech interfered with performance of his duties; (4) whether the employee's speech was directed to the public or the media or to a governmental colleague; and (5) whether the employee's statements were ultimately determined to be false.

Bauer, 261 F.3d at 785; *accord Hardy*, 260 F.3d at 680–81. The Eighth Circuit balances the *Pickering* factors in a slightly different fashion:

> (1) the need for harmony in the office; (2) whether the government's responsibilities require a close working relationship; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties.

Hall v. Mo. Highway & Transp. Comm'n, 235 F.3d 1065, 1068 (8th Cir. 2000).

Three cases are illustrative of how *Pickering* balancing works for professors. In *Bauer*, a professor at Irvine Valley College (IVC) was reprimanded for voicing his disapproval in a campus newspaper of IVC's handling of administrative affairs. 261 F.3d at 780. Bauer's articles contained profanity, threats, and other material which IVC believed represented generally "insulting", "dehumanizing," and "violent" behavior. *Id.* at 783. The Ninth Circuit found that Bauer's articles disparaging the college's administration undoubtedly touched on matters of public concern. *Id.* In applying the five *Pickering* balancing factors, the court found that IVC's "interests as an employer [did] not outweigh Bauer's First Amendment rights." *Id.* at 785. First, while "Bauer's expression no doubt created some disharmony among his colleagues," it did not create disharmony "on IVC's campus." *Id.* Second, the court said:

> [G]iven the nature of academic life, especially at the college level, it was not necessary that Bauer and the administration enjoy a close working relationship requiring trust and respect—indeed anyone who has spent time on college campuses knows that the vigorous exchange of ideas and resulting tension between an administration and its faculty is as much a part of college life as homecoming and final exams.

Id. Third, the District's interests did not outweigh Bauer's interests in this particular speech because there was no evidence that "Bauer's speech had any negative impact on Bauer's teaching or other

professional responsibilities." *Id.* Fourth, Bauer's articles were distributed only to the IVC community. Last, the court found that Bauer's articles conveyed opinion, "not factual assertions that could be proven false." *Id.* As a result, "Bauer's First Amendment rights clearly outweigh[ed] the District's interests as an employer in silencing his expression." *Id.*

In *Hardy*, an adjunct professor taught a summer course on interpersonal communication. 260 F.3d at 674. During one class, he presented a lecture on language and social constructivism, wherein students examined how language is used to marginalize minorities. The professor solicited examples of words used to marginalize, and the students offered, *inter alia*, "nigger" and "bitch." *Id.* at 675. An African-American student objected to this and complained to the college, which then fired the professor. The Sixth Circuit found that the professor had spoken on a matter of public concern because the discussion involved race, gender, and power conflicts in society. *Id.* at 679. The court also found that the professor's interest in speaking outweighed the college's interests in restricting his in-class discussions. *Id.* at 680–82.[29] Public universities must respect the First Amendment rights of faculty to speak on matters of public concern in teaching, scholarship, and outside of their job duties.

Finally, in *Bishop*, an assistant professor of exercise physiology at the University of Alabama occasionally referred to his religious beliefs during instructional time and arranged an after-class voluntary meeting where he lectured on the evidence of God in human physiology. 926 F.2d at 1068-69. The university instructed him to stop interjecting religion into the course and the optional classes. The Eleventh Circuit held that the university did not violate his right to freedom of speech because while he might have had an interest in speaking on such matters outside the classroom, inside the classroom the university could "scrutiniz[e] expressions that the public might reasonably perceive to bear [its] imprimatur." *Id.* at 1073. The court found that a university may "reasonably control the content of its curriculum, particularly that content imparted during class time." *Id.* at 1074. "Of course, if a student asks about [a professor's] religious views, he may fairly answer the question," just as he may "write and publish" about them. *Id.* at 1076.

IV. Professors Enjoy Protection from Viewpoint Discrimination

A professor who experiences censorship may also have a claim for viewpoint discrimination. The government may never discriminate against someone based on the viewpoint of his speech. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). The history of the public university itself shows that it is intended to be the "marketplace of ideas" where free thought and debate flourish. *Keyishian*, 385 U.S. at 603. If a public university punishes a professor for the views he expresses in an article or in the classroom, then he may have a claim for viewpoint discrimination. A good rule of thumb is that a professor may speak freely on matters that are germane to the

[29] *Compare Cockrel*, 270 F.3d 1036 (finding an elementary school violated a teacher's First Amendment rights when it fired her for teaching her students about industrial uses of hemp); *with Urofsky*, 216 F.3d at 409-10 (finding professors do not have "academic freedom" to determine classroom curriculum without any input from university).

curriculum, *Hardy*, 260 F.3d at 679, but may not force his religious beliefs into the curriculum, *Bishop*, 926 F.2d at 1076.

V. A Public University May Not Censor a Professor's Speech Based on a Vague Policy

Nearly every public university has policies that regulate faculty conduct, such as harassment, discrimination, or some other topic. And sometimes universities will try to apply these policies to restrict professorial speech. All too often, however, these policies use vague and overbroad words that give administrators virtually unlimited discretion. A government policy is unconstitutionally vague when it (1) denies professors fair notice of the standard of expression to which they are accountable; (2) permits unrestricted enforcement against any professor at anytime, thereby inviting arbitrary, discriminatory and overzealous enforcement; and (3) chills the exercise of First Amendment freedoms. *See City of Chi. v. Morales*, 527 U.S. 41, 56 (1999); *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972); *Cohen*, 92 F.3d at 972.

For example, a college ban on "offending" students and teaching "misinformation" would not provide professors with fair notice of prohibited expression. What kind of expression is offensive? What theories constitute misinformation? "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Morales*, 527 U.S. at 58 (citation omitted). These terms "require subjective reference in order to define them; the meanings of these terms are as vastly divergent as are individual tastes and personalities." *Dambrot v. Cent. Mich. Univ.*, 839 F. Supp. 477, 484 (E.D. Mich. 1993), *aff'd* 55 F.3d 1177 (6th Cir. 1995).

In *Cohen*, a California community college disciplined an English professor pursuant to a sexual harassment policy for using sexually charged language in the classroom. The Ninth Circuit held that the policy was unconstitutionally vague because it did not provide the professor with enough advance notice that his speech was sanctionable. 92 F.3d at 972.[30] Reliance on the subjective whims of college administrators leads to arbitrary and discriminatory enforcement and causes professors to self-censor their speech for fear of punishment.[31]

VI. Conclusion

While there is no independent right to academic freedom, public university professors enjoy First Amendment protection for their teaching, scholarship, and extracurricular speech. The Constitution also protects them from viewpoint discrimination and vague speech-restrictive policies.

[30] *But see Piggee*, 464 F.3d at 673-74 (holding sexual harassment policy was not vague as-applied to professor's speech).

[31] *See Dambrot*, 839 F. Supp. 477 (holding university policy unconstitutionally vague because it prohibited "negative" and "offensive" comments); *accord Silva v. Univ. of N.H.*, 888 F. Supp. 293, 314 (D.N.H. 1994)