

Academic Freedom as a Human Right

An Internationalist Perspective

The university as a transnational community of professors and students poses challenges to traditional conceptions of academic freedom. What if we rethought academic freedom as part of a human right to education?

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Defenders of academic freedom in the United States have argued for it as a professional or constitutional right of the individual or, less frequently, as an institutional right of the academy. Its practice has been quite vigorous in this country, especially when compared with its fate in closed political systems such as China's. Since the terrorist attacks of September 11, 2001, however, perceptions of threats to academic freedom have changed. Now, it seems, the war on terror has extended to academia.

Recent controversies involving faculty and student freedoms have shed light on this development, the most troublesome aspect of which is the increased risk facing foreign-born academics and students. Many of their procedural and substantive rights have been stripped away through aggressive antiterrorist legislation, such as the USA Patriot Act. The proposed Domestic Security Enhancement Act, which is circulating at the U.S. Department of Justice, can only exacerbate the situation. If the rights of foreign-born academics were fragile before September 11, they are almost nonexistent now. Even for other scholars who are U.S. citizens, the risks are substantial, because the government has claimed unprecedented rights to detain and monitor its citizens. It is a worrying time indeed for protecting academic freedom.

Before one can defend academic freedom, however, it must be defined. A principal question is whether it limits an academic's freedom to expressive and associational activity in that person's field of specialization, or whether it provides for a general freedom to engage in any expressive activity that does not constitute a violation of existing laws. Does it, for example, prohibit an engineering professor from expressing her views on war in the classroom? An unduly narrow definition of academic freedom does not fit its historical development in the United States. Nor does it reflect the role of the academic as a citizen.

Historically, academic freedom in the United States was influenced by nineteenth-century German ideas, and it has been defended at least since the formation of the AAUP and the adoption of its 1915 *Declaration of Principles on Academic Freedom*. Among the earliest cases that roiled the academic profession were a series of confrontations in the late nineteenth century between economics professors and university administrations that decisively shaped academic freedom. These confrontations included such notorious acts as the firing of Edward Ross, a tenured economics professor at Stanford University, for espousing "populist" economic ideas. It was partly due to such incidents that academic tenure was designed to enable academics to express their views, even if those views transcend narrow disciplinary boundaries. As a citizen, an academic has full freedom of expression, opinion, and association, which can be curtailed only when the exercise of such freedoms violates laws that protect public order or national security. Academic freedom is part and parcel of this overall freedom.

But how real is academic freedom for *all* academics in the United States right now, regardless of their national backgrounds and citizenship status? Should it concern us that foreign-born U.S. academics have fewer rights than their native-born peers? If so, how should we react? I will argue that it is important to protect the academic freedom of

everyone in U.S. academia, including the foreign born. A startlingly high number of foreign-born academics and students are in the United States, and, therefore, many people could potentially be affected adversely by ill-conceived measures that interfere with basic rights. Such a possibility must concern us all in the current political climate. Since foreign-born faculty, researchers, and students are not entitled to full constitutional protection under U.S. domestic law, the only way to ensure academic freedom for them would be to argue for it as a human right.

Academic Freedom on Campus

How serious is the threat to academic freedom, and how widespread is it globally? Worrying signs suggest that as freedom of expression, opinion, and association come under threat as a result of the global war on terror, academic freedoms are also being targeted. In the United States, some academics have reportedly been pressured because of their

views on the antiterror war. A number have been singled out for being unpatriotic and dangerous by conservative foundations; others have been more directly challenged over their selection of course materials or their opinions. For example, the U.S. Federal Bureau of Investigation visited an Iraqi American professor at the University of Massachusetts in November 2002 to question him about his alleged anti-American views.

Students have not been exempt. Foreign-born students from certain "countries of concern" must now register with the U.S. Immigration and Naturalization Service and be monitored. Universities have also been asked to report invasive information about foreign students electronically to the

government, which not only increases the risk of innocents being caught as a result of human error, but also inserts the universities into the frontline of the national security establishment. Indeed, the boundary between the state and the university is being blurred.

Similarly, the government is now screening foreign students and researchers involved in basic science research. This development disturbs research universities that depend heavily on foreign graduate students. It has even caused leading institutions to decline federal grants for research that demanded this screening requirement. Of course, some level of screening is legitimate in scientific areas important to national security, but indications are that the net is being cast unduly widely.

In India, the University of Jammu and Kashmir has banned its professors from talking to the media as a result of some allegedly critical comments about its antiterror war that a few faculty members made. The state of academic freedom is much worse in other countries, such as China, Iran, Tunisia, Egypt, Malaysia, and Indonesia. Indeed,

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according to a 2000 report of the United Nations, academic freedom is under a cloud in many parts of the world. In an atmosphere of diminishing freedoms in general, academic freedom cannot remain untouched for long.

As I noted, a major concern is that in the United States, many academics may be potentially subject to harsh laws that do not provide basic guarantees of rights. A 1999 survey by the U.S. Department of Education reported that out of a total of 590,937 faculty members in the United States, 94.4 percent were U.S. citizens, and 5.6 percent were noncitizens. This statistic is important, because in the United States, as in many other countries, not all constitutional rights automatically apply to noncitizens. Partly because of this difference in the treatment of citizens and noncitizens in the domestic laws of many countries, most countries have agreed upon a universal set of minimum human rights that apply to everyone in their territories.

Right now in the United States, almost 30,000 faculty members are potentially subject to a harsh and discriminatory legal regime under which they are denied important civil freedoms. Given the rather authoritarian approach to law enforcement adopted by the current U.S. administration, the possibility of their being scrutinized is not idle speculation. Of course, the threat faced by scholars of Islamic origin or those who hail from Muslim-majority countries is much greater. The number of these scholars—it is in the thousands—is far larger than many people realize. The best protection of their academic freedom is to ensure that it is a human right, not merely a constitutional right.

A Limited Freedom

But how secure is academic freedom as a constitutional right for U.S. citizens? As I said above, it has traditionally been defended in the United States on two grounds: as a constitutional and legal right of the individual under the First Amendment and as an institutional right of the academy. As the U.S. Supreme Court famously stated in 1967 in *Keyishian v. Board of Regents*, “academic freedom . . . is . . . a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”

Nevertheless, despite a seemingly absolutist commitment to the First Amendment under U.S. law, the government has not hesitated to take action against expressive activity in the interests of national security, and the Supreme Court has often gone along with such crackdowns, especially when the country has considered itself to be at war. That was particularly true during the Cold War in actions taken against “communist sympathizers.” In 1972, for example, the Supreme Court refused in *Kleindienst v. Mandel* to find any First Amendment rights of American academics to “receive information and ideas” from a Belgian professor with communist leanings.

In addition, as a constitutional right, academic freedom extends to employees of public colleges and universities, not to those working in private schools, although private contractual rights do protect the academic freedom of foreign-born professors. Nevertheless, such protection is not as strong as the First Amendment. It is thus not evident that academic freedom as a constitutional right in the United States protects all academics’ unpopular opinions about national security. In most other countries, the status of academic freedom as a constitutional right is even weaker or nonexistent.

A second way academic freedom has been protected in the United States is to assert it as a collective right of the academic body, or as a corporate right of the university. Although U.S. courts have not clearly defined this right, one can arguably see support for it in the language of the Supreme Court describing the academy as a marketplace of ideas where a “spirit of free inquiry” reigns, to quote from

the 1957 concurring opinion of Justice Frankfurter in *Sweezy v. New Hampshire*. As it is obviously not possible to protect a marketplace without supporting the rights of individuals to transact in it, the Court’s language could be seen as supporting academic freedom as an individual right. Indeed, the individual freedom of the faculty member and the collective right of the institution may be seen as co-existing in this way.

Alternatively, constraints imposed on individual members of the academy can be seen as adversely affecting the right of the academic body as a collectivity. The problem with this approach—aside from its lack of grounding in U.S. law—is that the domain of academic freedom may well be constrained by

the extent to which individual opinions are seen to advance collective freedom of inquiry. If the academic body does not agree with the views of individual professors, it can easily disown them, leaving them without legal protection for their expressive freedoms. It is not self-evident that this process will protect dissident voices at a time of war. Worse, academic freedom may then depend on whether the university as a corporate body is prepared to endorse the individual views of its faculty members.

Human Right to Academic Freedom

As I have pointed out, a focus on constitutional rights for individuals remains inadequate for protecting the academic freedom of *all* scholars in the United States. A better approach is to defend academic freedom as a human right. To say that something is a human right is to assert two things: first, that protecting such a right does not depend on national legal systems, but on international law; and, second, that transnational action, including that by international agencies, becomes legitimate for protecting such rights.

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In the current political climate, only this argument has a reasonable prospect of ensuring uniform respect for the academic freedom of all scholars working in American institutions of higher education.

Academic freedom can be asserted as a human right in two ways. One is to defend it as a human right to free expression; the other is to defend it as a human right to education. Freedom of opinion and expression are protected as human rights by article 19 of the International Covenant on Civil and Political Rights (ICCPR), a treaty ratified by most countries, including the United States. The right to education is guaranteed by article 13 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which most countries have ratified, although the United States has not.

The ICCPR does not subject the right to hold opinions to any restriction, while freedom of expression can be curtailed only on specified grounds, such as protection of public order or national security, through legal measures that are deemed necessary. The covenant therefore subjects academic freedom to restrictions similar to those imposed by U.S. law. For example, the United States could legitimately discriminate against noncitizens under the ICCPR and prevent the application of article 19 to private educational institutions. For noncitizen scholars working in the United States, this does not provide extra protection.

In 1999, through the ICESCR, the United Nations recognized academic freedom as part of a human right to education. As the organization's Committee on Economic, Social, and Cultural Rights stressed, the "right to education can only be enjoyed if accompanied by the academic freedom of staff and students." The committee further emphasized that, in its experience, "staff and students in higher education are especially vulnerable to political and other pressures which undermine academic freedom."

This approach—recognition of the importance of core civil and political rights, such as academic freedom, for the protection of economic, social, and cultural rights such as education—is an interesting and innovative way to defend academic freedom. Unfortunately, the covenant does not mention in any detail issues such as individual academic freedom, university autonomy, or the right of members of academic institutions to participate in self-governance. Such matters are left for the jurisprudence of the committee.

The United States is not a party to most human rights treaties, including the ICESCR, and has never recognized the right to education as a human right. Indeed, successive U.S. administrations have contested the existence of economic, social, and cultural rights as human rights, although such rights do exist within the United States. For example, many state constitutions guarantee the right to education.

Although the effect of this shortsighted and arrogant posture has deprived U.S. residents of the benefits of international cooperation on human rights, this refusal to ratify treaties does not prevent U.S. academics from taking full advantage of the ethical, political, and symbolic power of human rights as a global normative discourse.

The effort to defend academic freedom as a human right makes sense from a theoretical perspective as well. There are at least two ways to understand academic freedom. One is as an individual right, a collection of all the expressive freedoms that any member of the academic community has as an individual, including the rights to free expression, opinion, and association. This view defines academic freedom as a subset of a larger category that needs no special protection. The United States, where academic freedom is subsumed under the First Amendment, takes this approach, as does South Africa, where the constitution mentions it as part of the right to free expression.

A second way to think about academic freedom is as a right to education that has individual and collective dimensions that can only be discharged through complex relationships between students, faculty, institutions, the government, and society. In this sense, academic freedom is not only an end, as it is under an individualistic conception. It is also the means for realizing other important ends, including individual freedoms that go beyond expressive freedoms to encompass all freedoms such as nondiscrimination. The ICESCR expressly states that education "shall be directed to the full development of the human personality."

Indeed, a human right to education injects an ethical dimension into academic freedom by broadening the

objectives of education. That is, academic freedom exists so that individual professors and their institutions can pursue important educational objectives. Conversely, the right to academic freedom can be defended as an essential part of a right to education. In other words, academic freedom is not simply an individual right to something, but it is also a collective right for the realization of important societal goals. In our global age, these goals are themselves global, embodied in the idea of human rights.

Since September 11, 2001, the war on terrorism has weakened many constitutional liberties enjoyed in the United States and elsewhere in the world. Consequently, the defense of academic freedom cannot be left to the vagaries of domestic law. In the United States especially, it is a political necessity because of the many noncitizens in U.S. academic institutions, whose rights under domestic laws are constantly eroding. Indeed, asserting academic freedom as a human right has become a moral and political imperative across the globe. ☞

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