

**\*281 AT WORK IN THE MARKETPLACE OF IDEAS: ACADEMIC FREEDOM, THE FIRST  
AMENDMENT, AND JEFFRIES v. HARLESTON**

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INTRODUCTION

Anyone attempting to justify action against a professor based upon his or her speech must overcome the salutary barriers that principles of free speech and academic freedom erect to protect speech in the university. The case of *Jeffries v. Harleston* [FN1] presents a valuable opportunity to examine the scope and limits of these principles in the context of racist and anti-Semitic speech by a faculty member serving as a department chairman. Although the *Jeffries* litigation was extensive, involving a jury trial, two federal appellate court opinions, and two appeals to the U.S. Supreme Court, the judicial resolution of the case left important questions unanswered. The judges paid little attention to the issue of academic freedom, despite its importance to the nation's academic community. The vital question of what harms colleges and universities may suffer from faculty speech, and which of those harms they may properly sanction, was obscured by a jury finding that there was potential, but not actual, harm from *Jeffries'* speech. [FN2] As is usual with jury verdicts, the jury's findings were stated in conclusory fashion, with the reasons for its findings unexplained. Further confusing matters, the United States Court of Appeals for the Second Circuit understated the importance of the role of the chairperson of an academic department, mistakenly characterizing the position as merely "ministerial." [FN3]

In this Article I will explore the nature and bounds of academic freedom, and discuss the harms to a college or university that might justify action against a college professor otherwise protected by rights of free speech **\*282** and academic freedom. I conclude that the dismissal of Professor *Jeffries* as chair of the Black Studies Department at the City College of New York (City College) was neither unconstitutional nor a violation of academic freedom, properly conceived.

A. Professor *Jeffries'* Speech

Professor Leonard *Jeffries, Jr.*, chairman of the Black Studies Department at City College, achieved remarkable notoriety by delivering a single speech in Albany, New York on July 20, 1991. [FN4] The ostensible subject of his address to the Empire State Black Arts and Cultural Festival was multicultural education in American public schools. But the rhetorical power of the speech came not from his views on education, but from his sustained attack on Jews and his denigration of whites. He singled out Diane Ravitch, an official in the U.S. Department of Education and an opponent of his ideas on multicultural education, for special vilification, calling her "the ultimate, supreme, sophisticated, debonair racist." Explicitly making the religious connection, he later relabeled her a "sophisticated, Texas Jew." Throughout his address, *Jeffries* repeatedly and mockingly referred to Ravitch as "Miss Daisy," the Jewish character in the film *Driving Miss Daisy*. [FN5]

Jeffries warned his audience of "the attack coming from the Jewish community - systematic, unrelenting." He linked the "attack" to the supposed history of Jewish perfidy directed against blacks. He spent much of his speech railing against "rich Jews" who, he said, controlled the African slave trade. He blamed the "Jewish community" in Amsterdam, Hamburg, and Curacao ("the new center of the slave trade in the western world centered around the Jewish immigrants that moved into Curacao"); he condemned "wealthy Jews" in colonial Newport, R.I. ("the leading legal slaving center in America, and ... the home of the largest Jewish community and most active, wealthy Jewish community in America.... [W]ealthy Jews who not only controlled a couple hundred of the slave ships ... [but] the distilleries that ... [sold rum] to the native Americans as 'fire water'). He denounced "the Jewish rich ... [who] supported the Spanish throne and helped lay the foundation for the enslavement in the 1400s and 1500s." When the Spanish throne persecuted the Jewish community in Spain at that time, many Jews, according to Jeffries, \*283 converted to Christianity and "helped her [Queen Isabella] maintain the slave system against the Africans and native Americans." The synagogue in Amsterdam he identified as "the center of slave trading for the Dutch.... [I]t was around this synagogue that the slaving system was established." [FN6]

Jeffries took a break from his catalog of Jewish slaving centers to say, "Now we're not talking about most Jews. Most Jews were being beat-up and down Europe - persecuted for being Jewish. We're talking about rich Jews ...." He then went on: "But the documentation is there. We are now preparing ... ten volumes dealing with the Jewish relationship" to black enslavement. A full ten volumes were needed "so we can put it in the school system, so there'll be no question about Miss Daisy ...." [FN7]

Adding to his list of perfidious Jewish offenses, Jeffries claimed that Jews were centrally responsible not only for black slavery, but for white European slavery: "So rich Jews and the Catholic Church had an alliance for hundreds of years, selling white folks from central, eastern and southern Europe into slavery in the Arab world - the white slave trade, which is the precursor of enslavement later." [FN8]

In the course of the speech, Jeffries said he was not anti-Semitic, citing as proof the respect and support he received at City College, including support from a professor he identified only as "the head Jew" at the college. He also said he had avoided publicly speaking about what he termed "the Jewish question" for a year, in accord with an agreement with "my Jews at City College."

For Jeffries, there was not only a Jewish question but a white question as well. He proclaimed the superiority of African people compared to white European people. The African "sun people" originated science, mathematics, and philosophy, he stated, and they created a communal, cooperative, spiritual culture. White Europeans, the "ice people," lived in caves and produced "barbarism." [FN9]

\*284 Returning to education, Jeffries cautioned his audience not to be taken in by what he called "the white boy" -who, among other things, measures educational achievement by the unreliable device of test-taking. He ended his speech with a final mocking reference to "Miss Daisy."

## B. Public Reaction

Reactions to the speech were intense. Political leaders called for Jeffries' dismissal. Even Mario Cuomo, then-governor of New York State, called upon the City College to "take action or explain why it doesn't." [FN10]

The New York Times called Jeffries "a confused man whose ramblings are as unintelligible as they are hateful" and asked:

How can anyone take him seriously after last month's speech at a black cultural festival, where he sneered at "the white boy," the "head Jew at City College" and "Miss Daisy" - Professor Jeffries's pejorative name for Diane Ravitch, an assistant U.S. Education Secretary who disagrees with his definition of multicultural education. [FN11]

A Newsday editorial called the speech a "pernicious diatribe" containing "an acrid stream of anti-Semitic poison." [FN12] New York State's then-education commissioner, Thomas Sobol, forcefully disassociated himself from Jeffries, who had once been an education department consultant, by denouncing the Jeffries "diatribe." [FN13] Even a sympathetic media observer, the editorial page of The Nation, wrote of Jeffries: "he really does make the Jewishness of his political opponents and intellectual critics the basis of their 'devilish' positions." [FN14]

**\*285** Support for Jeffries came from black leaders and from the Harlem community; at one black church, a crowd of over 1,000 people applauded a videotape of the speech. [FN15] Some black leaders were more equivocal. Hazel Dukes, president of the New York State chapter of the NAACP, termed Jeffries' comments "race-baiting" but said that "Leonard Jeffries did not go to Albany to beat up on Jews. What he did was make isolated comments that could be taken out of context as bias or bigotry." [FN16] Despite the backing, or at most muted criticism, of black leaders, the overwhelming public reaction was one of strong condemnation. Jeffries, in his testimony, called the reaction "mass hysteria within the context of media hypersensitivity." [FN17]

Protests on campus were also sharp. Bernard Sohmer, Professor of Mathematics, wrote to Professor Jeffries: "you have many amends to make for this ugly, vicious and danger-laden performance ...." [FN18]

The City University of New York's (CUNY) Board of Trustees Chairperson, Vice Chairperson, and Chancellor issued a joint public statement declaring:

We are shocked and deeply disturbed by the irresponsible and inflammatory statements made by City College Professor Leonard Jeffries, Jr. At a time when this city and state need people of every racial and ethnic background working together to foster unity, Professor Jeffries' remarks serve only to fuel the fires of bigotry and disharmony. [FN19]

**\*286** City College's Bernard Harleston, in a letter addressed to "Alumni and Friends of City College," responded to the speech in strong terms: "The remarks of Professor Jeffries, which disparaged certain groups by race and religion, have deeply hurt and offended members of these groups and threaten to undermine the very fabric of collegial life.... I disassociate this college vehemently from such attitudes and values." [FN20]

The City College Faculty Senate condemned the remarks in an oddly phrased resolution that called Jeffries' comments both impolite and abhorrent. The resolution stated:

The Faculty Senate ... deplors the breach of academic courtesy and decorum in the ethnic slurs used by Professor Leonard Jeffries, Jr. to refer first to a colleague and a member of this body, and second, to a larger group of colleagues ... and disavows and rejects the abhorrent anti-Semitic and anti-Italian sentiments he has expressed; but repudiates as incompatible with academic freedom, any attempt, ... to discipline a faculty member, because he or she expresses provocative and controversial, even offensive, views. [FN21]

For its part, the Black Studies Department faculty supported Jeffries with a statement that included this passage:

After carefully reviewing the allegedly offensive July speech by Dr. Jeffries, we have concluded that the essence of Prof. Jeffries' message was historically and contemporarily true and correct.... The vicious attacks and racist manipulations against Brother Jeffries by a contemptuous press, public hate mail, offensive telephone calls, demonstrations-along with a disgraceful litany of V.I.P.'s and prominent scholars-are all incontrovertible evidence that the allegations emanating from the July remarks were purely a smokescreen for the underlying white establishment's anger and apprehension regarding Dr. Jeffries vigorous and articulate advocacy of a "Curriculum of Inclusion," and a rewriting of the human family history based on African foundations. [FN22]

### C. The Lawsuit

In March, 1992 the University Trustees, acting on the recommendation of the City College President, voted to end Jeffries' term as Chair \*287 of the Black Studies Department after one year, although the usual term of a Department Chair at the college was three years. [FN23] Professor Jeffries brought suit against the President and the Trustees, claiming they violated his First Amendment rights by removing him from his position as chairperson because of his Albany speech.

Although even the trial judge handing Jeffries a victory called his remarks "hateful, poisonous and reprehensible," [FN24] Jeffries prevailed in the trial court. [FN25] He won again when the university appealed to the Second Circuit (Jeffries I), which called his comments about Jews "hateful and repugnant." [FN26] But the Supreme Court vacated the decision and remanded the case to the Second Circuit [FN27] for reconsideration in the light of *Waters v. Churchill*, a recently decided case dealing with the government's right to dismiss an employee whose speech impairs the functioning of the workplace. [FN28] On remand, the Second Circuit in *Jeffries II* reversed itself, ruled against Jeffries, and dismissed his claim. [FN29]

Jeffries owed his sudden reversal of fortune to a developing area of free speech law. Generally, courts now permit the government employer to dismiss workers for speech that impairs the effectiveness or efficiency of the workplace. *Waters v. Churchill* [FN30] clarified one doctrinal element crucial to the Jeffries case. Justice O'Connor's plurality opinion observed that the government employer's "reasonable prediction of disruption" would generally suffice to show harm to the workplace. [FN31] It was this distinction drawn between actual harm and a "reasonable prediction" of harm that caused the Second Circuit's change of heart in *Jeffries*. The jury specifically found that City College officials had acted upon a reasonable prediction that harm would flow from Jeffries' speech. The circuit court's first opinion (*Jeffries I*) ignored this finding, relying instead on the jury's additional finding that the speech did not in fact hamper the operations of the department or the College. [FN32] Understanding *Waters* to require application of the reasonable-prediction-of-harm standard, the court on remand ruled for the college.

Although, as I will argue, *Jeffries II* is correct in its conclusion, the circuit court's opinion is unsatisfactory in its analysis. Applying the \*288 Supreme Court's First Amendment standard for public employers to a university, even a public one, is a delicate task. The state-run university is an employer, to be sure, but it does not share the marketplace features and orientation of many employers. It is organized differently and seeks different ends than do either traditional government agencies or government service providers.

The two *Jeffries* opinions in the Second Circuit displayed little sensitivity to this unique nature of the university. Consequently, the court failed to give convincing answers to three questions which I propose are central to its analysis:

1. How does higher education's dedication to academic freedom affect the analysis of the permissible actions that can be taken by the university to combat the damaging effects of faculty speech?
2. Did Jeffries occupy such a significant position within the university that the exercise of his free speech right might have a damaging effect on the ability of the university to accomplish its mission?
3. How might a speech like Jeffries' harm the university, its students, and the Black Studies Department itself?

In exploring these matters, I first discuss both of the key rights that professors normally enjoy: the right to academic freedom and the right to free speech. I propose how universities and courts might think about academic freedom, both as a professional norm implemented in public and private institutions, and as a First Amendment doctrine applicable to public universities. Academic freedom, a widely accepted but ill-defined concept in American higher education, poses important barriers to actions against faculty speech; nevertheless I suggest several reasons why academic freedom does not bar the action taken by City College in this affair.

Next, I examine the free speech doctrine that governs public employers, which the Second Circuit used to determine whether Professor Jeffries' First Amendment rights were violated. I conclude here that the chairperson's role within in the college organization is not a minor, "ministerial" one, as the Second Circuit panel characterized it, [FN33] but is rather an important post within the university structure. Particularly coming from the chair of an academic department, Jeffries' speech potentially had a significant and destructive impact upon the university.

Finally, I specify the kinds of harms that a Jeffries-style speech can inflict on a university. I detail these harms to provide an analysis that the Second Circuit neglected-an analysis essential to the correct determination of cases in which the interests of free speech and a university collide.

Of course, not every disruptive speech should be subject to penalty in an institution whose vitality depends in no small measure on free \*289 and sometimes controversial speech. Jeffries' speech, however, inflicts harms of a kind that justified the action the university took against the speaker. I thus agree with the ultimate decision of the Second Circuit, that the removal of Jeffries as chair of the Black Studies Department was constitutional and proper.

## I. ACADEMIC FREEDOM

The first issue City College had to face was whether academic freedom barred it from imposing any sanction against Professor Jeffries. The college administration, responding to the speech and the outrage it generated, initiated its own inquiry, promising to conduct the investigation with due deference to principles of academic freedom. [FN34] Despite agreement on all sides that academic freedom ought to be respected, the campus was divided over the question of its application. The administration and trustees went ahead with the removal of Jeffries, while the faculty senate voiced its view that any action by the college against Jeffries would be "incompatible with academic freedom." [FN35]

Academic freedom is a well established tradition in American higher education, [FN36] yet its metes and bounds are far from precise. It has different meanings in the academic profession and in the law: it is sometimes invoked to protect individual professors from their own colleges, [FN37] sometimes to protect colleges from the government, [FN38] and sometimes to protect professors from the government. [FN39] Much attention has been paid to the dismissal of faculty members, and less to sanctions which do not deprive faculty members of their faculty positions. I will initially consider academic freedom as a principle of the academic profession, and then consider its role in the law.

Within the profession, the most influential declaration on academic freedom is the 1940 Statement of Principles on Academic Freedom and Tenure, [FN40] formulated jointly by the American Association of University Professors (AAUP) and the Association of American Colleges. This relatively brief pronouncement sought to protect "the free search for truth and its free expression" by guaranteeing freedom for professors in their roles as teachers, researchers, and citizens. [FN41] Its key provisions, appearing under the heading "Academic Freedom," state:

\*290 (a) Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

(c) College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their

profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution. [FN42]

The last provision caused some controversy among the drafters of the 1940 Statement [FN43] and among contemporary scholars. [FN44] If academic freedom is founded upon the scholar's need to freely pursue truth, why should it include special protection for non-scholarly endeavors, which the academic undertakes in his role as ordinary citizen? Instead, a citizen's speech is protected by the First Amendment, but not by academic freedom. In 1964, an AAUP Committee elaborated upon the 1940 Statement by stating:

The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness to serve. Extramural utterances rarely bear upon the faculty member's fitness for continuing service. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar. [FN45]

**\*291** It is not clear how to classify the Jeffries speech. Although "extramural" in the sense that it was not given on campus, in an era of instant mass communications the distinction between on campus and off campus audiences may be ephemeral. The speech was on a topic within his professional field. It also concerned a matter of intense public debate, in which Jeffries was entitled to participate in his role as a citizen. Under the AAUP elaboration, which assumes academic freedom extends to professors speaking as citizens, Jeffries is protected from dismissal as a faculty member unless the speech demonstrates his unfitness as a professor. This does not mean he is protected in his position as chairman. [FN46]

If Jeffries spoke as a professor expounding upon his scholarly ideas in his field of academic expertise, his claim of academic freedom should prevail absent his transgression of some limit on that freedom or some vitally important countervailing interest. The AAUP's 1940 Statement hints at some limits to academic freedom, but in a somewhat vague and unsystematic way.

Professor William Van Alstyne has helpfully attempted to fully describe the scope and limits of academic freedom. He writes:

Insofar as it pertains to faculty members in institutions of higher learning, "academic freedom" is characterized by a personal liberty to pursue the investigation, research, teaching, and publication of any subject as a matter of professional interest without vocational jeopardy or threat of other sanction, save only upon adequate demonstration of inexcusable breach of professional ethics in the exercise of that freedom. [FN47]

Professor Van Alstyne sees academic freedom as a broad freedom, but one limited by standards of professional integrity. Academics are generally at liberty to pursue truth as they see fit, but they can be held accountable in some limited circumstances: "[t]he maintenance of academic freedom contemplates an accountability in respect to academic investigations and utterances solely in respect of their professional integrity, a matter usually determined by reference to professional ethical standards of truthful disclosure and reasonable care." [FN48]

I offer four rationales in support of the conclusion that Professor Jeffries' dismissal as department chair was proper, despite the doctrine of academic freedom. These are: (A) that Jeffries' statements gravely transgressed professional norms and merit no academic freedom protection; (B) that academic freedom confers immunity only from disproportionate penalties for speech that transgresses professional norms, and the penalty visited upon Jeffries was not disproportionate; (C) that the harm done by Jeffries to the department, the students, and the **\*292** university outweighed any infringement of academic freedom suffered by Jeffries; and (D) that academic freedom offers only limited protection for professors acting in administrative roles.

## A. Some Statements Constitute Transgressions of Professional Norms Grave Enough to Place the Speaker Beyond the Limits of Academic Freedom

Certainly serious departures from professionalism-plagiarism, falsification of research data, abuse of grading power to punish students for non-academic reasons-do not merit the protection of academic freedom, and indeed can justify dismissal from the university. Even in the classroom, where traditionally ideas are paramount and the professor is most free to expound, some limits apply. In 1988, after a student reported in the campus newspaper on the dubious racial theories and undercurrent of intimidation in Professor Jeffries' classes, a special fact finding committee was appointed to look into the content of Jeffries' classes. [FN49] The committee considered the proper bounds of classroom speech in a memorandum addressed to the college president. It stated:

Students must not be made to feel uncomfortable (or fearful) in the classroom due to the nature of the presentation ... or the action or statements of the instructor. While the protective net of academic freedom must be extremely wide, there must also be limits to the range of the instructor's statements, language, and injection of personal beliefs. Mutual respect must be maintained at all times, and instructional material must be based on verifiable facts or tenets. [FN50]

This statement presents dual sets of concerns. There are concerns for professional competence, to be exercised in choosing instructional materials and, presumably, in advancing theories that have a legitimate intellectual basis. No teaching scientist can legitimately portray the Earth as flat, or replace Darwin's theory with the creation story from Genesis. Jeffries' theory about melanin as a source of black intellectual \*293 superiority, his racial theory of superior African "sun people" and inferior European "ice people," and his dubious use of history in support of his ideology, [FN51] all create severe doubts about the professor's basic academic competence. [FN52] The college did not choose to act against Jeffries based on academic incompetence, but the case, it would seem, is there to be made. [FN53]

Concerns about professional integrity are often imprecise, but they must be addressed by every profession. Traditionally, the professor in the classroom orchestrates an intellectual discussion of the topic at hand. With this understanding, the Second Circuit felt confident in referring to the college classroom as a "marketplace of ideas." [FN54] But the classroom is not exactly like the marketplace of ideas in the society at large. Professors, unlike parading Nazis, have a job to do and distinct obligations to the audience gathered to hear them. Fundamental student interests justify limits on a professor's academic freedom in class. These interests include:

1. Learning the matter under study, guided by a professor who respects, rather than betrays, the basic tenets of intellectual life; [FN55]
2. Learning in an atmosphere as free of racial and ethnic hatred as the faculty and administration can make it;
3. Effective access to all courses in all academic departments (assuming academic qualifications are met);
4. Freedom from intimidation and from attacks on a student's race or religion by a faculty member; and
5. An environment in which the student's passage to mature adulthood is aided, not distorted and corrupted, by the faculty.

Statements demonstrating a professor's animus towards certain groups infringe upon these interests. [FN56]

\*294 Sometimes outsiders value these student interests more than faculties seem to. The trial judge in the Jeffries case rejected the notion that free speech rights in class extend to extreme lengths:

[T]he Constitution does not prevent a University from taking disciplinary action against a professor who engages in a systematic pattern of racist, anti-semitic, sexist, and homophobic remarks during class.... Nor does the Constitution protect the right of a professor to teach patently absurd and wholly fallacious theories in his class.... [The court's decision] does not require City University to continue to disserve its own students by subjecting them in class to the bigoted statements and absurd theories of any of its professors. [FN57]

Columnist Bob Herbert urged more consideration of student interests at City College, and suggested a metaphor different from the "marketplace of ideas" for the classrooms of professors like Leonard Jeffries:

You'd like to think of it as a skit. Play-acting. Theater of the absurd. The professor, in his African costume, stands before his student-followers and plays the buffoon.

Energized by the spotlight, the professor loudly proclaims that white people are nefarious, pigment-challenged "ice people" - cold, egotistical and exploitive. Black people, on the other hand, are warm and friendly, unfailingly humanistic and spiritual, the "sun people."

And Jews? Well, they stink.

It must be a joke, right? A put-on. Ladies and gentlemen, let's hear it for that champion of melanin - the chairman and chief anti-Semite of the Black Studies Department at City College - Professor Leonard Jeffries. [\[FN58\]](#)

For Herbert, the major question is "why Mr. Jeffries's clownish act was allowed to run so long at City College." [\[FN59\]](#)

If a professor ever proposed a course called Racism 101, designed to promote racist and anti-Semitic ideas, no university curriculum committee would ever approve the course. But professors who teach racism under a different course title have confounded college faculties. Academic freedom is invoked to permit what the faculty would unhesitatingly reject, were it proposed to them as a curricular matter. A professor \*295 like Jeffries, teaching his insupportable theories of racial superiority and his invented history of Jewish wrongdoing, need not be given free rein simply because his course is already part of the curriculum under some innocuous title. Faculties that tolerate such teaching under the rubric of academic freedom fail to see that they harm their students and demean true academic values when they stretch academic freedom so far. [\[FN60\]](#)

Even the "wide net" of protection cast by the principles of free speech, academic freedom and due process does not protect remarks that are destructive of the search for truth based on reasoned analysis and the exchange of ideas. The strongest case for this was made by a professor who did not testify at the Jeffries trial but who voiced his opinion in the campus debate over the bounds of academic freedom. Professor Morris Silver, in a memo to Provost Robert Pfeffer on September 26, 1991, stated, "[s]peaking as a Department Chairman and member to the Social Science P&B [personnel and budget committee] since 1969, it is my considered judgment that the ethnic slurs uttered by Professor Jeffries in this public forum represent gross deviations from proper professional discourse." [\[FN61\]](#)

In the faculty senate, Professor Silver proposed a resolution condemning Jeffries. [\[FN62\]](#) Saying that Jeffries "engaged in the crudest forms of race baiting," Silver concluded:

Citizen Jeffries has a right to foster racial and ethnic hatred. However, Professor Jeffries has no such right. Academic freedom \*296 is intended to protect the disinterested search for truth, no matter how politically incorrect, insensitive, or damaging. But not all utterances made by a professor are protected by academic freedom. Public statements devoid of intellectual content made with the intention of defaming and inciting hatred against ethnic groups are not protected by the principle of academic freedom. Indeed, ethnic slurs are incompatible with academic freedom and destructive of intellectual life. [\[FN63\]](#)

The charge of racism is often made in society, and in its broadest usage it seems to include insensitive remarks, actual or perceived insults, offensive jokes, and even political opinions that others find incompatible with social justice. By itself, racism is too broad a category to employ to limit academic freedom. But Professor Silver narrows the sense of the term to include only statements that defame and incite hatred against specific groups. The statements need not go so far as to present a clear and present danger of physical assault or riot; the limit advocated is one for academic freedom, not for free speech generally. [\[FN64\]](#) The speech need not be destructive of physical life, but of intellectual life, to fall beyond the bounds of academic freedom.



Professor Silver's distinction may hold the key to the comparison, often made in discussions of the Jeffries case, to the case of City College philosophy professor Michael Levin. [FN65] Levin became the focus of criticism when he published his views on race and intelligence. Levin had written a book review for an Australian journal, *Quadrant*, in 1988, a letter to a scholarly journal of philosophy in 1990 and a letter to the *New York Times* in 1987. [FN66] He expressed his opinion that IQ tests were \*297 accurate and unbiased measures of intelligence. Thus, the evidence from IQ tests convinced Levin that on average blacks as a group were less intelligent than whites. In the *New York Times* letter, he argued that white store owners were justified in refusing entry to black males because of fear of criminal acts of robbery and assault, even though refusing entry would penalize many innocent black customers, based upon probabilities drawn from crime statistics.

Protesters disrupted Professor Levin's classroom and engaged in menacing behavior toward Professor Levin. The protesting students were not from Professor Levin's class, and while City College administrators identified the two student leaders of the disruptions, the administration did not pursue disciplinary action against them after they refused to appear for a meeting in the Dean's office. The college did ask Professor Levin to withdraw from teaching his introductory philosophy course in the midst of the Fall 1988 Semester, which he agreed to do. In a later semester, the administration sent a letter to Professor Levin's students offering them the chance to transfer into a newly created section of the course, if they were offended by the controversial views espoused in Professor Levin's writings. Finally, the College President appointed a special committee to look into when a professor's speech might constitute conduct "unbecoming a member of the faculty," language that implicitly threatened action against Levin's tenure status.

Levin sued the college, and won a judgment that the university had violated his First Amendment free speech rights. [FN67] The same trial judge presided over both the Levin and the Jeffries cases, and found them to be essentially similar. But there are significant differences between the two matters that must be appreciated. The first and most obvious difference is that Levin did not hold an administrative post of any kind. Jeffries was a department chairperson, and the predictable harms to the college from his views, discussed later, [FN68] flowed from the damage he could cause in that position. A second difference is in the administration's interference with Levin's teaching and its threat to change his tenure status, neither of which occurred in the administration's dealings with Jeffries. These actions are much more likely to silence a professor than depriving him of a position not essential to his functioning as a teacher and scholar.

Finally, Levin's beliefs may or may not reflect the racial animus that would lead him to discriminate against or degrade students, faculty colleagues, applicants for faculty positions, or others. While Levin's views might be evidence of a pernicious desire to stigmatize blacks as a group, it does not necessarily follow from his views on overall group differences in intellect between blacks and whites that he believes: a given black student in his class is not as smart as a given white student in class, or that a black student can not be the brightest student in the class, or that the black students in Philosophy 101 are, as a group, less \*298 intelligent than the white students in Philosophy 101. There was no evidence that Levin adverted to his beliefs in any way in class. No student ever complained in Levin's twenty-two years of teaching that Levin was unfair to a student because of race. [FN69] While Levin's views are troubling, on grounds of both quality of analysis and negative effects on racial harmony on campus, overall he seems not to be a racial demagogue.

Jeffries' message, by contrast, was unmistakably malicious. His speech shows that he belittles and scorns Jewish people because of their group membership, he scapegoats and demonizes Jews, and he regards members of the group as engaged in a conspiratorial effort to oppress blacks. His specious history of Jewish evil-doing is demagogic, not academic; his political agenda leads him to create a despised enemy, the Jews. If academic freedom is freedom to pursue one's academic agenda, it seems proper to exclude those efforts which incite group hatred that have only the false trappings of "academic" inquiry.

## B. Transgressions of Professional Norms, Though Not Grave, Suffice to Deny Complete Academic Freedom Protection

This rationale recognizes that there are many norms of academic propriety, some of which are of utmost importance and others which are of lesser significance. Academic freedom, particularly when supported by an institution's tenure system, provides some very strong protection for the speech of the tenured faculty member, permitting dismissal only for serious wrongdoing or gross incompetence. But even with a tenure system fully in place, some deprivations short of dismissal may be visited upon faculty members who commit less than capital academic offenses.

From this perspective, academic freedom looks less like a system that grants total immunity from the consequences of one's speech, and more like a system that protects professors from certain selected kinds of adverse-and often disproportionate-reactions to their academic work as teachers and scholars. Within the academy, academic freedom's protections need not be total. A professor who teaches and writes in a way that fails to garner respect-by engaging in sloppy research, employing unsound methodologies, drawing overbroad conclusions from limited data, exhibiting disdain for the work of others, unfairly criticizing colleagues or committing a host of other academic sins-may remain tenured but still may experience some negative consequences. Judgments about the quality and integrity of professorial speaking and writing legitimately factor into decisions about research leaves, access to funding, reduced teaching loads, university committee assignments, promotions, nonreappointment of untenured faculty, course assignments, salary increases, and many other important matters. [FN70]

**\*299** For Professor Jeffries, his speech, with its serious negative effects on the college, led to the loss of his department chair. The college's action was not disproportionate to the offense. The speech was damaging to the efforts of the college to create a bias-free environment, to instill respect for the ideals of the university, and to make the Black Studies Department a source of pride rather than a source of embarrassment. It demonstrated an irresponsible mindset at odds with the basic responsibilities of academic administration entrusted to a department chairperson. [FN71] In this light, removal from the chair seems a reasonable rather than a disproportionate response by the college.

## C. The Damage Done to the University Can Outweigh the Infringement of Academic Freedom Suffered By the Professor

No rule, even one protecting academic freedom, can hold absolute sway in the real world. Important principles must sometimes yield to compelling needs. Some measure of academic freedom in the university is sacrificed, for example, because of the need to evaluate untenured faculty members. [FN72] Knowing they will be judged by tenured faculty and deans, junior faculty have a practical stake in not alienating these future judges; as a consequence, some untenured academics will avoid controversial subjects or withhold fully candid expressions of their opinions. A primary virtue of tenure is that it eliminates or vastly reduces such pressures. For those without tenure, some of academic freedom's protection is lost. Yet the loss of academic freedom is outweighed by the essential institutional need for a probationary period in which to assess the quality of untenured faculty members, before the institution makes the lifelong commitment that tenure represents.

Similarly, it can be argued that the great harm likely to be done to his department, to the college's students, and to the university itself [FN73] outweighed whatever academic freedom protection Jeffries enjoyed as **\*300** a professor occupying a departmental chair. Insofar as Jeffries expressed his views on multicultural education, his speech was protected by academic freedom. But by blending in anti-Semitic and racist comments and by substituting scapegoating and race-baiting for intellectual analysis, he willingly risked inflicting substantial and unwarranted damage on his college, and at the same time reduced the value of his contribution to the multicultural debate. With his tenure status unchallenged, he

might continue to air his views, albeit without the prestige conferred by his chairmanship. Under these circumstances, the college could reasonably conclude that the damage done outweighed the academic freedom values at stake.

A parallel weighing of values occurred in the Second Circuit's resolution of Jeffries' First Amendment claim, when the court ruled that "as a matter of law, this potential disruptiveness [of Jeffries' speech] was enough to outweigh whatever First Amendment value the Albany speech might have had." [FN74] Unfortunately, the court did not say any more on the matter, leaving any "weighing" that it did unarticulated. Its assertion is subject to some doubt when another of its conclusions—that the chair was a merely ministerial position—is taken into account. If the chair's job was not of much significance, why weigh very heavily the potential disruptiveness to the college of the chairman's speech? Because I do not agree with the characterization of the chairmanship as "ministerial," [FN75] and I believe the harm was substantial, [FN76] I agree that the result of the weighing supported Jeffries' dismissal.

#### D. Academic Freedom Offers Limited Protection to Professors Acting As Administrators

This argument classifies the chair as an administrative position. Typically administrators do not have tenure in their administrative roles. Although Professor Jeffries had tenure as a faculty member, he did not have tenure as a department chair. Continuation as chair depended upon the good opinion of the department faculty which elected him, and of the President who approved the appointment and submitted it to the Trustees. The institutional powers that appoint chairs are entitled to the discretion that management generally has to remove administrators.

While it is plausible to argue that a departmental chair is not a role for which academic freedom exists at all, this goes too far in denying a professor academic freedom protection from a sanction—loss of a chair—imposed only because of politically or socially unpopular professorial \*301 speech. In Jeffries' case, his speech was on a matter within his academic domain, and it was unpopular. But it did more than merely generate disagreement, which universities, of all places, should be able to tolerate. Jeffries' speech also cast doubt on his judgment on matters bearing on the operation of the university, and was likely to cause harm to students and to his own department. [FN77] It is these qualities of the speech that justify his dismissal from the chairperson's role.

Academic freedom should include freedom to talk about one's field while one holds an administrative position, but the freedom is not absolute, and should be more qualified than the liberty of the faculty member to speak and maintain his ordinary position as a faculty member. The university president is entitled to have confidence in the quality of judgment, leadership ability, and high level of academic competence of the department chair. Greater responsibilities devolve upon the faculty-administrator, [FN78] and speech that calls into question one's ability to discharge those responsibilities justifies depriving the faculty member of his enhanced role in university affairs.

#### E. Academic Freedom and the Law

The Second Circuit's opinion in Jeffries II devoted little attention to academic freedom, addressing the issue in this sole paragraph:

Finally, we note that an amicus curiae argues that we should not apply Waters at all because Jeffries, as a faculty member in a public university, deserves greater protection from state interference with his speech than did the nurse in Waters who complained about the obstetrics division of the hospital. We recognize that academic freedom is an important First Amendment concern. Jeffries' academic freedom, however, has not been infringed here. As we held in the earlier Jeffries, and as Jeffries himself has argued, the position of department chair at CUNY is ministerial, and provides no greater public contact than an ordinary professorship. Jeffries is still a tenured professor at CUNY, and the defendants have not sought to silence him, or otherwise limit his access to the "marketplace of ideas" in the

classroom. [\[FN79\]](#)

The court's statement about Jeffries' continued tenure status is in line with the arguments made above concerning proportionality and weighing. [\[FN80\]](#) The court's conclusion that the position of department chair was merely ministerial, however, seems incorrect for City College and inaccurate for many institutions of higher education. [\[FN81\]](#) As previously [\\*302](#) discussed, the characterization of Jeffries' classroom as a marketplace of ideas seems misguided. The court's dismissive brevity, however, does seem in keeping with the Supreme Court's recent pronouncements on academic freedom as a component of the First Amendment.

Nearly three decades ago, in *Keyishian v. Board of Regents*, [\[FN82\]](#) the Supreme Court termed academic freedom a "special concern of the First Amendment." [\[FN83\]](#) Striking down attempts by the government in the cold war era to impose loyalty oaths to regulate the teaching profession, the Court wrote in an earlier case that these laws threatened to impose "a strait jacket upon the intellectual leaders in our colleges and universities." [\[FN84\]](#) Later, in *Keyishian*, the Court wrote that the laws threatened to "cast a pall of orthodoxy over the classroom." [\[FN85\]](#) These older cases were construed in the 1990 case of *University of Pennsylvania v. EEOC* [\[FN86\]](#) as government attempts to "control or direct the content of the speech engaged in by the university or those affiliated with it." [\[FN87\]](#) This characterization describes a standard First Amendment violation, regardless of the academic setting. Notably, the Court in *University of Pennsylvania* did not renew its *Keyishian* pledge to make academic freedom a special concern of the First Amendment; it referred to the older precedents as "the so-called academic-freedom cases." [\[FN88\]](#) No special commitment to academic freedom can be found in the opinion, although the justices reaffirmed their adherence to the "principle of respect for legitimate academic decision-making." [\[FN89\]](#)

It now seems possible that the Court might refuse to recognize any academic freedom claim not embraced within already established First Amendment doctrines. At most, the Court might be willing to add at least the core ideas of academic freedom to the existing stock of First Amendment ideas. [\[FN90\]](#) Keeping to the core is in many ways a desirable outcome. The core would protect critical inquiry into ideas in the [\\*303](#) classroom, in research and in debate; it would guarantee a measure of freedom to the individual professor and some autonomy to the academic institution. [\[FN91\]](#) Teachers in our educational system, Justice Frankfurter once wrote, cannot function "if the conditions for the practice of a responsible and critical mind are denied to them." [\[FN92\]](#)

But if fundamental constitutional values are not "sharply implicate[d]," [\[FN93\]](#) the courts are well advised not to fashion new rules of constitutional law around the profession's concept of academic freedom. Broader constitutionalizing would inevitably bring its own set of problems, e.g., confiding problems of line-drawing to judges who are not necessarily attuned to the realities and nuances of academic life; pressuring universities to make judgments based upon strategies of litigation avoidance rather than application of the institution's own academic standards; and increasing the incidence, costs, and disruption attendant upon litigation.

Constitutionalizing academic freedom would also prevent institutions from defining various aspects of the concept for themselves. The widely adopted 1940 Statement does not begin to provide an elaborate, detailed, or precise understanding of the concept and its many possible applications to university life. As long as the academic profession itself does not agree on the bounds of academic freedom, constitutional decisions risk truncating an important and necessary debate within the profession on academic freedom's proper scope. [\[FN94\]](#) Courts, for their part, should be wary of deciding matters that are best left to academics themselves; as one court stated years ago, "The court does not intend to referee every debatable dispute between school teachers and their employers simply because academic freedom may arguably be involved." [\[FN95\]](#)

The discussion thus far of denying academic freedom immunity to Professor Jeffries demonstrates that the Jeffries situation is far from academic freedom's core concern about interference with the basic conditions for free and responsible inquiry. Thus

the Second Circuit's \*304 rejection of the constitutional academic freedom argument is well founded.

Apart from the Constitution, it is conceivable that a professor might claim academic freedom as a contractual right. Guarantees of academic freedom might exist if academic freedom were referred to in faculty contracts or in official faculty handbooks published by the university. [FN96] No contractual claims were advanced in the Jeffries case; if any were based on the general language of the AAUP's 1940 Statement and the customary understanding of the term in the profession, they ought not to succeed for the reasons stated in the discussion above of academic freedom as a norm of the profession.

## II. THE FIRST AMENDMENT, PUBLIC EMPLOYEE SPEECH, AND THE UNIVERSITY EMPLOYER

In his case, Professor Jeffries did not rely on an academic freedom argument. He instead argued strenuously that a separate branch of First Amendment doctrine—that which gives public employees certain rights to speak out without fear of employer sanctions—protected him and barred his removal from the Black Studies Department Chair. [FN97] In this section I will outline the free speech rights of government employees and suggest how the legal doctrine now in place ought to be applied in the university setting. I also suggest some cautions about the Second Circuit's resolution of Jeffries II.

### A. Public Employee Speech

In the late 19th century, Justice Holmes suggested a rather drastic limit on the free speech rights of government employees. In his epigrammatic style, he wrote that "[a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." [FN98] In this century the Supreme Court has recognized that government employees are protected, to some extent, from dismissal based on speech. The Supreme Court's decision in *Pickering v. Board of Education* [FN99] is an important example. The Court disallowed the discharge of a public school teacher who, in the midst of a public election campaign, wrote a letter to the editor of a local newspaper critical of \*305 the local school board's revenue raising proposal. The Court held that a balance must be struck "between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." [FN100] The Court struck the balance in favor of the teacher, finding his speech caused no harm to his ability to teach his classes or to relate appropriately to his immediate superiors in his school. [FN101] The teacher's interest in expressing his views on an important community issue outweighed any small detrimental effect his speech may have had on the school's functioning.

Later cases allowed the government employer to dismiss workers for speech if the employer could make a credible argument that the speech interfered with the operations or mission of the workplace. [FN102] Determining whether the employee's speech is harmful depends upon a careful examination of the function of the government agency, the position of the employee in the agency, and the nature of the employee's statement. [FN103]

Several cases illustrate how the interaction among these elements could produce valid or invalid claims of interference with workplace functioning. In *McMullen v. Carson*, [FN104] the Eleventh Circuit upheld the firing of a sheriff's department clerical employee who announced in a television interview that he worked for the sheriff's office and was an active recruiter for the Ku Klux Klan. The court reasoned that a law enforcement office depends upon public support and cannot afford to be associated with supporters of groups known for violence and lawlessness. [FN105] By contrast, in *Rankin v. McPherson*, [FN106] a clerk in a county constable's office who made a comment in a private conversation with a fellow employee critical of the president of the United States was held to have been unlawfully fired. The clerk's lowly ministerial duties, the limited audience for her

comment (a co-worker and one deputy constable who overheard the conversation), and her lack of involvement in the law enforcement work of the office made any claim of harm to the employer's operations or mission seem unrealistic. [FN107]

Someone in a position of substantial responsibility has less freedom to speak out than a low-level employee. An example given by the Supreme Court shows that the highly-placed government official is **\*306** liable to dismissal for disagreement with superiors: "[T]hrough a private person is perfectly free to uninhibitedly and robustly criticize a state governor's legislative program, we have never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same thing." [FN108] In Rankin v. McPherson, the Court stated more generally:

The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails. Where, as here, an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal. [FN109]

## B. The University Employer

Jeffries v. Harleston required the court to determine a department chairperson's role in the operation of the university. Was he merely a low level functionary at the bottom of the administrative ladder, or did he occupy a position with significant and important responsibilities? If the chair is deemed an influential position, then it is more likely that the university employer will be able to show adverse consequences to its operation, or undermining of its educational mission, stemming from an irresponsible speech. In both Jeffries I and II, the Second Circuit reached the conclusion that the chairperson "carries out policy but does not make it" and thus the department chairperson's role was "essentially ministerial." [FN110] To challenge this assertion, I will consider first how the chair fits into the governing structure of the university and then explore the specific roles the department chair plays in university affairs.

Government offices are commonly structured along traditional hierarchical lines: with a single boss, a set of deputies with defined areas of oversight, and various supervisors and workers with more or less well defined tasks. Wherever a given employee is in the structure, typical employee attitudes valued in private sector enterprise—such as ability and willingness to follow management directives, a sense of loyalty to the employer, cooperativeness and teamwork, and concern for the good name and economic welfare of the employer—are also valued by the government employer. [FN111]

**\*307** Courts are likely to go astray, however, if they have this model in mind when the employer is a university. A unique managerial structure predominates in American higher education. Instead of the typical single hierarchy found in government and industry, there is an unusual hybrid. A traditional hierarchy, represented by the college administration, coexists with a group of professional employees (the faculty) that possesses some measure of independence from the university, some decision making authority within the university, some of its own organizational structures (hierarchical and otherwise), and some degree of input into the administration's decision making process. The faculty's independence, authority, organization, and input vary from college to college, and vary over time within the same college. Contributing to the structural complexity are higher education's widely accepted but sometimes imprecisely defined concepts of collegiality, peer review, academic freedom, and tenure. In such a context, drawing simple lines of authority in the university is a hazardous and potentially misleading undertaking. [FN112]

The complexities of shared power in the university are not necessarily reflected in the officially promulgated by-laws of the institution. Internal rules commonly confer seemingly unlimited formal authority on the president of the college, with final authority resting in a board of trustees. [FN113] By-laws are unreliable guides to the true nature of authority in the university. [FN114] While the president may hold imposing formal power, the day of the president-as-autocrat is

long gone. "Authority in the typical 'mature' private university," the Supreme Court observed in the context of a university labor relations dispute, "is divided between a central administration and one or more collegial bodies." [FN115] Whatever the formal rules may say, authority is diffuse and the faculty may exercise important managerial functions. [FN116] Even the president, \*308 though officially appointed by the board of trustees, is somewhat accountable to the faculty in most institutions and significantly accountable to it in many. [FN117]

To carry out its educational functions, the university is organized into a number of academic departments. The size, importance and autonomy of departments vary from college to college and sometimes even from department to department within an individual college. The chair of a department may have little, some, or substantial power. [FN118] In some colleges, the faculty generally is weak and authority in fact resides in the administration. In others, the faculty wields considerable power and control, and "the fact that the administration holds a rarely exercised veto power does not diminish the faculty's effective power in policymaking and implementation." [FN119]

### C. Role of the Department Chair

Within the unique structure of the university, department chairs often have many formal and informal responsibilities. They usually have a major role in decision making for the department in areas of curriculum and course scheduling, faculty hiring, tenure and promotion, new program development, admission of graduate students, composition of departmental committees, and choosing incumbents of other departmental positions (e.g., director of undergraduate or graduate studies). Chairs gather and allocate resources for and within the department, prepare department budget proposals, and act as spokespersons for the department.

At City College, the university by-laws provide a sketch of the chair's responsibilities. While the chair's role and influence is not solely determinable from this listing, it is a useful place to begin. The bylaws identify the chairperson as the "executive officer" of the department and state the expectation that the chair will "act effectively as the departmental administrator and spokesman and as a participant in the formation, development and interpretation of college-wide interest and policy." [FN120] The chair must:

- \*309 1. Be responsible for departmental records.
2. Assign courses to and arrange programs of instructional staff members of the department.
3. Initiate policy and action concerning the recruitment of faculty and other departmental affairs . . . .
4. Represent the department before the faculty council or faculty senate, the faculty and the board.
5. Preside at meetings of the department.
6. Be responsible for the work of the department's committee on appointments or the department's committee on personnel and budget which he/she chairs.
7. Prepare the tentative departmental budget . . . .
8. Transmit the proposed budget to the president with his/her recommendations.
9. Arrange for careful observation and guidance of the department's instructional staff members.
10. Make a full report to the president and to the college committee on faculty personnel and budget of the action taken . . . when recommending an appointee for tenure . . . .
11. Hold an evaluation conference with every member of the department . . . .
12. Generally supervise and administer the department. [FN121]

The following sections probe beyond the by-laws to uncover the role of the chair in the context of the actual realities of university life, at City College and elsewhere.

#### 1. Role in Building and Shaping the Academic Department

Universities are often known for the strengths of particular academic departments. A reputation for an excellent history, political science, engineering, or biology department can generate undergraduate and graduate applications, influence foundation grants, foster alumni pride and support, and generally enhance the standing and prestige of the college in the academic world. A poor departmental reputation, conversely, can diminish institutional status and prestige and drive away potential students and faculty. In the worst cases a poor department becomes a source of embarrassment to the institution.

When a department is in disarray, a university often looks to the chair to revitalize it. Using the power of the office, the chairperson can initiate contacts with promising young scholars or veteran professors with established reputations. The chairperson's prestige, position, and personal contacts can be used to recruit new faculty members for the department, to re-energize established faculty, and to generate renewed \*310 interest in the field of study on the part of students and in the wider academic community. [\[FN122\]](#)

A chair's power to profoundly influence the direction and shape of his department is illustrated by the experience of Harvard University's department of Afro-American studies, which was reportedly "on the verge of collapse" in 1990-91. [\[FN123\]](#) With only one tenured professor, course offerings were so sparse that student majors were forced to take some of their required courses at other universities in Boston. The Harvard administration realized that the key to revitalizing the department lay in finding the right chairperson. When the University hired Henry Louis Gates, Jr. as chair, he brought in new faculty, forged useful ties with related academic departments, and generally excited new interest on the campus in the department's offerings. [\[FN124\]](#)

The Jeffries case aptly illustrates the critical role of the chairperson in building and shaping a department. The trial court heard from two department chairs: Professor Jeffries, and his replacement for the 1992-93 academic year, Professor Edmund Gordon. Both men's experiences showed that the chair's vision of what a department can and should be drives the actions the college takes to improve itself. In his trial testimony, Professor Jeffries acknowledged that he was originally hired by City College to create a new Black Studies Department and, as its first chair, to build it into "the strongest possible department of Black Studies in the country. We were asked to recruit the staff and to develop the curriculum and the programs relating to the local community, the urban community and the international community." [\[FN125\]](#)

Twenty years later, perceiving that a departmental rebuilding effort was required, the college brought in Dr. Edmund Gordon to replace Jeffries as chair of Black Studies. Gordon was a respected scholar and academic who had taught at some of the nation's leading educational institutions. He testified that at City College he embarked on an effort "to scour the country for outstanding people who could broaden the \*311 perspective [of the department], who could strengthen the scholarly productivity, [and] who could enrich the experiences of our students." [\[FN126\]](#) Professor Gordon described the central role of the chair at the various universities where he had served:

I have tried to [employ] . . . the same conception of the chairperson role that has worked for me at Yeshiva, at Columbia, and at Yale, and that is I'm the conceptual leader for this group of people. If nobody else has the ideas, I generate the ideas. I'm the standard bearer. I represent what . . . is best about the department. I try to hold my colleagues to that. I am a mentoring coach. I have the responsibility for helping faculty members achieve and discharge the kind of standard that I'm setting forth. I have to raise the resources to enable them to do what they're going to do. All of us can't be out beating the bushes for money, so the chairperson does that. The chairperson coordinates, administers, you know, keeps the glue together, should be the spirit of the place, should set goals and ideals and visions for the department. [\[FN127\]](#)

Part of Gordon's vision for the Black Studies Department at City College included inaugurating an institute for the study of the African diaspora and adding a graduate program. [\[FN128\]](#)



Of course, the influence of a chair can be negative instead of positive. The chair can impose not a vision but a straitjacket on a department, by the process of "ideological inbreeding," [FN129] i.e., seeking out and hiring only those who agree with his or her beliefs, attitudes, and approaches to the field. Whether the overall influence of a chair is good or bad, however, the essential point is the same: a chair who acts to build or shape a department often wields enormous effective power in the college.

## 2. Role in the Faculty Personnel Process

Faculty personnel decisions—those relating to hiring, retention or dismissal, promotion, and tenure of faculty—determine, in large measure, the nature and quality of the institution.

The chair's influence in the hiring process can be considerable. An enterprising chair initiates the very opportunity to hire by seeking \*312 budgetary authorization, and also initiates contacts with prospective candidates, screens out those he believes to be unsuitable, and shepherds the valued candidates through the appointment process. [FN130] The chair usually conducts negotiations on behalf of proposed appointees, seeking authority to offer such enticements as money for research support and early leave to work on special projects. Once hired, faculty members often feel a loyalty to the chair who brought them on and guided them through the hiring process, further enhancing the chair's influence in the department. [FN131] The chair may also be instrumental in funneling university funds to department members for conferences, travel, or special programs. [FN132]

If the chair is an important voice in the tenure process, junior faculty will not only be beholden to him for his role in their hiring, but dependent upon his continued good will. Tenure decisions are among the most critical decisions a college makes. Tenure gives its recipient a lifetime guarantee of job security, with exceptions only for gross incompetence, egregious misconduct, or severe institutional financial distress. [FN133] Dismissal from a tenured post requires a full due process hearing; the costs, delay, procedural barriers, and high substantive standards make dismissal for cause a rare event in academia. [FN134]

While tenure decisions are not made by any one individual, the departmental chair frequently has an important voice in the decision. The process usually includes a faculty committee which makes the initial assessment of the candidate's merit as a teacher and scholar. The department chair may make an independent recommendation, may chair the department's tenure committee, or may represent the department on a university-wide tenure committee. Wherever he is in the formal process, the chair can exert a substantial, and sometimes decisive, influence in tenure decision making.

At City College, by virtue of being chair of his department, Professor Jeffries sat on the Social Science Personnel and Budget Committee (P&B), which included the chairs of all social science departments and the Dean, and which had jurisdiction over personnel issues in all of these departments. Tenure and promotion candidates were considered at P&B meetings once a year; the university Provost testified that this \*313 was one of the most important functions of a department chairperson. [FN135]

## 3. Role in Shaping Educational Practices and Policies in the Department

Judge Benjamin Cardozo once observed: "By practice and tradition, the members of the faculty are masters, and not servants, in the conduct of the classroom. They have the independence appropriate to a company of scholars." [FN136] Under the umbrella of academic freedom, individual faculty members are generally free to teach their courses as they see fit, using their professional judgment to choose teaching methods and materials. [FN137]

Given this freedom, it might appear that the educational program was largely a product of individual decision making, not subject to much influence by a department chair. While this may be true in some college departments, there is still the need for departmental coordination and room for a chair to exercise important influence in establishing academic policy for the department.

Academic decisions that coordinate the work of individual faculty members and establish the overall research and teaching program must be made at the department level. [FN138] Such decisions include which courses will be taught and at what intervals, how faculty will be allocated between entry level and advanced courses, what courses shall be required for students majoring in the subject, the number and type of elective courses, and how the sequence of courses will be rationalized so that the program progresses in a coherent manner. Some of the details may appear ministerial, but in truth these decisions combine routine management with decision making about basic academic policy. Much of that decision making is likely to be left to the chair alone or to the chair in consultation with department faculty members or committees.

The chair may also be charged with the task of monitoring the teaching done in the department. Section 9.3 of CUNY's Bylaws directs the department chair to "arrange for careful observation and guidance of the department's instructional staff members." [FN139] Academic freedom concerns probably limit the implementation of this directive in practice, especially with respect to tenured faculty. But the chair is likely to exercise this supervisory function when there are serious problems, e.g., a faculty member's constant lateness to class, or student complaints \*314 about classroom intimidation. When the chair himself, like Professor Jeffries, generates such problems, it is not likely he will be eager to fulfill the monitoring function. [FN140] It remains nevertheless an important function if the department is to maintain the quality of its educational program.

#### 4. Role in Dealing With Other Departments and With the Administration

Within the university there are many decisions and activities that require some degree of cooperation, good relations, and mutual respect among departments and between any given department and the central administration. Department chairpersons commonly speak for and represent their departments on issues which involve other units of the college.

A key issue for departments and the administration centers on the university budget. [FN141] Budgetary information in a university must flow in both directions, from departments to deans and higher administrative officials, and from the administration back to departments. Chairs link the faculty to the administration, serving as sources of information about the department and its needs and advocating its interests. Chairpersons may be advised of impending budget shortfalls, and asked to prepare budget plans that address projected deficits. [FN142]

Departments may find themselves in budgetary competition with one another. In the allocation of hiring lines, for example, limited funds for faculty hiring compels decisions to determine, in the first instance, which of the various departments will receive additional faculty lines. In times of severe budget constraints, decisions about where cuts will occur require departments to justify their existing faculty lines, and may require some departments to justify their very existence. [FN143] While department chairs do not have final authority on budget matters, they have important input in the decision-making process in their roles as \*315 sources of information and recommendation. Chairs with reputations for good judgment and high quality scholarship will be listened to, and their domains are more likely to flourish in the budgetary competition.

Joint programs sometimes cut across department lines, necessitating interdepartmental cooperation. Arrangements for interdisciplinary majors, professors to teach in different departments, cooperative use of computer technologies in teaching or research, and the like may depend upon the capacity of the departments, through their chairpersons, to work together. The respect (or lack thereof) accorded

a given department may hinge on its chair, who is likely to be one of the few professors in the department known to other faculty throughout the university.

The experience of Harvard University's Black Studies Department before the arrival of Henry Louis Gates as its chairperson demonstrates the difficulties that can hinder joint academic efforts. Because the Black Studies Department was perceived as academically weak, other departments shied away from joint faculty appointments with that department. After Gates came on to lead the department, he was able to engineer joint appointments (and thereby to save department resources) with four other departments in the University. [\[FN144\]](#)

Department chairs are logical choices for academic committees whose mandates cut across department lines. [\[FN145\]](#) Numerous issues come up that faculty bodies are called upon to investigate, to deliberate upon, and to make recommendations for university action. Affirmative action plans, student disciplinary rules and procedures, and sexual harassment policies are some issues that have figured prominently in campus administration in recent times. More unusual issues, such as the merger of departments or the transfer of a department from one school to another within the university, also arise on occasion; the input of department chairs may be of vital importance in the ultimate decisions made. [\[FN146\]](#)

## 5. Role in Contributing to the Campus Ecology

At every college there is a campus ecology, an overall environment created by the myriad interactions of people in the social system. The \*316 institution may be experienced as an intellectual arena or a party school, as diverse or homogeneous, personal or impersonal, friendly or unfriendly, centered around football or non-athletic. The quality of the overall environment will affect all who live and work in it.

Those perceived to be leaders of the institution, including department chairs, will have a greater impact on the campus ecology than others. Leaders typically are more visible than others, have more access to campus communications media, and exercise more control over the flow of information than non-leaders. Those with official titles, such as chairpersons, will be regarded as leaders, by virtue of their apparent authority over their departments. This may be true even if they exercise little effective authority, since students and others on campus are not necessarily aware of the political realities within departments. [\[FN147\]](#)

Influences on the institutional ecology are magnified by behavior that attracts attention or notoriety. Professor Jeffries already attracted attention to himself by virtue of reports about his Black Studies classes. A white student, Fred Reuckher, described his experience in a black studies course taught by Jeffries in a series of articles that appeared in the campus newspaper. [\[FN148\]](#) Reuckher compared Jeffries to a "shock jock" on the radio, who regularly made outrageous, bizarre statements.

In class, Reuckher wrote, the professor "was always snapping on my race. At times it really made me angry and at other times, it just hurt. But I didn't say anything because it was his show." [\[FN149\]](#) Once Jeffries answered a student question-"What do you think we should do about the white people?"-by saying "If I had my way, I'd wipe them off the face of the earth." [\[FN150\]](#) Later he retreated to: "I mean, I mean the white value system, I'd like to see that wiped off the face of the earth." [\[FN151\]](#) In another lecture, "Jeffries said that the space shuttle Challenger blowing up was probably the best thing to happen to America in a long time. He feels that the space program needs something to slow it down before white people start spreading their filth throughout the universe." [\[FN152\]](#)

An official college inquiry sparked by the articles made no factual findings when the student author declined to meet with the investigating committee, saying that everything he had to say about the classes \*317 was in his articles. [\[FN153\]](#) Nevertheless, the committee report to the president did express some concern for the campus ecology:

Students must not be made to feel uncomfortable (or fearful) in the classroom

due to the nature of the presentation . . . or the action or statements of the instructor. . . . Mutual respect must be maintained at all times . . . . It is of utmost importance that all members of the College Community [sic] conduct themselves in a manner that fosters mutual respect and understanding among the many ethnic and racial groups that make up the City College Community [sic]. [FN154]

Of course, Jeffries did not need to be chair of the Black Studies Department to make provocative statements in class. But the position enhanced his status at the college, and conveyed to the entire community that this was no wayward maverick in the department, but its leader and official spokesperson.

## 6. Role in Relation to Alumni, Government, and Community

Department chairs usually perform their functions within the bounds of the university community. Nevertheless, it is sometimes the case that what they say or do affects the quality of the institution's relations with the outside world, especially with groups that are of particular importance to the college, such as alumni, government officials, prospective students, and community leaders. Chairs may seek funding from government or private foundations, assist others in the department with funding proposals, address alumni groups, and otherwise make contact with external university constituencies.

Offending those constituencies can create difficulties in maintaining the levels of alumni fundraising and government support that are vital to the institution's fiscal well-being. [FN155] Community support is often needed as well to help alleviate the "town and gown" frictions that regularly beset college campuses. [FN156] Speeches by any faculty member may damage the university's external relations. It seems plausible, however, that an offending speech by one who chairs a department \*318 may generate greater anger toward the university, because the speaker is perceived either as part of the administration or as holding a special place of honor and prestige granted to him by the university.

The foregoing description of the role of the department chair demonstrates that the job, both as it is sometimes described in written rules and as it is performed in practice in higher education, is rarely a merely ministerial one. In fact it is a potentially critical position that directly affects the quality of the institution's educational program, and one which requires its occupant to refrain from speech that is likely to cause the harms detailed next in this paper.

### III. HARMS TO THE UNIVERSITY

The opinion of the Second Circuit in Jeffries II did not detail the harms that might flow from a speech like that given by Professor Jeffries, but instead relied upon a jury finding that college officials were motivated by a reasonable prediction that some harm to the students, the Black Studies Department, and the college would result. But it is important for future cases to attempt a careful analysis of this question of harm, since it is essential to the consideration of both academic freedom and free speech claims in the university.

#### A. Noncognizable Harm

It is necessary to distinguish the types of harms that a university may properly complain of, and those that the university, because of its essential character, must absorb as part of the academic environment. In government-employee free speech cases, courts routinely assess harm by referring to marketplace values. [FN157] Courts inquire, for example, whether the employee, through her speech, showed disloyalty, disobeyed superiors, impaired efficiency, acted contrary to the interests of the employer, or damaged workforce morale or harmonious relationships between workers and superiors. [FN158]

In the university setting, marketplace inquiries do not provide a sufficient basis for measuring harm caused by faculty speech. Market criteria do not take full

account of the multiple purposes, relationships and governance structures of higher education. An employer's interest in workforce esprit de corps, [\[FN159\]](#) for example, is much diminished in a college setting, where the need for professors to work together to \*319 generate the "product" is minimal and ideas that generate dissent and cause disagreement are valued as contributions to intellectual debate. Sharp differences of opinion, though they may impair harmony, are not merely tolerated but expected in academia. [\[FN160\]](#) Neither is faculty loyalty to "superiors" an obligation of academic employment; faculty criticism of the current administration and the policies of the institution is another expected and accepted part of academic life. [\[FN161\]](#) Even concern for the economic goals and financial well being of the employer is not a demand of faculty employment. If alumni stop giving as generously as they have in the past because of anger with a faculty speaker, this economic loss does not justify the dismissal of the speaker. It is axiomatic that in academic life, faculty must be free to discuss controversial ideas that generate intense opposition, without fearing for their jobs. [\[FN162\]](#)

Despite this, Professor Jeffries was properly dismissed from his chairmanship. Jeffries was both a tenured faculty member and a department chair. The latter post arguably requires some greater fidelity to administration goals because it is a position within the administrative hierarchy of the college. Resolving the speech issues through an attempt to classify the position as administrative or faculty, however, seems less satisfactory than articulating the possible harms that the chairperson can cause and assessing the propriety of dismissal from the chair in light of those harms. It is to this task that this article now turns, using the Jeffries example to specify harms to the department, to the students, and to the university generally.

#### B. Harm to the Black Studies Department

Following the July 20th speech, the faculty of the Black Studies Department issued a statement strongly supporting the comments and positions taken by Jeffries. [\[FN163\]](#) His department colleagues' support, however, does not alter the fact that Professor Jeffries' speech demonstrated his commitment to attitudes and beliefs that harm his own department.

Jeffries' anti-Semitism poses a threat to the college's Black Studies Department in several ways. Judgment impaired by bias is a serious lack for one entrusted not merely to teach in this area but to play a primary role in hiring new faculty members and in monitoring and judging the quality of teaching and scholarship in the academic discipline. The chair is sometimes expected to shape or rebuild the department according to his own vision, and ordinarily plays a significant role in the department's hiring, promotion, and tenure decisions. [\[FN164\]](#) A \*320 vision warped by anti-Semitism holds out the prospect of a department warped by anti-Semitism. [\[FN165\]](#) At this time, black studies is a particularly vulnerable area to anti-white or anti-Jewish sentiment, as respected black scholars have recognized. [\[FN166\]](#)

A chair's recruitment of faculty and recommendations for hiring, promotion and tenure will likely reflect the biased attitudes and preferences to which he is deeply committed. This seems especially dangerous in a case like that of Jeffries, who sees his department's subject area, the history and present condition of the black community, in terms of his Jewish scapegoating and conspiracy theories. In hiring, a chair may seek out those with compatible views, who are either similarly anti-Semitic or at least comfortable with this espousal of anti-Jewish ideology. [\[FN167\]](#)

The chair's power over others in the department magnifies the harm he can cause. His influence will be greatest with respect to those in the department who do not have tenure. Despite the protection of academic freedom enjoyed by all faculty, untenured members of a department know that they are subject to the judgment of the tenured faculty and the chairperson. Openness to the latter's ideas and suggestions and a willingness to adopt them may stand the untenured academic in good stead when the tenure decision comes. Decisions on tenure depend on inherently subjective

judgments about the quality of the tenure candidate's entire academic life. What are the prospects for the chair's approval if the candidate regards the chair's views as not only unwise, but indecent and "hateful, poisonous and reprehensible"? [FN168]

Academics talk privately of the phenomenon of faculties that clone themselves, i.e., hire and tenure people who think and act as they do. A psychology department, for example, may shun behaviorists and favor Freudians, if Freudians dominate the department. This "ideological inbreeding" [FN169] has a dangerously narrowing effect on the intellectual life of the department. But how much worse it is to clone bigotry \*321 in a department. There is evidence that this had already happened in Jeffries' Black Studies Department, which he had led since its inception in 1972. The faculty saw no cause for concern about anti-Semitism in the thinking of their department chair. [FN170]

The college surely has an interest in not allowing anti-Semitism to penetrate teaching, research, and publication in a department. A chair who leads the department in its efforts to determine what course of study to offer, what main ideas and themes students majoring in the field ought to become familiar with, and who will teach introductory and advanced courses each semester, is in a position to facilitate the spread of his own anti-Semitic bias, [FN171] Moreover, by showing respect to the kind of pseudo-scholarship that dresses racism and anti-semitism in the garb of intellectual inquiry, [FN172] the chair undermines the value of legitimate research and publication by department members.

The district court judge raised another possibility of harm to the department: that "the racist and bigoted nature of Professor Jeffries' remarks would stigmatize and isolate the Black Studies Department, and make it a parochial backwater of the College." [FN173] Indeed, a healthy academic community will ostracize campus bigots, a response that may sometimes be more effective than more formal sanctions and proceedings. [FN174] The damage to the ostracized department may be difficult to measure. Students who reject the chairperson's bias may quietly stay away from department courses, depressing enrollments. The department may lose funds as it loses campus respect. University decisions that affect the department's welfare, such as budget determinations that allocate new faculty lines or that apportion financial cutbacks, are likely to be influenced by the department's poor reputation. Whatever the issue-finances, academics, personnel-deans and supervisory faculty committees may be reluctant to assist or indulge the blighted department. Significant numbers of students, faculty and administrators may simply regard the department as a lost cause, a site of racism and anti-Semitism best dealt with by informal quarantine.

### C. Harm to Students

A racist and anti-Semitic chairperson causes damage to students and to student life at the institution in a number of ways: (1) by diminishing the educational program offered by the department and betraying the fundamental ideals of the academy; (2) by making some students feel unwelcome in the department's courses and activities; (3) by corrupting \*322 other students vulnerable to bias appeals; and (4) by poisoning the college experience of all students.

#### 1. Effects on the Educational Program

An academic department, to the extent it reflects the influence of the chairperson's biased attitudes and views, veers sharply away from its educational mission. If an astronomer mixed in astrology and the occult with the study of the stars, his students would be deprived of a good education. By undermining a legitimate field of social inquiry with anti-Semitism, a teacher leads students down a similar intellectual blind alley.

In addition to incompetently addressing the subject matter, such a teacher offers a perverted role model, one that rejects and defies the basic standards of the academy. Whatever subjects they teach, all faculty members communicate fundamental

attitudes toward intellectual inquiry and the pursuit of truth. Respect for truth, for scholarship, and for reasoned debate, are academic ideals that should be communicated by all teachers. [FN175] In the social sciences, the pursuit of truth requires, among other things: attention to others' contributions, acknowledgement of the complexities of the social problems under study, careful analysis, honesty in the handling of historical materials, acknowledgement of what facts are not known and what theories are not supportable by available evidence, and engagement with others on a plane of reason. A department shaped and led by one who disdains these values will undermine the very foundations upon which intellectual life is built.

## 2. Making Students Feel Unwelcome

The students most likely to experience harm are those who know that a professor feels contempt for them. If that professor is the titular leader of his department, students will perceive that they are not welcome in the department. After a speech like that given by Jeffries, Jewish and white students generally at City College will certainly know that they are regarded as the enemy, and subject to possible abuse, intimidation, or denigration in the Black Studies Department. [FN176] These students may reasonably conclude that this corner of the university is \*323 closed to them, and that steering clear of it is the wisest course to follow. [FN177]

Even black students may fear challenging the ideas of a professor like Jeffries. As New York Times columnist Bob Herbert points out:

Mr. Jeffries has much of City College intimidated. Black students who know that he is a charlatan are afraid to protest, afraid even to criticize him if there is a chance they will be identified. Such an atmosphere turns the whole idea of the student-teacher relationship upside-down. It makes a mockery of the archetype of the wise old man (or woman) who assists the youngster in the difficult transition to a successful adulthood. [FN178]

## 3. Corruption of Vulnerable Students

Students taking courses or majoring in the Black Studies Department are not likely to feel harmed if they have chosen to study there knowing its reputation. Indeed, some students may be attracted by appeals to prejudice. Kenneth S. Stern notes that "students are coming to college less prepared to accept people of different backgrounds." [FN179] On many campuses, there exists an "everyday bigotry and insensitivity level." [FN180] Those inclined toward bias will gravitate towards a department like black studies at City College that caters to and exploits such feelings.

Whether these students recognize harm to themselves or not, the university is entitled to combat this exploitation of their vulnerability to racist ideologies. Typically students come to campus in late adolescence. Immaturity and insecurity are common to this period of life, as is the need for a sense of belonging and identity. Unfortunately, ethnic bigotry can unify its adherents and satisfy some of their psychic needs. A university, however, should be the place where unexamined and unsubstantiated biases are brought to light, not reinforced by the faculty.

## 4. Poisoning the College Experience For All Students

Bigotry promoted by a department chair poisons the campus environment generally. Robert L. Hess, president of Brooklyn College, declares that "universities owe their students a comfortable environment without the traumatic distractions of bigotry, and . . . university presidents must set a tone that cultivates that environment." [FN181]

\*324 Bigotry may be centered in a particular department, but there is no guarantee that it will be confined there. On a diverse college campus, students susceptible to racist appeals come into contact with many other students in residence halls, dining areas, sports facilities, and other common gathering places on campus. The college

provides an age-segregated, often culturally diverse environment that is only loosely supervised by older adults. The destructive potential of ideologies of contempt for others in this context is readily apparent.

Recent studies suggest that intolerance can generate a crisis of the first order on a college campus, requiring the intervention of the highest officials of the institution. [FN182] A single bias incident can attract national attention, involve the administration in a time-consuming effort to restore the reputation of the institution, and deeply upset students and faculty. In these circumstances, it surely must be within the power of the college president to ensure that no appearance of official sanctuary for bias is given. In this respect at least, the management of a department should be obligated to support the administration in opposing bias. Certainly those propagating racial and religious intolerance should be subject to dismissal from positions of special influence and prestige.

#### D. Harm to Other University Interests

The university suffers whenever an academic department is weakened or when its students are harmed. It sustains damage to itself as an institution as well when its reputation is impaired. The university's interests, financial and otherwise, depend upon its ability to maintain its good name among public and private donors, prospective students and their families, its own alumni, government officials, and potential job applicants. Faculty speech that alienates such groups can interfere with university fundraising, admissions, recruiting, and efforts to achieve diversity, and often diverts administrative efforts away from operations and planning toward "damage control." When the university needs community support, whether for zoning variances, building permits, special traffic and parking rules, or a myriad of other forms of assistance, its reputation may affect how public officials respond. The university, in short, cannot fail to protect its reputation in the wider community.

Reputational concerns are very broad, however, and do not justify abandonment of principles of free speech and academic freedom. The tenure system will preclude action in most speech matters against ordinary faculty members. But what of others who serve the university in positions of leadership?

For those in leadership positions, a careful weighing of the nature of the speech, the position held by the speaker, and the likely damage \*325 done is essential if basic university values are to be preserved. If a college president had given Jeffries' speech, there is little doubt the trustees could have dismissed him. A leadership position involves more than the performance of a set of tasks; it also involves inspiring others, earning their confidence, and leading by example.

The president of Rutgers University, Francis L. Lawrence, provided a dramatic example of damaging speech in 1994 when he told a faculty group that disadvantaged African-American students lack the "genetic, hereditary background" to do well on college admissions tests. [FN183] An outcry ensued, with many seeking the president's removal. Surely the trustees could have dismissed him from the university's top leadership position for that comment, given the status of the president as the public spokesman for the entire institution and the power of that expressed view to dishearten, discourage, or dismay the African-American student population at the institution. The trustees chose not to dismiss Lawrence, however, in view of his strenuous apologies for his remark on many occasions, and his past record of demonstrated commitment to and success in expanding higher education opportunities for minorities. [FN184] Professor Jeffries, by contrast, never apologized for what he said, and spoke in a way that was consistent with his earlier record. [FN185] Indeed, his post-speech attitude was that there was a Jewish conspiracy out to get him, and in 1994 he was quoted as saying that Jews were "skunks." [FN186]

\*326 Professor Jeffries, as a department chairperson, is much further down the university's administrative ladder than the president. After a 1985 incident sparked by a Jeffries remark, City College's President Harleston stated:



[T]here is no place at City College for racism, anti-Semitism . . . or any other attitude that denies equality among individuals. Those who are appointed or elected to leadership positions in the College have an added responsibility to insure that attitudes and values that deny equality among individuals are neither directly or indirectly supported or reinforced. [FN187]

Jeffries was elected Chair by his department, then recommended for the post by the president, and formally appointed by the trustees. [FN188] He served as the leader and primary representative of his department (in the words of the by-laws, its "executive officer" [FN189]). To head a department of learning in an academic institution confers considerable prestige and honor, as well as responsibility. [FN190] Despite the Second Circuit's conclusion to the contrary, it also confers real power and influence. [FN191]

Jeffries' racist, anti-Semitic speech contradicted the basic tenets of the college, indeed, of American higher education generally. The institution should not be required to retain him in a position of leadership. To require retention would force the college to affect a pose of indifference to the violation of its own ideals and fundamental principles by one of its own leaders. It might, of course be argued that the university is able to publicly repudiate the speech through critical statements from its president. But the fact remains that Jeffries is a **\*327** source of disharmony and ethnic conflict; [FN192] if the university wishes to credibly limit his influence and show he is not representative of the college as a whole, it must be able to back up its claim by discharging Jeffries from his position of leadership and influence.

#### E. Proving Harm

Prior to the Supreme Court's decision in *Waters v. Churchill*, several lower federal courts required government employers to submit evidence showing actual harm to the workplace resulting from employee speech. [FN193] The *Waters* case appears to establish, at least by way of dicta, that an employer's reasonable prediction of potential harm will suffice. [FN194] Whether predictions of harm are reasonable depends upon the nature of the speech, the sorts of consequences likely to flow from it, and the position the speaker occupies. Under judicial scrutiny, some predictions may seem too speculative, [FN195] while others appear well-founded.

Reliance upon credible testimony of college administrators regarding expectations of harm is sound in cases like *Jeffries*. This flows from the nature of the chairman's tasks and from the inherent difficulties of proving actual damage from *Jeffries*' speech. Once there is evidence from his own mouth that the chair favors anti-Semitic or other biased ways of thinking, it is unrealistic to require demonstrative proof of the influence of anti-Semitism from the students and the faculty inside and outside the department.

In the *Jeffries* trial, the university produced members of the Board of Trustees and the City College President, Provost, and Dean of Social Sciences. It did not call as witnesses any faculty members or students to testify about the damage caused by the speech. Although the trial judge criticized the college for this, there are several reasons why students and faculty would not agree to testify on the college's behalf in this type of litigation. First, any faculty members or students who testified would have attracted unwanted attention to themselves from militant groups on campus or in the surrounding community supporting Professor *Jeffries*. *Jeffries* himself at one point told the college administration that if it tried to penalize him for his speech there would be an uprising that "would make Crown Heights pale in comparison." [FN196]

**\*328** Second, many faculty members who found *Jeffries*' statements abhorrent still believed that academic freedom protected him. [FN197] Academic freedom is not a well defined concept, and the professoriate has worked hard throughout this century to see it widely accepted in academic life. [FN198] A broadly defined notion of academic freedom makes all faculty members more secure. Given this, it is perhaps not surprising that the Faculty Senate at City College sided with Professor

Jeffries, and submitted an amicus brief in the United States Court of Appeals arguing that the college's dismissal of him was unlawful.

Finally, professors in Jeffries' own department could not be expected to testify against him. They were recruited by him, saw the conflict as he did, and would remain dependent upon him in a variety of ways if he won the case. They were not likely to turn against him even if they thought harm to the department would result from his speech.

Another problem with insisting on hard evidence of actual harm is that some effects may be impossible to document. The influence of anti-Semitism on the chairperson's decisions and recommendations in the hiring and tenure processes is easy to disguise, since these processes involve judgments that are by their nature imprecise and unavoidably subjective. The number of prospective student applicants who don't apply to City College, either because they belong to groups targeted by the speech or because they deplore bigotry wherever it is aimed, is impossible to ascertain. The university should be able to take such likely, if unprovable, effects into account in deciding whether to act against a department chairperson.

#### CONCLUSION

Professors enjoy both academic freedom and free speech rights. These rights, though broad, do not confer total immunity from adverse consequences for all speech by faculty members. Academic freedom protects faculty members from dismissal for airing unpopular and controversial views. Its protection is lost for grave transgressions of professional standards in teaching, research and publication. I suggest that lesser transgressions suffice to deny protection from some adverse consequences; I propose that there be a notion of proportionality introduced into the discussion of suitable responses to breaches of academic responsibilities. I also suggest that student interests- particularly the interest in a learning environment in which racial or religious hatred is opposed by faculty members, not incited by them- be given greater weight, limiting academic freedom to give universities broader discretion to choose their responses to racist or anti-Semitic faculty speech. \*329 The First Amendment should protect only the core of academic freedom, by preserving the basic conditions which make free inquiry possible. The still imprecise contours of academic freedom should be left to the academic community to develop, free of judicial interference.

The First Amendment doctrine that limits government employers' ability to discipline workers who speak out as citizens on matters of public concern also protects faculty members at public universities. Courts must apply this doctrine to the university employer with care, so as not to impose marketplace values on an institution which is organized and functions differently from typical marketplace enterprises. The norms of faculty employment do not include unquestioning loyalty to administrative "superiors," harmony among fellow faculty co-workers, and other employee traits typically valued in the marketplace. Faculty members who occupy departmental chairs can, however, be expected to adhere to norms of the academy, e.g., to respect the basic values of scholarly inquiry, to keep bigotry from penetrating teaching and research in the department, to make recommendations on hiring, promotion and tenure free from the taint of prejudice, and to refrain from enticing some students with bias appeals and attacking the race or religion of others.

A department chairperson in an academic community often plays a role in university affairs that fundamentally affects the quality of the educational program offered by the institution. Contrary to the conclusion voiced by the United States Court of Appeals for the Second Circuit in *Jeffries v. Harleston*, the position is not merely a ministerial one, and the anti-Semitic or racist words and attitudes of the chairperson can weaken the academic department which he or she leads, inflict substantial damage upon students, and poison the overall college environment. These factors tilt the balance called for in the First Amendment test for government employee speech decisively against Professor Jeffries.

Thus, despite the protections afforded by free speech and academic freedom, I conclude that the removal of Professor Leonard Jeffries as chair of the Black Studies Department at City College was not barred by either of these principles. Rather, the university's response to the Jeffries speech was well within reason, given the harm such a speech could cause to academic life, the doubt it cast on his ability to carry out his important responsibilities as chair, and the fact that Jeffries would remain as a tenured member of the faculty. In these circumstances, to force his continuance as chair would be contrary to the legitimate and compelling needs of the students, the department, and the university.

[FN1a]. Professor of Law, New York Law School; J.D., Columbia University School of Law. Special thanks to my colleague Ellen Ryerson for her careful review of the manuscript and her valuable editorial and substantive suggestions, and to librarian Marta Kiszely, Library Director Joyce Saltalamachia, Professor Ed Purcell, and research assistants Rebecca L. Koch and Dan Stewart.

[FN1]. 828 F. Supp. 1066 (S.D.N.Y. 1993), aff'd in part and vacated in part, 21 F.3d 1238 (2d Cir. 1994) [hereinafter Jeffries I], vacated and remanded, 115 S. Ct. 502 (1994), rev'd, 52 F.3d 9 (2d Cir. 1995) [hereinafter Jeffries II], cert. denied, 116 S. Ct. 173 (1995).

[FN2]. The jury's findings are reported in the district court opinion. See Jeffries, 828 F. Supp. at 1077-78.

[FN3]. See Jeffries I, 21 F.3d at 1247; Jeffries II, 52 F.3d at 14.

[FN4]. Leonard Jeffries, Address before the Empire State Black Arts and Cultural Festival (July 20, 1991), reprinted in NEWSDAY, Aug. 19, 1991, at 3. The speech was broadcast by an Albany cable television station, NY-SCAN. All quotes in this section are from the speech.

[FN5]. Early in the speech, Jeffries turned his attention to movies from his youth-films which denigrated blacks through images of Sambo, Beulah, and Stepin Fetchit. He asserted that "people called Greenberg and Weisberg and Trigliani and whatnot" had formed a "conspiracy, planned [in] ... Hollywood, where ... Russian Jewry had a particular control." In league with "their financial partners, the Mafia," these Jews "put together a system of destruction of black people." Id.

[FN6]. Jeffries embraced the classic anti-Semitic themes of Jewish financial control of Europe and of a Jewish world-wide conspiracy:

In Spain there were the grandees [previously identified by Jeffries as rich Jews] managing the money of the Spanish throne. In Germany, in the 16 and 1700s, there were the court Jews, managing the political and economic apparatus of Europe, the Hapsburg empire, the German states, et cetera. We have the names. We know who they were, what they were, what they controlled. We know when they set up the Dutch East Indian Co., Dutch West Indian Co., the Portuguese company, the Brazilian company. We know who and what documents. We know the family connections. We know that even when they converted to Christianity, they maintained links with their Jewish community brothers who had not converted; and that's why they had a network around the world.  
Id.

[FN7]. Id.

[FN8]. Id.

[FN9]. Jeffries informed his audience:

We are sun people, people of color because of the sun. The melanin factor. Europeans have a lack of melanin and have lost a great deal of it because much of the European development has been in the caves of Europe where you do not need melanin. So the factor of the ice is a key factor in the development of the Europeans biologically, culturally, economically, socially.  
Id.

[FN10]. Sam Howe Verhovek, *Cuomo Urges CUNY to Act on Professor*, N.Y. TIMES, Aug. 8, 1991, at B1; Vivienne Walt, *CUNY Studies Black Prof; College Bows to Cuomo Plea*, N.Y. TIMES, Aug. 9, 1991, at 3.

[FN11]. *Watching Dr. Jeffries Self-Destruct*, N.Y. TIMES, Aug. 25, 1991, § 4, at 14. The editorial concluded: "It is sad that Dr. Jeffries devalues the often laudable objectives he espouses . . . . But advocates of those goals will have to look to others to lead them because Professor Jeffries cannot. Hate and distortion parading as scholarship tend to have a short life when exposed and denounced." Id.

[FN12]. Leonard Jeffries' *Vicious Diatribe*, NEWSDAY, Aug. 8, 1991, at 60.

[FN13]. Sobol wrote in *Newsday*:

Let's get this straight: I never asked Leonard Jeffries to rewrite New York State's social studies curriculum. Jeffries served as a part-time consultant to an education department advisory committee three years ago. When his views and tone became known, the Regents and the department had nothing further to do with him . . . .

Thomas Sobol, *Jeffries Is Not The Point*, NEWSDAY, Aug. 28, 1991, at 91.

[FN14]. *Bitter History: Leonard Jeffries and Black-Jewish Relations*, THE NATION, Sept. 9, 1991, at 251.

[FN15]. See Jacques Steinberg, *Jeffries Misses Brooklyn Rally on Racial Issues*, N.Y. TIMES, Aug. 16, 1991, at B3; Philip Gourevitch, *The Jeffries Affair*, COMMENTARY, Mar. 1992, at 34, 35-36.

[FN16]. Steven Lee Myers, *Professor's Race Remarks Prompt Resolution by N.A.A.C.P.*, N.Y. TIMES, Aug. 18, 1991, at 28. See also Pamela Newkirk, *Prof: They're Smearing Me; Says Words Distorted by Press, TV*, NEWSDAY, Aug. 18, 1991, at 5 (quoting Dukes as equating Jeffries' remarks about Jews to "calling Hazel Dukes a nigger").

[FN17]. Trial Transcript at 70, *Jeffries*, 828 F. Supp. 1066 (S.D.N.Y. 1993) (on file with editor) [hereinafter Transcript].

[FN18]. Letter from Bernard Sohmer to Leonard Jeffries (Aug. 31, 1991) (Exhibit Appendix to Appellant's Brief at 46, *Jeffries I*, 21 F.3d 1238 (No. 93-7876)) [Hereinafter all cites to the Exhibit Appendix to Appellant's Brief for Jeffries I will be Exhibit Appendix]. Sohmer continued:

You used the putative Jewishness of a name to indicate that a person is intrinsically evil. You referred to me as 'head Jew,' a verbalization which, again, would be used only by an overt anti-Semite. You then proceeded to quote me as saying, 'Everyone knows rich Jews participated in the slave trade,' a statement I

would be incapable of making.

Id. But see Denise K. Magner, *In a Reversal, Court Upholds CUNY's Demotion of Afrocentrist*, CHRON. OF HIGHER EDUC., Apr. 14, 1995, at A23 (quoting Sohmer later as opposed to City University of New York-imposed sanctions against Jeffries, describing such action as a "terrible threat to academic freedom").

[FN19]. Statement By Board of Trustees' Chairperson James P. Murphy, Vice Chairperson Edith B. Everett, and Chancellor W. Ann Reynolds of the City University of New York (Aug. 8, 1991), in Exhibit Appendix, supra note 18, at 181 [hereinafter Statement]. City College is a part of the City University of New York (CUNY).

[FN20]. Letter from President Harleston to Alumni and Friends of City College (Sept. 17, 1991), in Exhibit Appendix, supra note 18, at 133.

[FN21]. Resolution of the Faculty Senate of City College (Sept. 19, 1991), in Exhibit Appendix, supra note 18, at 136-37 [hereinafter Resolution]. The resolution passed by a vote of 23:8.

[FN22]. Press Release: Departmental Faculty Support for Prof. Leonard Jeffries, Jr. (Sept. 16, 1991), in Exhibit Appendix, supra note 18, at 20-21 [hereinafter Press Release] (signed by seventeen members of the full time and adjunct faculty in the black studies department).

[FN23]. CUNY By-Laws § 9.1(b). The president is given power to recommend a new chairperson to the trustees before the three years expire if doing so is in the "interests of the college." Id. § 9.1(c) (on file with editor).

[FN24]. Jeffries, 828 F. Supp. 1066, 1071 (S.D.N.Y. 1993).

[FN25]. Id.

[FN26]. Jeffries I, 21 F.3d 1238 (2d Cir. 1994).

[FN27]. Harleston v. Jeffries, 115 S. Ct. 502 (1994).

[FN28]. 114 S. Ct. 1878 (1994).

[FN29]. Jeffries II, 52 F.3d 9 (2d Cir. 1995).

[FN30]. 114 S. Ct. 1878 (1994) (upholding the firing of a nurse in a public hospital who spoke critically of her superiors to other employees. The nurse had discouraged a co-worker from transferring into the hospital's pediatric unit, and rejected overtures from her superiors to resolve her difficulties with the unit.).

[FN31]. Id. at 1887.

[FN32]. See Jeffries, 828 F. Supp. at 1082.

[FN33]. Jeffries II, 52 F.3d at 18.

[FN34]. Letter from President Harleston to City College Colleagues (Aug. 8, 1991), in Exhibit Appendix, supra note 18, at 132.

[FN35]. Resolution, supra note 21.

[FN36]. See generally COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE (1973) [hereinafter COMMISSION ON ACADEMIC TENURE].

[FN37]. See, e.g., Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991).

[FN38]. See, e.g., University of Pa. v. E.E.O.C., 493 U.S. 182, 110 S. Ct. 577 (1990).

[FN39]. See, e.g., Keyishian v. Board of Regents, 385 U.S. 589, 87 S. Ct. 675 (1967).

[FN40]. Reprinted in AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, POLICY DOCUMENTS AND REPORTS 3 (1990) [hereinafter AAUP 1940 STATEMENT].

[FN41]. Id.

[FN42]. Id.

[FN43]. See Walter P. Metzger, The 1940 Statement of Principles on Academic Freedom and Tenure, in FREEDOM AND TENURE IN THE ACADEMY (Van Alstyne ed., 1993).

[FN44]. See, e.g., David M. Rabban, A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment, 53 LAW & CONTEMP. PROBS. 227 (1990); William Van Alstyne, The Specific Theory of Academic Freedom and the General Issue of Civil Liberty, in THE CONCEPT OF ACADEMIC FREEDOM 59 (Edmund L. Pincoffs ed., 1972). Both authors ably advance the argument that the academic is not protected by academic freedom when acting in his role as citizen.

[FN45]. Committee A Statement on Extramural Utterances (1964), reprinted in AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, POLICY DOCUMENTS AND REPORTS 32 (1990).

[FN46]. See further discussion infra notes 74-78 and accompanying text.

[FN47]. Van Alstyne, supra note 44, at 71.

[FN48]. Id.

[FN49]. Memorandum to Bernard Harleston from the Special Fact Finding Committee to

Review the Incidents Described in the Recent Articles Written by Mr. Fred Rueckher Appearing in The Campus, in Exhibit Appendix, supra note 18, at 50. The Rueckher articles are discussed infra notes 148-54 and accompanying text.

[FN50]. Exhibit Appendix, supra note 18, at 53. The committee also added: "It is of utmost importance that all members of the College Community conduct themselves in a manner that fosters mutual respect and understanding among the many ethnic and racial groups that make up the City College Community." Id. The committee made no finding against Professor Jeffries after the student refused to meet with it and Jeffries claimed some matters were taken out of context or inaccurately reported. Id. at 51-52. For a case in which a university properly restricted a professor's in-class comments about personal religious matters, see Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991), cert. denied sub nom. Bishop v. Delchamps 112 S. Ct. 3026 (1992); see also Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986).

[FN51]. The gross distortions and false claims involved in the attempt to portray the Jews as centrally responsible for the slave trade are discussed in HAROLD BRACKMAN, *MINISTRY OF LIES* (1994).

[FN52]. See Henry Louis Gates Jr., *Black Demagogues and Pseudo-Scholars*, N.Y. TIMES, July 20, 1992, at A15. See also Levin v. Harleston, 770 F. Supp. 895, 914 (S.D.N.Y. 1991), aff'd, 996 F.2d 85 (2d Cir. 1992) (Trial judge noted that a statement was attributed to Jeffries "to the effect that AIDS was created as part of a conspiracy by whites to destroy blacks."). See also William H. Honan, *Harvard Investigates a Professor Who Wrote of Space Aliens*, N.Y. TIMES, May 4, 1995, at A18 (discussing controversy at Harvard Medical School over Professor John Mack, whose published work accepts accounts of human contact with space aliens).

[FN53]. Jeffries v. Harleston 828 F. Supp. 1066, 1097 (S.D.N.Y. 1993). Additionally, observers report that Jeffries teaches his theories to his students in class. See Richard Bernstein, *Jeffries and His Racial Theories Return to Class*, N.Y. TIMES, Sept. 12, 1993, § 1, at 47; Fred Rueckher, *Crazy White Boy Blues*, THE CAMPUS, Mar. 22, 1988, at 11, Apr. 15, 1988, at 7, Apr. 26, 1988, at 13, and May 19, 1988, at 13.

[FN54]. Jeffries II, 52 F.3d at 15.

[FN55]. See infra note 175 and accompanying text.

[FN56]. See infra notes 175-82 and accompanying text.

[FN57]. 828 F. Supp. at 1097-98.

[FN58]. Bob Herbert, *In America: Racism 101*, N.Y. TIMES, Dec. 11, 1994, at 15.

[FN59]. Id. Herbert indicts City College by writing:

Mr. Jeffries is notorious for his bigotry and for teaching nonsense. Racist and incompetent, he should have been chased from the campus long ago. But more than two decades of cowardice and irresponsibility by blacks and whites alike have allowed him to remain a tenured professor and chairman of his department.

Id.

[FN60]. There were some at City College who did suggest that the Jeffries speech was

a grave transgression of professional standards. A statement issued by the Chairperson of the CUNY Board of Trustees, the Vice Chairperson and the Chancellor questioned whether Jeffries' remarks fell within the ambit of academic freedom. Their statement included this paragraph:

A university seeks to find and to impart truth through scholarship, a process that requires an exchange of ideas based upon research, reflection, and analysis; its mission is protected by the principles of free speech, academic freedom, and due process. Professor Jeffries' remarks threaten that mission and seriously challenge the delicate balance between academic freedom and responsibility. Statement, *supra* note 19.

[FN61]. Memorandum from Professor Morris Silver to Provost Robert Pfeffer (Sept. 26, 1991), quoted in Jeffries, 828 F. Supp. at 1073 n.2.

[FN62]. Faculty Senate, Resolution of Professor Morris Silver (Sept. 19, 1991), Plaintiff's Exhibit 13, Jeffries, 828 F. Supp. 1066 (on file with the editor). Professor Silver explained:

There have been calls for Jeffries' "ideas" or "views" to be debated to test whether they are "true." But the statements ... are devoid of intellectual substance. They are merely slurs; by their very nature they cannot be debated and cannot be true. Does, for example, the fact that Diane Ravitch is a Jew from Texas mean that Jeffries' statement about her is pertinent or cogent? To ask the question is to expose its absurdity. Jeffries is communicating that he has unmasked a vile creature whose vileness consists in her Jewishness. Regarding Jeffries' accusations of responsibility for the slave trade and negative stereotyping by Hollywood, any marginally competent academic would know that the participants did not seek, did not receive, and did not need the consent of their ethnic and religious groups. Id.

[FN63]. Id.

[FN64]. This suggested limit is reminiscent of the standards in hate speech codes that some American universities have enacted. One of these, promulgated by Stanford University, talks of epithets that convey "visceral hate or contempt." Thomas Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment*, 8 SOC. PHIL. & POLICY 81 (1991). Another at the University of Texas defines racial harassment as "extreme or outrageous acts or communications that are intended to harass, intimidate, or humiliate a student or students on account of race, color, or national origin and that reasonably cause them to suffer severe emotional distress." REGULATING RACIAL HARASSMENT ON CAMPUS (Thomas P. Hustoles & Walter B. Connolly, Jr. eds., 1990) (collection of University codes for National Association of College and University Attorneys). Such speech codes are extremely broad in coverage, restricting speech among entire academic communities, and are vulnerable to free speech challenges in court. See, e.g., *Stanford Won't Appeal Ruling on Anti-Hate Speech Rule*, N.Y. TIMES, Mar. 10, 1995, at A11. The academic freedom limits advanced here are justified by different policies, discussed throughout this article, that affect only the faculty in limited circumstances.

[FN65]. On campus, the black studies department faculty supporting Professor Jeffries compared Jeffries' message (denominated "historically and contemporarily true and correct") with the views of "a racist colleague, teaching and publishing nonsensical hogwash that African peoples have innately less intelligence than European descendants ...." Press Release, *supra* note 22.

[FN66]. See Levin v. Harleston, 770 F. Supp. 895, 901-03 (S.D.N.Y. 1991), *aff'd*, 966 F.2d 85 (2d Cir. 1992).



[FN67]. Id.

[FN68]. See *infra* part III, "Harms to the University."

[FN69]. Levin, 770 F. Supp. at 914-15.

[FN70]. At Wellesley College, the president and history department faculty, for example, took steps against a black studies faculty member who used a book prepared and published by the Nation of Islam in his course, despite its obvious anti-Semitic tone and false accusation that the Jews dominated the slave trade. The professor responded to initial concerns expressed about his assignment of the book by charging that he was the victim of a "Jewish onslaught" and that black professors who joined in the criticism were "Uncle Toms." The college president denied the professor a merit salary raise and the history department declared that history majors would not receive credit in their major for the professor's courses. See Alice Dembner, *Wellesley Faculty Joins Book Protest; 124 Sign Statement Decrying Martin's Work As Anti-Semitic*, BOSTON GLOBE, Mar. 17, 1994, at 29; Alice Dembner, *Wellesley Denies Raise to Professor*, BOSTON GLOBE, Aug. 26, 1994, at 23 (the Wellesley president cited "recent degradation of your scholarship, and the apparent effects on the quality of your teaching" in denying salary increase).

[FN71]. For elaboration of the role of the chairperson and the harms flowing from Jeffries' speech, see *infra* part II.C.

[FN72]. See Graham Hughes, *Tenure and Academic Freedom*, in *THE CONCEPT OF ACADEMIC FREEDOM* 170 (Edmund L. Pincoffs ed., 1972). For an extreme example of how untenured faculty may be told what to do and how to teach see Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989).

[FN73]. See *infra* notes 182-92 and accompanying text.

[FN74]. Jeffries II, 52 F.3d. at 13. On the matter of weighing the effects of given speech for First Amendment purposes, see also University of Pa. v. E.E.O.C., 493 U.S. 182, 201-02, 110 S. Ct. 577, 588-89 (1990).

[FN75]. For a discussion of the important role of the chairperson in the university, see *infra* notes 120-56 and accompanying text.

[FN76]. For a discussion of the harms, see *infra* "Harms to the University" notes 157-98 and accompanying text.

[FN77]. See *infra* part III.B.

[FN78]. See *infra* part II.C for a discussion of the role of the department chair.

[FN79]. 52 F.3d at 14-15 (citations omitted).

[FN80]. See *supra* part I.B-C.

[FN81]. Discussed *infra* part II.C.1-6.

[FN82]. 385 U.S. 589, 87 S. Ct. 675 (1967).

[FN83]. Id. at 603, 87 S. Ct. at 683.

[FN84]. Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S. Ct. 1203, 1211 (1957).

[FN85]. 385 U.S. at 603, 87 S. Ct. at 683. For a review of the cases, see William Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, in *FREEDOM AND TENURE IN THE ACADEMY* 79-154 (William Van Alstyne ed., 1993).

[FN86]. 493 U.S. 182, 110 S. Ct. 577 (1990).

[FN87]. Id. at 197, 110 S. Ct. at 586.

[FN88]. *Id.*

[FN89]. Id. at 198-99, 110 S. Ct. at 587. The University of Pennsylvania argued that it should not have to reveal confidential peer review materials gathered in its tenure process to the EEOC, which was investigating possible racial and sexual discrimination in a university tenure decision. A unanimous Court found that any interference with "the asserted academic freedom right of choosing who will teach" was speculative and remote, and that the link between the asserted right and the burden on it caused by disclosure was too attenuated.

[FN90]. This surmise is based upon the language, tone, and unanimity of Univeristy of Pennsylvania.

[FN91]. David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 230 (1990). Rabban states, "In order to engage in critical inquiry, professors need some degree of independence from their university employers, and universities need some degree of independence from the state." *Id.*

[FN92]. Weiman v. Updegraff, 344 U.S. 183, 196, 73 S. Ct. 215, 221 (1952) (Frankfurter J., concurring).

[FN93]. Epperson v. Arkansas, 393 U.S. 97, 104, 89 S. Ct. 260, 270 (1968). Epperson dealt with a "monkey law" penalizing the teaching of Darwinism in public schools; this I would argue does touch the core of academic freedom. The Court, however, held the law created an unconstitutional establishment of religion.

[FN94]. For discussions of the extraordinary breadth of the freedom claimed by academics, see Sanford H. Kadish, *The Theory of the Profession and Its Predicament*, *AAUP BULL.* 120 (Summer 1972); Mark G. Yudof, *Intramural Musings on Academic Freedom:*

A Reply to Professor Finkin, 66 TEX. L. REV. 1351 (1988).

[FN95]. Mailloux v. Kiley, 436 F.2d 565, 566 (1st Cir. 1971) (per curiam).

[FN96]. See, e.g., Silva v. University of New Hampshire, 888 F. Supp. 293 (D.N.H. 1994). Academic freedom may also be referred to in a school's tenure rules, since such freedom is said to be a basic reason for the tenure system. See Graham Hughes, Tenure and Academic Freedom, in THE CONCEPT OF ACADEMIC FREEDOM 170 (Edmund L. Pincoffs ed., 1972).

[FN97]. As a public institution, City College is bound by the First Amendment. Private universities, though not similarly bound, share the societal values expressed by the principle of free speech. They may wish to use the judicial resolution of the free speech issue as a guide in their own policy making.

[FN98]. McAuliffe v. Mayor of New Bedford, 29 N.E. 517 (Mass. 1892).

[FN99]. 391 U.S. 563, 88 S. Ct. 1731 (1968).

[FN100]. Id. at 568, 88 S. Ct. at 1734-35.

[FN101]. Id. at 568, 88 S. Ct. at 1737.

[FN102]. Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684 (1983); Rankin v. McPherson, 483 U.S. 378, 107 S. Ct. 2891 (1987).

[FN103]. See, e.g., Rankin, 483 U.S. at 392, 107 S. Ct. at 2901.

[FN104]. 754 F.2d 936 (11th Cir. 1985). The case was cited with apparent approval in Rankin, 483 U.S. at 391 n.18, 107 S. Ct. at 290 n.18.

[FN105]. McMullen, 754 F.2d at 939.

[FN106]. 483 U.S. 378, 107 S. Ct. 2891 (1987), reh'g denied, 483 U.S. 1056, 108 S. Ct. 362 (1987).

[FN107]. Id. at 389-91, 107 S. Ct. at 2899-900.

[FN108]. Waters v. Churchill, 114 S. Ct. 1878, 1886 (1994).

[FN109]. Rankin, 483 U.S. at 390-91, 107 S. Ct. at 2900.

[FN110]. Jeffries I, 21 F.3d at 1247; Jeffries II, 52 F.3d at 12.

[FN111]. Pickering v. Board of Educ., 391 U.S. 563, 570-73, 88 S. Ct. 1731, 1735-37

(1968); Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684 (1983); Jeffries I, 21 F.3d 1238 (2d Cir.), vacated and remanded, 115 S. Ct. 502 (1994), rev'd, Jeffries II, 52 F.3d 9 (2d Cir.), cert. denied, 116 S. Ct. 173 (1995); Waters v. Churchill, 114 S. Ct. 1878 (1994); Rankin v. McPherson, 483 U.S. 378, 107 S. Ct. 2891 (1987).

[FN112]. See AMERICAN ASSOCIATION FOR HIGHER EDUCATION, FACULTY PARTICIPATION IN ACADEMIC GOVERNANCE (1967); ALEXANDER ASTIN & RITA SCHERREI, MAXIMIZING LEADERSHIP EFFECTIVENESS (1980); KENNETH P. MORTIMER & T.R. MCCONNELL, SHARING AUTHORITY EFFECTIVELY (1978); COLLEGE AND UNIVERSITY ORGANIZATION: INSIGHTS FROM THE BEHAVIORAL SCIENCES (James L. Bess ed., 1984).

[FN113]. Cynthia Hardy et al., College and University Reorganization: Strategy Formation in the University Setting, in COLLEGE AND UNIVERSITY ORGANIZATION 169, 180-81 (James L. Bess ed., 1984); CARNEGIE COMMISSION ON HIGHER EDUCATION, GOVERNANCE OF HIGHER EDUCATION 5 (1973).

[FN114]. See, e.g., N.L.R.B. v. Yeshiva Univ., 444 U.S. 672, 684 n.17, 100 S. Ct. 856, 863 n.17 (1980) (president's formal veto power rarely used; faculty in fact has substantial policy making role); Hardy, supra note 113 (formal power of central administrators not in fact exercised in many cases).

[FN115]. Yeshiva University, 444 U.S. at 680, 100 S. Ct. at 861 (holding that for purposes of the National Labor Relations Act, the faculty at Yeshiva were "managerial employees" involved in developing and enforcing university policy).

[FN116]. Id.; see also University of New Haven, 267 N.L.R.B. 939 (1983) (supplemented by University of New Haven, 279 N.L.R.B. 294 (1986)); Northeastern Univ., 218 N.L.R.B. 247 (1995); University of Vermont, 223 N.L.R.B. 423 (1976); University of Miami, 213 N.L.R.B. 634 (1974).

[FN117]. See William H. Honan, Professors Battling Television Technology, N.Y. TIMES, Apr. 4, 1995, at D24 (faculty-president dispute may lead to president's resignation). An anecdote about Woodrow Wilson's experience as president of Princeton University is revealing: "Wilson, ensnared in a feud with the faculty, left the presidency of Princeton to become governor of New Jersey in 1910. Wilson is said to have remarked: 'I wanted to get out of politics.'" Shawn Tully, Finally, Colleges Start To Cut Their Crazy Costs, FORTUNE, May 1, 1995, at 110.

[FN118]. Compare Northeastern Univ., 218 N.L.R.B. 247 (1975) (giving an example of a weak or figurehead department chair; department faculty act collectively and the chair is merely one of faculty) with Rensselaer Polytechnic Institute, 218 N.L.R.B. 1435 (1975) (particularly strong department chair).

[FN119]. Yeshiva, 444 U.S. at 684 n.17, 100 S. Ct. at 863 n.17.

[FN120]. CUNY By-Laws § 9.1 (on file with the editor).

[FN121]. Id. § 9.3. quoted in part in Jeffries, 828 F. Supp. at 1088 n.30.

[FN122]. Evidence in the trial indicated that Professor Jeffries in prior years had driven away a prominent candidate for a position with the college by making anti-Semitic remarks (to the effect that the college's black president was under the

influence of the college's "white Jewish power brokers"). Jeffries was rebuked, but not dismissed as chair, for this incident, which demonstrated the power of the chairperson to drive away promising prospects if his reputation, conduct, or treatment of candidates was unacceptable. Report of the Inquiry Regarding Allegations Made by Mitchell A. Seligson (Defendant's Exhibit I); discussed in Jeffries, 828 F. Supp. at 1097 n.50 (on file with the editor).

[FN123]. Fox Butterfield, Afro-American Studies Get New Life At Harvard, N.Y. TIMES, June 3, 1992, at B7.

[FN124]. Id. The story of New York University's improved academic reputation and performance also includes the reshaping of a department (the political science department) by its newly appointed chair, who was able to attract outstanding scholars from the academic world. William H. Honan, A Decade and \$1 Billion Put N.Y.U. Into the Top Ranks, N.Y. TIMES, Mar. 20, 1995, at A1.

[FN125]. Transcript, supra note 17, at 51 (on file with editor).

[FN126]. Id. at 1414.

[FN127]. Id. at 1424.

[FN128]. See Richard Bernstein, Jeffries Return Hinders Plans to Alter Department, N.Y. TIMES, Aug. 6, 1993, at B3. Gordon did not succeed in revamping and improving the department because of the resistance of entrenched department members, who supported Jeffries. See also Maria Newman, Rift Over Black Studies Head Leaves Program Riven, Too, N.Y. TIMES, Nov. 23, 1992, at A1.

[FN129]. Judith Jarvis Thomson, Ideology and Faculty Selection, in FREEDOM AND TENURE IN THE ACADEMY 155, 174-76 (William Van Alstyne ed., 1993).

[FN130]. See CUNY By-laws § 9.6; Interview with Ellen Ryerson, former Associate Provost, Yale University (Apr. 5, 1995) [hereinafter Interview].

[FN131]. Interview, supra note 130.

[FN132]. Interview, supra note 130.

[FN133]. AAUP 1940 STATEMENT, supra note 40, at 4; COMMISSION ON ACADEMIC TENURE, supra note 36, at 75.

[FN134]. Statement on Procedural Standards in Faculty Dismissal Proceedings (1958) and Recommended Institutional Regulations on Academic Freedom and Tenure (1982), reprinted in AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, POLICY DOCUMENTS AND REPORTS 11-14, 26-27 (1990); Nathan Glaser, Levin, Jeffries and the Fate of Academic Autonomy, 36 WILLIAM & MARY L. REV. 703, 723 (1993) ("The costs of dismissing a professor with tenure are so great it is simply not worth it.").

[FN135]. Transcript, supra note 17, at 106, 890.

[FN136]. Hamburger v. Cornell Univ., 148 N.E. 539, 541 (N.Y. 1925).

[FN137]. See discussion of academic freedom, *supra* notes 34-48 and accompanying text.

[FN138]. Cynthia Hardy et al., College and University Reorganization: Strategy Formation in the University Setting, in COLLEGE AND UNIVERSITY ORGANIZATION 169, 175-77 (James L. Bess ed., 1984). CUNY By-Laws § 9.1(a) grants to "[e]ach department ... control of the educational policies of the department ...."

[FN139]. CUNY By-Laws § 9.3, quoted in Jeffries, 828 F. Supp. at 1088 n.30.

[FN140]. See Fred Rueckher, Crazy White Boy Blues, THE CAMPUS, Mar. 22, 1988, at 11; Apr. 15, 1988, at 7; Apr. 26, 1988, at 13; and May 19, 1988, at 11 (student articles describing Jeffries' classes) (on file with editor); JAMES TRAUB, CITY ON A HILL 229-71 (1994) (describing Jeffries' classes and the atmosphere within his department) (on file with editor).

[FN141]. See *supra* notes 120-21 accompanying text.

[FN142]. At City College, the department chairs within the social science division met as the Personnel and Budget Committee to make recommendations to the Dean on budgetary choices. Trial evidence revealed that during 1992, the dean for the social sciences division told the personnel and budget committee of a projected College deficit of seven million dollars. Budget discussions among the department chairs focused on measures such as reductions in adjunct faculty, elimination of elective courses, and enlargement of introductory sections. Minutes, Social Science P&B Meetings (Feb. 11 and Mar. 10, 1992), in Exhibit Appendix, *supra* note 18, at 168, 170.

[FN143]. See William H. Honan, State Universities Reshaped in the Era of Budget Cutting, N.Y. TIMES, Feb. 22, 1995, at A1.

[FN144]. Fox Butterfield, Afro-American Studies Get New Life At Harvard, N.Y. TIMES, June 6, 1993, at B7. By contrast, administration and faculty at City College were reportedly trying to "bypass the black studies department for as long as Dr. Jeffries is its chairman. The idea is to hire new faculty members in other departments, such as history or English, so that students interested in the black experience will be able to study there rather than in Dr. Jeffries' department." Richard Bernstein, Jeffries and His Racial Theories Return to Class, N.Y. TIMES, Sept. 12, 1993, § 1, at 47.

[FN145]. At City College, chairpersons are expected to be only participants in the "formation, development and interpretation of college-wide interests and policy." CUNY Bylaws § 9.1 (emphasis added). In addition, the chair is to "[r]epresent the department before the faculty council or faculty senate, the faculty and the board." Id. § 9.3.

[FN146]. See, e.g., University of New Haven, 267 N.L.R.B. 939 (1983).

[FN147]. Jeffries, 828 F. Supp. at 1072 n.1. Professor Jeffries' authority as chair of the Black Studies Department lasted from 1972 to 1992.

[FN148]. Fred Rueckher, Crazy White Boy Blues, THE CAMPUS, Mar. 22, 1988 at 11; Apr. 15, 1988, at 7; Apr. 26, 1988 at 13; and May 19, 1988, at 11 (on file with editor).

[FN149]. Fred Rueckher, Crazy White Boy Blues, THE CAMPUS, Mar. 22, 1988, at 11.

[FN150]. Fred Rueckher, Crazy White Boy Blues, THE CAMPUS, Apr. 15, 1988, at 7.

[FN151]. Id.

[FN152]. Id. Reuckher also reported that Jeffries condemned "the whole European 'homosexual warrior mentality,'" attacked black men involved with white women by saying they exhibited the "white pussy syndrome," and criticized several black entertainers as "faggots." Id.

[FN153]. Memorandum to Bernard Harleston from the Special Fact Finding Committee to Review the Incidents Described in the Recent Articles Written By Mr. Fred Rueckher Appearing in The Campus (July 21, 1988), in Exhibit Appendix, supra note 18, at 50.

[FN154]. Id. at 53. Jeffries met with the committee and claimed that some things were taken out of context or inaccurately reported.

[FN155]. Interview, supra note 130. City College President Harleston expressed his concern about alumni and government support after the Jeffries speech, and wrote to alumni and friends of the college to explain the college's actions in response to the Jeffries speech. Jeffries, 828 F. Supp. at 1074 n.4. See also Glaser, supra note 134, at 720.

[FN156]. See, e.g., Eleanor Charles, Yale Works to Break Down the Town-Gown Barrier, N.Y. TIMES, Sept. 25, 1994, § 9, at 9; Ramin P. Jaleshgari, Stony Brook Residents at Odds Over Proposed Stadium for SUNY, N.Y. TIMES, Oct. 15, 1995, § 13, at 8.

[FN157]. See, e.g., Pickering v. Board of Educ., 391 U.S. 563, 88 S. Ct. 1731 (1968); Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684 (1983); Rankin v. McPherson, 483 U.S. 378, 107 S. Ct. 2891 (1987).

[FN158]. Connick, 461 U.S. at 154, 103 S. Ct. at 1693-94 (undermining authority of employee's superior, impairing efficiency, disrupt working relationships); Rankin, 483 U.S. at 388, 107 S. Ct. at 2899 (impairing working relationships, discipline by superiors, harmony among co-workers); Pickering, 391 U.S. at 570, 88 S. Ct. at 1735 (maintaining discipline, co-worker harmony).

[FN159]. See Rankin, 483 U.S. at 401, 107 S. Ct. at 2905 (Scalia, J., dissenting).

[FN160]. Interview, supra note 130.

[FN161]. Id.

[FN162]. See Rabban and Van Alstyne, *supra* note 44.

[FN163]. Press Release, *supra* note 22 (signed by seventeen members of the full time and adjunct faculty in the black studies department).

[FN164]. See *supra* part II.C.1-6.

[FN165]. Because the anti-Semitism of the speech represented a greater proportion of the speech than its racist and anti-Italian sentiments, I will refer to the harms caused by anti-Semitism, on the understanding that harms inflicted by all the varieties of bigotry are similar.

[FN166]. See Gates, *supra* note 52. One black studies professor at Wellesley College has assigned *The Secret Relationship Between Blacks and Jews* to his students; this work, which Gates calls "the bible of the new anti-semitism," was prepared and published by the Nation of Islam. Id. See also *Campus Journal; A Book is Read as Biased at Wellesley*, N.Y. TIMES, Apr. 28, 1993, at A19.

[FN167]. In a physics or chemistry department, racist or bigoted views may have less significance than in a social science department; here scapegoating, blaming and vilification of certain groups contaminate the intellectual analysis of the subject area and exert their influence over course materials and course content.

[FN168]. Jeffries, 828 F. Supp. at 1071 (quoting the trial judge).

[FN169]. This term is employed by Judith Thomson, *supra* note 129, at 174-76.

[FN170]. See Press Release, *supra* note 22 and accompanying text.

[FN171]. See *supra* notes 121-40 and accompanying text.

[FN172]. The purveying of anti-Semitism under the false guise of scholarship was best exposed by Henry Louis Gates Jr. in *Black Demagogues and Pseudo-Scholars*, *supra* note 52.

[FN173]. Jeffries, 828 F. Supp. at 1075.

[FN174]. KENNETH S. STERN, *BIGOTRY ON CAMPUS: A PLANNED RESPONSE* 12 (1990).

[FN175]. See DEREK BOK, *UNIVERSITIES AND THE FUTURE OF AMERICA* 94-102 (1990). Justice Felix Frankfurter expressed a similar view when he wrote: "Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry." Wieman v. Updegraff, 344 U.S. 183, 196, 73 S. Ct. 215, 221 (1952) (Frankfurter, J., concurring).



[FN176]. Jeffries' hostility toward groups represented in the student body is reminiscent of Mings v. Department of Justice, 813 F.2d 384 (Fed. Cir. 1987), where a government employee expressed his hostility towards Hispanics and Catholics, people that the agency had to deal with on a regular basis. The employee's dismissal was upheld despite a First Amendment challenge.

[FN177]. While I have rejected marketplace parallels in this article, it seems appropriate here to recognize that students are in this context the "customers" of the college, who are being cheated when a department is effectively closed to them.

[FN178]. Bob Herbert, *Racism 101*, N.Y. TIMES, Dec. 11, 1994, § 4, at 15.

[FN179]. Stern, *supra* note 174, at 5.

[FN180]. *Id.*

[FN181]. Robert L. Hess, Foreword to KENNETH S. STERN, *BIGOTRY ON CAMPUS: A PLANNED RESPONSE* (1990).

[FN182]. See U.S. COMM'N ON CIVIL RIGHTS, *BIGOTRY AND VIOLENCE ON AMERICAN COLLEGE CAMPUSES* (1990); KENNETH S. STERN, *BIGOTRY ON CAMPUS: A PLANNED RESPONSE* (1990).

[FN183]. Doreen Carvajal, *A Career in the Balance; Rutgers President Starts a Firestorm with Three Words*, N.Y. TIMES, Feb. 6, 1995, at B1.

[FN184]. *Id.* Despite the trustees' support, it is still unclear if the protests will force the end of Lawrence's presidency. See Robin Wilson, *Flash Point at Rutgers; Despite President's Apologies, Outrage Over Racial Comment May Force Him Out*, CHRON. OF HIGHER EDUC., Feb. 24, 1995, at A21.

[FN185]. The trial court noted that "as far back as November of 1984, Professor Jeffries made anti-Semitic and racist remarks to a candidate interviewing for the position of director of the College's International Studies Program." Jeffries, 828 F. Supp. at 1097 n.50. The candidate withdrew as a result of the remarks and Jeffries was sent a letter of reprimand. *Id.*

[FN186]. Following the Albany speech in 1991, Jeffries told the dean and the provost that "the Jews are out to get me," and that "the Jewish press has mounted a systematic campaign to destroy me." See Confidential Memorandum from Provost Robert Pfeffer and Dean Jeffrey Rosen (Nov. 13, 1991), in Exhibit Appendix, *supra* note 18, at 144. He angrily threatened a community uprising if college officials dared to take action against him. Jeffries, 828 F. Supp. at 1076.

In addition, after the speech Jeffries was interviewed by a student reporter from the Harvard Crimson. Jeffries called Harvard's Henry Louis Gates "a faggot and a punk," and then threatened to kill the student if the content of the interview ever became public. The district court judge wrote of this incident: "The professor's behavior can fairly be described as thuggish, and incompatible with the civilized discourse and conduct expected of tenured professors." Jeffries, 828 F. Supp. at 1094.

In 1993, after Jeffries was reinstated by the district court, he kept teaching his racial theories in class. See Richard Bernstein, *Jeffries and His Racial Theories Return to Class*, N.Y. TIMES, Sept. 12, 1993, § 1, at 47. In 1994, Jeffries was

quoted as saying that white groups could be represented by animals: the English were like elephants, the Dutch like squirrels, and the Jews like "skunks" who "stunk up everything." See Professor's Remarks Reported as Bigoted, N.Y. TIMES, Nov. 28, 1994, at B5. When asked about the speech. Jeffries said he "did not remember it, but he added: 'Isn't there free speech in America? Isn't there also comedy in America?'" Id.

[FN187]. Memorandum to the College Community (Mar. 18, 1985), in Exhibit Appendix, supra note 18, at 10.

[FN188]. 828 F. Supp. at 1072-73, 1075.

[FN189]. CUNY By-Laws § 9.1.

[FN190]. See discussion supra part II.C.1-6.

[FN191]. See id. The trial court understood that the chairmanship "carries with it a prestige both within and outside the university. In addition [it] gives its holder a significant degree of power and influence over the policies and direction of the Black Studies department." Jeffries, 828 F. Supp. at 1093. See also Piarowski v. Illinois Community College, 759 F.2d 625 (7th Cir. 1985) (chairmanship of art department confers impression of official college approval).

Even if the chairmanship is deemed less than a position of leadership, it is still an honor bestowed by the college. A racist or anti-Semitic speech likely to bring dishonor to the university is good and sufficient reason for dismissal from such a post. Dishonor, it should be noted, goes beyond mere disapproval by alumni or donors. It rather signifies a violation of widely shared moral precepts that are basic to the educational enterprise.

[FN192]. See supra notes 10-22 and accompanying text.

[FN193]. See Jeffries I, 21 F.3d 1238 (2d Cir. 1994), and cases cited therein.

[FN194]. 114 S. Ct. at 1887.

[FN195]. See, e.g., United States v. National Treasury Employees Union, 115 S. Ct. 1003 (1995).

[FN196]. Jeffries, 828 F. Supp. at 1076. As all New Yorkers knew at the time, the Brooklyn neighborhood of Crown Heights saw three days of violence and rioting in August of 1991, sparked by tensions between black and Jewish residents; one Jewish man walking in the neighborhood was stabbed to death by a group shouting anti-Semitic slogans. See Philip Gourevitch, The Crown Heights Riot and Its Aftermath, COMMENTARY, Jan. 1993, at 29.

For whatever reason, there was a general reluctance in academia to speak for public attribution about Jeffries. Nick Chiles, Other Profs Aren't Talking, NEWSDAY, Aug. 14, 1991, at 28.

[FN197]. The most striking example is Professor Bernard Sohmers, who took personal affront at Jeffries' anti-Semitism, but thought action by the college was a threat to academic freedom, See supra notes 18-21 and accompanying text.

[FN198]. See Metzger, supra note 43.

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