Privacy, Surveillance, and Academic Freedom

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Introduction

As traditionally understood in the United States, academic freedom protects the ability of college and university faculty to engage in teaching, research and scholarly publication, and participation in institutional governance free from retaliation, improper influence, or control by administrators, trustees, donors, politicians, and other external actors. It also extends to protect extramural expression by faculty members outside of their institutions in their capacities as citizens.[1] In the first instance, these protections are often framed as safeguards against direct interference with faculty speech and publication.[2] Although academic freedom first emerged as a set of professional standards within the domain of higher education itself—and remains primarily grounded in those professional norms—its subsequent and still limited recognition under the First Amendment both reflects and further reinforces this prevailing emphasis on direct protection of expression.[3]

This understandable emphasis on the ultimate outputs of academic expression, however, can obscure the need to also protect the professional and institutional conditions necessary for academic work to take place and those expressive outputs to be developed. Before faculty members engage students in the classroom, publish their scholarship, or participate in institutional governance, they often must develop, test, and refine their ideas, frequently through processes that are informal, tentative, or exploratory. These formative activities frequently depend on expectations of confidentiality, discretion, or bounded disclosure that receive limited attention in discussions about academic freedom focused primarily on direct protection of expression. Moreover, even after ideas have been developed and judgments have been more fully formed, faculty members still often depend

1 *See generally* Matthew W. Finkin & Robert Post, For the Common Good: Principles of American Academic Freedom (2009); Henry Reichman, Understanding Academic Freedom (2d ed. 2025).

2 *See, e.g.*, Jennifer Lackey, *Academic Freedom*, *in* Academic Freedom 3, 3 (Jennifer Lackey ed., 2018) ("Academic freedom . . . allows members of institutions of higher learning to engage in intellectual pursuits without fear of censorship or retaliation . . . . The rationale for academic freedom is often connected to the justification for free speech more broadly.").

3 *See, e.g.*, David M. Rabban, Academic Freedom: From Professional Norm to First Amendment Right (2024).

upon assurances that their contributions, both written and spoken, will remain confined to limited audiences or institutional settings. In those instances, the concern is not that tentative ideas might be disclosed prematurely, but that disclosure might nevertheless inhibit faculty expression or engagement in various ways.

For example, effective teaching and learning often require environments that are shielded from external monitoring, interference, or control to allow faculty and students to freely explore tentative, controversial, or unsettled matters. Producing scholarship depends upon intellectual space for unhindered individual and collaborative development of ideas, shielded from premature disclosure of drafts, notes, and correspondence. Tenure and promotion processes benefit greatly from confidentiality, since disciplinary experts may be more likely to provide candid or critical assessments of scholarship when assured that their evaluations will remain private.

In this Article, I argue that *academic privacy*—the ability of faculty members to develop, discuss, and refine ideas in settings where access is limited to those with legitimate academic roles or purposes—is a critical but often overlooked condition for the meaningful exercise of academic freedom. Just as scholars need freedom to express their ideas publicly, they also need protected spaces in which to think through those ideas, offer candid feedback, and participate in internal deliberative processes in which they offer judgments on academic matters. Whether in the classroom, in research processes, or in faculty deliberations, the integrity of academic work often depends upon practices of confidentiality and limited disclosure. While privacy-related interests have not been entirely unrecognized in discussions of academic freedom, they have garnered insufficient conceptual attention and, in more practical terms, have been left insufficiently protected in many colleges and universities.

The need to protect the institutional and professional conditions that enable freedom in teaching, research, participation in governance, and extramural expression has long been recognized as essential to the meaningful exercise of academic freedom. Faculty organizations and universities have long recognized, for example, the importance of a robust, primary role for faculty in institutional governance over academic affairs and have recognized collective bargaining as an important tool for safeguarding academic freedom.[4] Tenure and security of position for faculty members have long been understood as an important "means" to achieving the end of "freedom of teaching and research and of extramural activities."[5] Faculty organizations and their advocates also have long emphasized the importance of "academic due process" in faculty disciplinary processes as a set of procedural guarantees to reinforce the substantive protections of academic freedom.[6]

4 *See, e.g.*, AAUP Comm. on College & Univ. Governance, *On the Relationship of Faculty Governance to Academic Freedom (1994)*, *in* Policy Documents and Reports 123 (Am. Ass'n Univ. Professors ed., 11th ed. 2015) ("[A]llocation of authority to the faculty in the areas of its responsibility is a necessary condition for the protection of academic freedom within the institution"); AAUP Comm. on Representation of Economic & Professional Interests, *Statement on Collective Bargaining (2009)*, *in* Policy Documents and Reports 323, 323 (Am. Ass'n Univ. Professors ed., 11th ed. 2015) (describing collective bargaining as a potentially "effective instrument" for "obtain[ing] explicit guarantees of academic freedom and tenure").

5 Am. Ass'n Univ. Professors & Ass'n Am. Colls., 1940 *Statement of Principles on Academic Freedom and Tenure (with 1970 Interpretive Comments)*, *in* Policy Documents and Reports 13, 14 (Am. Ass'n Univ. Professors ed., 11th ed. 2015).

6 *See, e.g.*, Louis Joughin, *Academic Due Process*, 28 Law & Contemp. Probs. 573 (1963).

By contrast, privacy-related interests have received comparatively limited attention as necessary conditions to support and enable academic freedom. To be sure, the importance of privacy-related interests to academic freedom has not been ignored altogether. As early as 1915, for example, when the American Association of University Professors was founded, its *Declaration of Principles on Academic Freedom and Academic Tenure* emphasized that classroom discussions "ought always be considered privileged communications," not "utterances for the public at large."[7] Subsequently, in the First Amendment context, Justice Felix Frankfurter's concurring opinion in *Sweezy v. New Hampshire* expressly framed the issue before the Court (albeit somewhat in passing) as one requiring it to "balanc[e]" the "right of a citizen to political *privacy*," on the one hand, against the "right of the State to self-protection," on the other.[8] More recently, AAUP's Committee A has devoted some attention to potential threats to academic freedom arising from new technologies, which has included some limited analysis in terms of privacy interests.[9]

Nevertheless, attention to privacy-related interests that support academic freedom has remained fragmented in theory, and their protection has been uneven in practice. Unlike shared governance or academic due process, privacy interests are rarely characterized as contributing to the structural conditions that academic freedom presupposes, and they are frequently left without sufficient institutional safeguards. When privacy interests in higher education are recognized, that recognition and attention tend to be limited to the privacy interests of students—perhaps most notably, for example, in the Family Educational Rights and Privacy Act's strict limits on the disclosure of student records. In response to FERPA, academic institutions have developed elaborate institutional policies and compliance regimes. However, few institutions appear to have analogous policies comprehensively protecting the privacy interests of faculty members—despite their importance as conditions to support activities at the heart of the academic enterprise. By developing a broader, more explicit understanding of academic privacy that goes beyond this relatively limited attention to student interests, I highlight the importance of conditions that have long operated implicitly or beneath the surface of how academic freedom is conventionally understood, but which nevertheless are essential for academic work and expression to flourish.

7 Am. Ass'n Univ. Professors, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, *in* Policy Documents and Reports 3 (Am. Ass'n Univ. Professors ed., 11th ed. 2015). On the 1915 Declaration, see Hans-Joerg Tiede, University Reform: The Founding of the American Association of University Professors 114–30 (2015); Rabban, *supra* note 4, at 15–34.

8 Sweezy v. New Hampshire, 354 U.S. 234, 266–67 (1957) (Frankfurter, J., concurring) (emphasis added).

9 AAUP Comm. A on Academic Freedom and Tenure, *Academic Freedom and Electronic Communications*, *in* Policy Documents and Reports 42 (Am. Ass'n Univ. Professors ed., 11th ed. 2015); *see also* Robert O'Neil, Academic Freedom in the Wired World: Political Extremism, Corporate Power, and the University 173–206 (2009).

Scholars of academic freedom have long emphasized that academic freedom cannot be reduced to a simplistic notion of "free speech for professors." In the United States, academic freedom first emerged as a set of professional standards—developed within higher education and civil society institutions, and implemented through institutional policies and contractual guarantees—and only later and secondarily has been recognized as a nascent set of constitutional principles under the First Amendment. In Part I, I identify and discuss some of the relevant differences between academic freedom and freedom of expression. Attention to these differences helps to make sense of the specific ways in which academic freedom has long been understood to protect not merely the final outputs of academic expression, but also the conditions under which knowledge creation and dissemination take place within colleges and universities.

In Part II, I explore the relationships between privacy interests and expressive interests that scholars have identified and developed outside the context of academic freedom. Scholars have recognized that privacy and confidentiality interests can support and enable the preconditions for the development of expression, including interests in intellectual privacy, associational privacy, and decisional or deliberative privacy. Doctrinal principles in various domains reflect similar understandings. In Part III, I apply these insights to develop a framework for assessing the relationship between academic freedom and academic privacy interests, which are relevant across all of the various domains—teaching, research, institutional governance, and extramural expression—in which academic freedom protects faculty expression.

While in earlier eras potential infringements on privacy interests in higher education were limited by practical constraints, the proliferation of new technologies in higher education has introduced new privacy-related challenges, which I discuss in Part IV.[10] In addition to the kinds of electronic communications and storage platforms that are found in virtually all contemporary workplaces, learning management systems, online proctoring tools, data analytics platforms, and other technologies have become ubiquitous in colleges and universities, and often have been implemented with limited transparency or faculty input, involvement, or ongoing oversight.[11] While certainly offering potential benefits for teaching, research, and administration, these technologies also create new and more efficient opportunities for surveillance, data collection, and control—not only by tracking student performance, but also by monitoring faculty activities, controlling access to information, and generating detailed digital footprints of academic work. While growing attention has been given in recent years to issues arising from these technologies, including their privacy implications, much of that attention has focused on student experiences.

10 *See, e.g.*, Neil Richards, Intellectual Privacy: Rethinking Civil Liberties in the Digital Age 96 (2015) (noting that "until very recently, it has been difficult as a practical matter to interfere with the generation of ideas . . . Law was not need to tackle such a problem"); *see also* David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. Ill. L. Rev. 1385 (2017) (discussing analogous developments with respect to publicly accessible court records); Anil Kalhan, *Immigration Surveillance*, 74 Md. L. Rev. 1, 10 (2014) (discussing analogous developments in the context of immigration control and enforcement).

11 *See, e.g.*, Leonie Maria Tanczer et al., *Online Surveillance, Censorship, and Encryption in Academia*, 21 Int'l Studs. Persps. 1 (2020); Catherine McGowan, Britt Paris & Rebecca Reynolds, *Educational Technology and the Entrenchment of "Business as Usual,"* Academe, Winter 2024, at 12; Patricia McGuire, *The Academic Dilemma of Data-Driven Decision-Making*, Academe, Winter 2024, at 29; Martha Fay Burtis & Jesse Stommel, *Bad Data Are Not Better Than No Data*, Academe, Winter 2024, at 18.

Finally, in Part V, I consider and respond to reasons for ambivalence or skepticism about the value of developing a deeper understanding of privacy as a component or condition of academic freedom. I conclude that such an understanding not only can help to illuminate underappreciated conditions of academic work that are central to the production and dissemination of knowledge, but also offers a framework to more concretely articulate the full range of privacy-related harms that can occur in the course of that work—which can arise variously from practices involving the collection, storage, processing, and dissemination of information, across all of the domains in which academic work takes place—and help to further develop professional norms and design and implement policies and practices to minimize those harms.[12]

As Danielle Citron has observed, "[w]e live in a golden age of student surveillance," arising from both traditional surveillance mechanisms and new technologies. The risks and harms to the academic freedom of faculty members arising from those same kinds of mechanisms and surveillance-enhancing technologies warrant similar attention. Developing a framework to identify and address privacy-related harms in academic work can help strengthen professional norms, institutional policies, and legal principles in a manner that better safeguards academic freedom.

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12 *See* Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. Pa. L. Rev. 477, 490–91 (2005–2006); *see also* Richards, *supra* note 11, at 169–84.