

# Academic Freedom, Professional Autonomy, and the State

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In the United States, academic freedom is generally understood as professorial ability to follow research where it leads and to communicate the results, whether through publications, in research forums, in the classroom, or to the public. Academic freedom is the cornerstone of academic expertise, which is central to professional autonomy and authority. The tacit social contract between professors and society allows faculty to engage freely in research in return for the fruits of research that enhance the public good.

However, academic freedom is to some degree dependent on the political climate and various state agencies, ranging from the courts to public colleges and universities, as well as on the business community's concern with preserving pro-business ideas, such as managerial authority over professional workers (Feaga and Zirkel 2006; Furner 1975; Jorgensen and Helms 2008; Veblen 1918). This essay explores recent shifts in politics that have produced changes in the organization of the state in order to understand what they mean for academic freedom. The "state" is not uniform; it varies within and among agencies and across levels (federal, state, local) and jurisdictions (i.e., different federal court circuits). Some state agencies are decidedly neoliberal (i.e., the Federal Reserve Board), while others remain liberal (i.e., the Social Security Administration) and still others are socially conservative (i.e., faith-based welfare and education programs). The various state agencies take different forms (i.e., liberal, neoliberal, socially conservative) when their policies are changed, usually through political-legal actions that alter rules and practices (i.e., the shift within the Federal Reserve from liberal regulation to neoliberal deregulation, or the shift in public higher education from liberal low tuition to neoliberal high tuition). Although the general direction of change is

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from liberal to neoliberal, change is uneven and inconsistent, and agencies can reverse direction, as we are currently seeing with the Federal Reserve's response to the current economic crisis.

The political turn toward the free market and neoliberalism<sup>1</sup> has created opportunities for universities to engage in entrepreneurial activity through new state forms characterized by public-private interaction that blur boundaries among public, non-profit, and for-profit activity. University and faculty entrepreneurship presents challenges to professorial norms and values when it puts profit before discovery, chooses secrecy with regard to intellectual property over openness, and makes decisions without consulting with faculty via governance mechanisms. At the same time, social conservatives,<sup>2</sup> perhaps in response to the changes wrought by the materialism promoted by free markets and the possibilities for social change created by the knowledge economy, for example, by stem cell research, have pressured the state for legislative and administrative rules and regulations that promote socially conservative values such as the teaching of intelligent design or curtailment of research on a variety of forms of sexuality, posing challenges to professors' academic freedom. Of course, neoliberalism does not pervade all state agencies; some remain liberal. Among those are agencies such as the Federal Bureau of Investigation and the Central Intelligence Agency, which have expanded greatly in the wake of 9/11. In much the same way as they monitored citizens thought to be involved with Communism during the Cold War, these established agencies work with new agencies created in response to the War on Terror, such as Homeland Security, to monitor citizens suspected of involvement with the Evil Empire. As was the case with the Cold War, the War on Terror has created a number of challenges for academic freedom, ranging from the right of professors to admit qualified students to their research programs based on the students' place of origin to professors' ability to engage in critique of foreign policy. In sum, recent political movements have unevenly altered the state, changing policies and practices in different branches and at various levels, creating new challenges for academic freedom.

I explore three cases that illuminate the complex relationship between academic freedom, politics, and the state in the early twenty-first century: the *UC Berkley–Novartis* case (*Novartis*), the *Urofsky v. Gilmore* (*Urofsky*) decision emanating from several Virginia universities, and the *Ward Churchill* (*Churchill*) case at the University of Colorado. The *Novartis* case illuminates the issues raised for academic freedom by entrepreneurial neoliberal state formations

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taking root in research universities. The *Urofsky* decision brings to the fore questions about the ways in which social conservatism, embodied in state laws, prevents professors from researching topics that are morally sensitive, while simultaneously strengthening the power of institutions, as represented by the administration. The *Churchill* case speaks to the ways in which security concerns play out in universities and governing boards during times of war, regardless of state form, severely challenging academic freedom in the United States.

### Background

Academic freedom was defined by the American Association of University Professors (AAUP) in its 1940 Statement of Principles as “the free search for truth and its free exposition,” justified because disinterested knowledge is necessary to “the common good” (AAUP 1995a). Academic freedom in research and teaching is inextricably linked to tenure. According to the AAUP, tenure provides protection for the written word and speech as well as economic security, the necessary corollary of freedom. With these “rights” come responsibilities: professors should not introduce controversy in the classroom unrelated to their subjects, and when speaking as private citizens “they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinion of others, and should make every effort to indicate that they are not speaking for their institution” (AAUP 1995a). Academic freedom gives faculty a degree of professional autonomy vis-à-vis their institutional employers, whether the state, in the case of public institutions, or nonprofit boards of trustees, in the case of private institutions.

Over time, the AAUP definition of academic freedom has become the standard formulation, shared by the National Educational Association and the American Federation of Teachers as well as many learned societies and professional associations. Many colleges and universities have adopted policies and procedures promoted by the AAUP to protect academic freedom. These are seen most clearly in personnel policies—specifically hiring, promotion and tenure, evaluation and dismissal of professors—that embed the Principles in university policy by allowing senior faculty to decide who should be hired, who merits tenure, or, should the possibility of tenure revocation arise, who should be dismissed. These personnel policies, however, are advisory, and final authority rests with senior administrators and regents or boards of trustees.

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A separate but related aspect of the AAUP's approach to academic freedom is encompassed by academic governance. As the AAUP notes, "a sound system of institutional governance is a necessary condition for the protection of faculty rights" (AAUP 1995b, 179–86). The AAUP states that the areas in which faculty should have "primary responsibility" are teaching and research. However, the AAUP also makes the case that faculty must have a strong voice in "decisions about the institution's long-range objectives, its physical and fiscal resources, the distribution of its funds among its various divisions, and the selection of its president," precisely because these have such a powerful impact on professional autonomy in the areas of teaching and research (AAUP 1995b, 187).

The AAUP was organized in 1915 to protect professional norms and values in the face of dismissals of faculty from universities at the behest of heads of large corporations, university donors, and state officials and legislators (Metzger 1969). The AAUP acts as an extralegal body that attempts to enforce the Statement of Principles through investigating violations and censuring universities that deviate from the Principles. The investigative reports it produces serve as a body of extralegal case law. The AAUP has no formal legal authority, and the success of its censorship activity is mixed. Generally, the AAUP attempts to ensure that due process is followed. Many colleges and universities have established academic senates or other deliberative bodies, but academic governance at best advises university administrations, at worst legitimates administrative decision making (Slaughter 1994). Despite initiation of an investigatory capacity with regard to academic governance, AAUP governance practices have not been as widely institutionalized as the Declaration of Principles. Perhaps that is because the Principles are confined to due process with regard to personnel policies, while governance has the potential to shape institutional decision making in many other areas, including future planning and investment.

Although the AAUP insists that the U.S. Supreme Court has recognized a constitutional right to academic freedom, it is perhaps more accurate to say that the Court has acknowledged academic freedom on some occasions, but academic freedom has not been well clarified and has never been dispositive.<sup>3</sup> As Byrne remarks about academic freedom, "lacking definition or guiding principle, the doctrine floats in the law, picking up decisions as a hull does barnacles" (1989). Or as a *Harvard Law Review* article on recent cases put it, "Although the Supreme Court has identified academic freedom as a 'special

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concern of the First Amendment,' it has yet to articulate a coherent analytic framework for protecting that concern" (2002).

The AAUP's definition and defense of academic freedom represent codified versions of professional norms and values with regard to teaching and research. At the same time, academic freedom and governance serve as a bulwark of professional autonomy in that they constrain institutional decision making by administrative fiat that might jeopardize professors' authority with regard to teaching and research. However, as the Fourth Circuit Court of Appeals has pointed out, the AAUP's definition of academic freedom represents a norm, not a law or a "right," and remains vulnerable to politico-legal shifts that are embodied in the administrative state, including public research universities (*Urofsky v. Gilmore* 2000).

### Approach

The cases selected for examination are not representative of post-2000 cases considered by the AAUP (Slaughter 1981, 1988), nor are they representative of post-2000 legal cases that deal with academic freedom (Baez and Slaughter 2001; Feaga and Zirkel 2006). Rather, they were selected to represent challenges to academic freedom stemming from changing state formations.

The *Novartis* case at Berkeley was reported by an impartial team hired by the University of California to investigate the relationship between Berkeley and Novartis, a biotechnology company.<sup>4</sup> The *Churchill* case at the University of Colorado was reported by the Standing Committee on Research Misconduct at the University of Colorado–Boulder (Wesson et al. 2006). Interpretation of *Urofsky* is made from the legal documents related to the case (*Urofsky v. Gilmore* 2000). Perhaps because of the complexity of the issues and the professorial turn to litigation, the AAUP investigated none of the cases.

Although I may speak about a state agency—for example, the University of California—the levels and laws are often recursive, with federal laws and agencies feeding into state administrative law and agency policy. In the *Novartis* case, for example, national competitiveness laws (Slaughter and Rhoades 1996) and federal mission agency funding, informed and facilitated actions at the state level, and state administrative law operationalized federal laws and policies, as with university intellectual property policies that concretized Bayh-Dole. So too, the political tendencies and movements discussed, while distinct, are not always separate.

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### University of California–Berkeley and the *Novartis* Case

The *Novartis* case illustrates how free-market politics resulted in legislation that reshaped state agencies to emphasize neoliberal characteristics that allowed state actors, among them faculty, to respond to new incentive structures, some of which challenge the historic academic incentives of discovery, publication, and prestige, creating challenges to academic freedom.

In 1993, Berkeley administrators responsible for strategic planning in biotechnology decided they wanted to increase industry investment substantially. The chair of Plant and Microbial Biology (PMB) worked to realize this by creating an International Biotechnology Advisory Board, which included fourteen representatives from industry. These initial results did not bear fruit, and the chair of PMB put together a small group of administrators (himself, another professor, the head of cooperative extension, and the dean of the College of Natural Resources) and approached the Office of Technology Licensing for advice on how to obtain private funding. The group had “at least the tacit approval of the highest administrators within the UC Office of the President” (Busch et al. 2004, 23). Together they agreed to a process of “auctioning” the department to the highest private bidder and sent a letter “announcing the availability of PMB expertise . . . to sixteen selected companies” (Busch et al. 2004, 24). Five replied, and *Novartis Agricultural Discovery Institute (NADI)*, a wholly owned entity of *Novartis*, won the bid.

Like other corporations in agricultural biotechnology, *Novartis* sought to identify and utilize genes that would contribute to plants’ insect resistance and herbicide tolerance as well as create or enhance valuable traits in plants. *Novartis* was a latecomer to the field and sought to use NADI as “the Bell Labs of plant biotechnology” (Busch et al. 2004, 26), which PMB researchers found reassuring. Generally, the agreement called for *Novartis* to spend \$5 million a year on PMB for five years.<sup>5</sup>

Negotiations occurred in a thirty-day time frame and were open neither to the public nor to the Berkeley community. Those outside the PMB faculty, including graduate students, were unable to view the emerging contract. The agreement was with PMB as a whole and granted *Novartis*

right of first negotiation on an exclusive license to commercial research conducted by signers of the agreement; the agreement gave *Novartis* the option to exercise that right on a portion of the results equal to the percentage of exter-

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nal research funding that it provided. The right of first negotiation applied to all research conducted by signatories of the agreement, regardless of whether Novartis funded that research or not, with the exception of DOE and funding from other private parties. In other words, if funds from Novartis constituted one-third of PMB external research funding, Novartis got the first right of negotiation to one-third of all PMB discoveries, including research funded by the National Institutes of Health (NIH), the National Science Foundation, and other public institutions. (Busch et al. 2004, 50)

Although the agreement with the department as a whole was unusual, it was not unprecedented.<sup>6</sup> The leverage Novartis exercised on other external funds in PMB was unprecedented, but otherwise the agreement fell within evolving norms of university-industry partnerships.<sup>7</sup>

The agreement was negotiated over the summer when few faculty members were around. In August, the dean of the College of Natural Resources, perhaps anticipating opposition, contacted the Academic Senate about the impending agreement, even though Berkeley policies do not require Senate approval of contracts with industry. As faculty and students returned in the fall, opposition emerged. Students for Responsible Research began to organize against the agreement, and the Senate outlined its concerns. In November 1998, the Senate took the position that it could not endorse the agreement and requested that it be treated as an experiment and that ongoing assessment of its impact be undertaken. Despite the Senate's reservations, on November 23, 1998, the agreement was formally signed, marred only by a member of Students for Responsible Research throwing a pie at the signatories.

About the time that the Novartis agreement was finalized, indirect ties between the dean of the College of Natural Resources and Novartis came to light. In 1988, Professor Gordon Rausser, dean when the Novartis agreement was made with PMB, founded the Law and Economics Consulting Group (LECG) with several other Berkeley faculty members. Congruent with Berkeley policy, Rausser stayed on as a principal in LECG while he was dean, including the period when the Novartis agreement was negotiated.

LECG had ties to the forerunners of Novartis. . . . In 1996, Rausser earned \$1.3 million from LECG, significantly more than his salary as Dean. The company followed by an Initial Public Offering on December 19, 1997, at which Rausser planned to sell 16 percent of his shares for \$2.2 million. . . . Finally,

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less than one year later LECG was acquired by the Metzler Group for \$200 million. (Busch et al. 2004, 48)

Although a Committee of the California State Legislature, headed by Senator Tom Hayden, held a hearing on the Berkeley-Novartis agreement on May 15, 2000, nothing came of it. Berkeley commissioned an external study of the Berkeley-Novartis agreement, which did not get underway until early 2003 (Busch et al. 2004, 26). The PMB's agreement expired on November 23, 2003. It was not renewed because Novartis had been taken over by Syngenta, an agricultural chemical company based in Basel, Switzerland, that was not interested in basic plant bioscience.

The Novartis-Berkeley agreement did not produce the intellectual property expected. Of fifty-one disclosures made by PMB faculty during the period of the agreement, twenty were patented. Ten of these patents were derived at least partially from funding provided by the Novartis-Berkeley agreement. Novartis expressed interest in six, but no options for exclusive licenses were exercised (Busch et al. 2004, 13).

The agreement exacerbated tensions within the College of Natural Resources and generated issues related to academic freedom. The College of Natural Resources was divided between faculty who favored productivity—enhanced crop production based on pesticides, insecticides, herbicides, and increasingly on biotechnology—and faculty who favored preservation of the natural environment and sustainability. Departments other than PMB were not included in the negotiations, but the dean extended the agreement to the College as a whole in the final negotiations. Many faculty not in PMB objected, particularly those in Environmental Science, Policy and Management (ESPM), a department committed to the natural environment and sustainability.

Ignacio Chapela was an assistant professor who was chair of the College Executive Committee, a member of ESPM, and an outspoken critic of the Novartis agreement. In 2001, he and a coauthor published an article in *Nature* “alleging that native maize landraces in Oaxaca, Mexico, contained introgressed transgenic deoxyribonucleic acid (DNA) constructs” and that these transgenes were unstable, which might lead to the destruction of local varieties of maize that would reduce the gene pool for future generations (Busch et al. 2004, 41). The article became the center of controversy, in which corporations weighed in against environmentalists. Academics in PMB, site of the Novartis agreement, sided with the corporations. As the controversy contin-

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ued, *Nature* distanced itself from the article, undermining its credibility (Busch et al. 2004, 41).

Chapela was up for tenure during this period and was supported through all the steps of the review up to the university level. The chair of Chapela's committee asked that there be no one who was party to the Novartis agreement on the committee because PMB professors had led the public critique of Chapela's work. However, one of the professors on the university-level committee was also a member of the Novartis Advisory Committee. A number of people, including the dean of the College of Natural Resources, objected on conflict-of-interest grounds. The chancellor argued there was no conflict and the PMB professor on the Advisory Board stayed. Chapela was denied tenure at the university level, and despite appeals, the chancellor concurred.<sup>8</sup> Chapela responded by moving his office onto the lawn outside California Hall, which housed the offices of the Budget Committee of the Academic Senate, responsible for the university-level decision in his case, and the office of Chancellor Robert Berdahl, who had the final say. Chapela held office hours and spoke about what had happened (Tonak 2004). When the decision against Chapela was finally delivered, hundreds of letters, many from academics, flooded the Chancellor's office. Chapela chronicled the case on his Web site and also initiated a lawsuit against Berkeley for damages and injunctive relief.

According to the brief, posted on Chapela's Web site,<sup>9</sup>

Dr. Chapela personally opposed the Novartis agreement and became a public leader of organized opposition to it. He asserted that the agreement was improperly negotiated in secrecy, that it was detrimental to the university's traditions of academic freedom and disinterested inquiry, that it resulted in the misuse of university resources, that faculty members and administrators who performed work under the agreement were subject to conflicts of interest under University policy, and that the fruits of the agreement could cause harm to the environment, to native plants, and to people's health and welfare throughout the world.

On May 17, 2005, a new Berkeley chancellor had Chapela's case reconsidered by a specially reconstituted budget committee, the standing nine-member panel of the Academic Senate, which has the final vote on tenure cases, and he was granted tenure (UC Berkeley News 2005).

A related case occurred outside the College of Natural Resources. Tyrone Hayes, an associate professor of Integrative Biology in the College of Letters

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and Sciences, worked for Ecorisk Inc., studying how the herbicide atrazine affected amphibians. Syngenta, which took over Novartis, funded Ecorisk. Syngenta and Ecorisk had the right to approve or deny publication of the research they sponsored. When Hayes tried to publish results that showed that frogs were physiologically affected by low levels of the drug, Syngenta and Ecorisk tried to stall and prevent publication. After he stopped working for Syngenta and Ecorisk, Hayes began to self-fund and publish his findings (Busch et al. 2004, 43). Although he published in journals such as *Nature*, his work was attacked by “Syngenta, the Kansas Corn Growers Association, a Fox News commentator known for minimizing the potential threat of global warming, and the Center for Regulatory Effectiveness, an organization based in Washington that is challenging the use of academic studies in federal rule making” (Blumenstyk 2003, 2).

Although Berkeley did accept Hayes’s initial contract with Syngenta and Ecorisk, despite the confidentiality clause, it has not penalized Hayes. The Hayes case attracted a great deal of media attention, and while there were many attacks on Hayes’s work by figures associated with the herbicide industry, he also received a great deal of support, and the quality of his work was affirmed when he won heavily refereed NSF funding. Although the EPA approved atrazine, it called for further studies, drawing upon the work of Hayes and that of other scientists that showed that small doses affected male frogs’ sexual development. The EPA is requiring Syngenta to conduct further studies on the effects of atrazine on amphibians.

The issues that the *Novartis* case raises for academic freedom are (1) creation of new circuits of knowledge that link the academy to the economy; (2) development of an administrative preference for science and technology able to generate external revenues, which undermines academic autonomy and credibility and threatens institutional potential for critique; and (3) weakening of faculty self-governance, which underpins the exercise of academic freedom on campus. These issues arose as a result of the University of California acting on opportunities provided by a neoliberal state to shift the boundaries between the public and private sector, creating new opportunities for external funding and enhanced prestige for some faculty and research programs and not others.

The agreement between PMB and Novartis was made possible by the rise of the competitiveness coalition, beginning in the 1980s, through which a vigorous legislative initiative opened federally funded research performed in

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universities to faculty; institutional and corporate exploitation through university provision of incentives to faculty for patentable discoveries; university ownership of patents; university exploitation of patents through licensing; and faculty and university administrators working together to create start-up companies (Slaughter and Rhoades 2004). The opportunities presented by this legislation and the growth of a knowledge economy drew a number of faculty in a wide variety of departments toward entrepreneurial research.<sup>10</sup> In the Novartis agreement, PMB faculty, not corporations, initiated the search for corporate funding; faculty, not corporations, came up with the idea of “auctioning” the department. A segment of the Berkeley faculty and the administration pursued marketization opportunities opened up by shifts toward neoliberal principles in law and state and institutional policies.<sup>11</sup>

Competitiveness legislation increased the porosity of boundaries between the public and private sector, altering circuits of knowledge. Rather than valuing discoveries as judged by professional and scientific associations, some faculty and university administrators began to prefer discoveries with market potential as judged by business leaders, policy makers, and politicians seeking a high technology path to economic development. Taking a company public, as did Dean Rausser with LECG, signifies the new circuits of knowledge in which professors are simultaneously business persons and professors. Generally, professors who occupy both roles simultaneously do so based on the strength of their university expertise. However, the profits they make under the changed rules of the neoliberal state are individual. Great personal gain derived by professors in public research universities undermines their credibility and authority as experts. For example, Len Richardson, editor of *California Farmer*, acknowledged that Berkeley policy allows faculty members up to 48 days per year of paid outside activity but asked in regard to LECG, “Can you build a \$30 million business on 48 free days? Is the good name and reputation of UC becoming a faculty profit center?” (Busch et al. 2004, 48).

As segments of the professoriate align themselves with the market and make great personal gains from the synergy between their university work and their corporate endeavors, their claims about the need for buffers from external pressures ring less true, undermining their historic stance as disinterested scientists and experts, which is the foundation on which the claim of academic freedom rests.

Despite neoliberal rhetoric, faculty members are not free agents. To enter the Novartis agreement, they had to work closely with Berkeley administrators,

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from the PBM department head and College of Natural Resources dean up through the chancellor and the president. At all levels, administrators favored the Novartis agreement. They were able to bring it to fruition because the administrative capacity of universities has greatly expanded in the past twenty-five years, to the point where universities are capable of engaging in almost any form of market activity (Slaughter and Rhoades 2004). The participation of the Office of Technology Licensing was emblematic of new administrative structures developed to support public-private partnerships. When the dean and the faculty wanted to secure support from corporations, they turned to administrative personnel already in place. The head of Cooperative Extension worked with the group, demonstrating the shift of public service function of land grant universities from service-for-free to offering service-for-fees (Slaughter and Rhoades 1993, 287–312).

The Novartis agreement points to the increasing power that administrators have to decide the research agenda of universities. Administrative support is essential for new directions in research, given the expenditures required for infrastructure such as facilities and equipment. The Novartis agreement brought funds to PMB, including substantial indirect cost recovery. As the external evaluation noted, the Berkeley administration has shown a preference for research initiatives perceived as likely to enhance external revenue flows, exhibiting a neoliberal preference for commercial solutions to public problems.

The opposite side of the coin is Berkeley's reluctance to invest in or support those departments, centers, or institutes critical of university-industry partnerships around biotechnology. Berkeley administrators turned down requests by ESPM to develop sustainable urban agriculture projects that were unlikely to increase external revenue flows. Berkeley initially turned down the assistant professor who vocally criticized Novartis and field trials of genetically altered crops.

In interviews the PMB faculty said they looked for external corporate funding because they needed an infusion of resources to put their research program in the top tier. Increased funding for research was what they valued most about the Novartis agreement. Conventional wisdom suggests that faculty members are driven into the arms of industry by decreases in funding. However, funding for research at elite research universities *increased* steadily from the mid-1990s until the present.

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Since 1990, inflation-adjusted Federal dollars for academic R&D have grown continuously, increasing by about 66 percent through 2002. Real support to all other sectors declined during the decade, rebounding from its 2002 low but still contracting by about 14 percent over the period. (National Science Board 2004, 3)

In other words, academic R&D was a *preferred* social investment because such investment was deemed central to building a knowledge-based economy. Similarly, institutional funds committed to research have risen, now accounting for 20 percent of all funds (NSF 2007). After a half century of increase, institutional funds are now the second largest source of funding for academic R&D, topped only by the federal government (NSF 2007). PMB at Berkeley shared in these increased streams of research funds (NSF 2004).

Berkeley's and PMB's conception of themselves as lacking research funding suggests that they have embraced a neoliberal conception of unrelenting competition, under which resources, no matter how abundant, are never sufficient. If this is the case, research universities and departments and faculty within them that are able to intersect public and private research markets are likely to expand their efforts to do so. The ability of some departments, centers, and institutes to generate large amounts of external resources while others cannot, or will not, exacerbates divisions within universities.

Berkeley policies facilitated the Novartis agreement. Faculty were allowed to hold positions on corporate boards of start-up companies based on their intellectual property, to serve as CEOs of such firms, or to serve on advisory boards to such firms.<sup>12</sup> These rules are frequently spelled out in intellectual property policies, which are usually crafted by professors and administrators involved in university-industry activity. Intellectual property policies in general follow a neoliberal trajectory, allowing professors and institutions, as well as the corporations with which they partner, to use public resources as the basis for individual and institutional economic gain. Theoretically, professors, institutions, and society are the winners, but few studies carefully trace the returns to the citizenry.

Faculty members have not been able to exercise much control over these developments. Berkeley is often held up as an example of an institution with a strong faculty voice in university affairs, a position allegedly strengthened by Berkeley's constitutional status. However, effective self-governance assumes

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some unity among faculty with regard to norms, values, and the directions the university should take. There have been few studies of faculty senate voting patterns, so the degree of division among faculty, likely to be heightened in times of change, is unknown, as is the number of cases when the administration overrides a divided faculty. In other words, a strong faction backed by the administration might be able to implement policies of which a large number of professors might not approve.

Regardless of the unity of the Berkeley faculty, the senate was irrelevant to most of the negotiations surrounding the Novartis agreement. Indeed, Berkeley policies and procedures were such that there was no need to consult the senate. When the dean of PBM ran the agreement past the senate, whether as a courtesy or because he feared opposition, the senate was unable to get more than an external review. The Novartis agreement was signed and executed, and the five years of funding concluded before the external review began.

Berkeley faculty members have received deserved credit for their opposition to the Novartis agreement, but it was Syngenta, not Berkeley faculty opposition, that ended the agreement. Novartis tried to fund a Bell-like lab that could do basic science in a field where investments in fundamental science frequently led to discoveries likely to produce new forms of intellectual property. Novartis hoped to leapfrog over its competitors. Syngenta, already holding a top market share, was not interested.

The treatment of Chapela by his colleagues in PMB and by administrators at UC Berkeley raised academic freedom issues. Their treatment of Chapela suggests suppression of critique by groups internal to the university seeking external research sponsors and by the research sponsors themselves. Chapela fought back and was able to prevail. What is unknown is how many faculty members decide not to engage in critique because they do not want to face the all-consuming struggle that engulfed Chapela.<sup>13</sup>

In the other case, Hayes was supported by Berkeley, eventually becoming a full professor, but not by Syngenta and Ecorisk, corporations with which universities are willing to do business, even if a confidentiality agreement were part of the research contract. If pharmaceutical companies are able to retain control over publication of research that they sponsor and universities participate in such studies, as they routinely do when they adopt neoliberal state forms characterized by privatization, deregulation, and commercialization, academic research is no longer disinterested. New circuits of knowledge allow corporate scientists and business to play a role in deciding what

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merits publication. Peer review and the expertise of the discipline(s) lose authority.<sup>14</sup>

The *Novartis* case illustrates the ways in which public universities have embraced neoliberal state policies and processes that promote individual and institutional entrepreneurship. The goals of entrepreneurial research are individual faculty profit and increased institutional revenue flows. The market, not professors and peer review, judges success. Entrepreneurial research stands in contrast to traditional academic norms and values, which stress discovery, publication, prestige maximization, and separation from the business world. Individual faculty and institutional preference for entrepreneurial research sometimes raises academic freedom issues by seeking to silence critique of entrepreneurial science or institutions' entrepreneurial activities.

*Urofsky v. Gilmore: Virginia Public Universities*

The *Urofsky* case illustrates how legislation enacted to enforce a socially conservative morality restricts academic freedom. *Urofsky* also demonstrates the unexpected consequences of legislation. Although the obvious focus of *Urofsky* was academic freedom with regard to sexually explicit material, the decision in *Urofsky* also shifted power within public universities from faculty to administrators, strengthening the neoliberal state's tendency to concentrate power in the executive branches of government.

In 1996, the General Assembly of Virginia enacted a law that restricted state employees from accessing sexually explicit content on publicly owned computers.<sup>15</sup> The section of the act that triggered litigation on the part of faculty states the following:

Except to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure, files or services having sexually explicit content. Agency approvals shall be given in writing by agency heads, and any such approvals shall be available to the public under the provisions of the Virginia Freedom of Information Act (Virginia Code 2.2-2827).

The definition of sexually explicit content was wide-ranging, covering any description or visual representation that depicted lewd nudity, sexual bestiality,

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sexual excitement, sadomasochism, urophilia, coprophilia, fetishism, or sexual conduct, including actual or simulated depictions of masturbation, sexual intercourse, homosexuality, as well as sexual stimulation, clothed or unclothed, derived from genitals, pubic area, buttocks, or, if female, breasts.

In 1998, in response to the act, a professor of history at Virginia Commonwealth University, Melvin I. Urofsky, and six other professors located at various public colleges and universities in Virginia filed suit in the Alexandria division of the District Court for the Eastern District of Virginia. The professors alleged that the Virginia Act interfered with their right to academic freedom. For example, Urofsky felt unable to continue making assignments to students in which he asked them to evaluate the power of the Communications Decency Act by searching the World Wide Web for easy access to sexually explicit images because he would violate the Virginia Act when he viewed his students' assignments. (Ironically, students were not covered under the act and can view such material without legal consequences.) The other professors told similar stories, claiming that their First Amendment rights were violated and their academic research jeopardized.<sup>16</sup> For example, if the act were enforced strictly, "a history professor's research on Argentina's Dirty war or human rights abuses in Guatemala might be banned under the Act," not because of speech related to sex or gender but because images of torture under study depicted material that could be construed as sadomasochistic abuse (*Urofsky v. Allen* 1998, 11).

The district court decided in favor of the professors, but the Fourth Circuit Court of Appeals reversed the district court's decision (*Urofsky v. Gilmore* 2000). The Fourth Circuit Court was not swayed by the professors' arguments that their academic freedom was violated because the decision about what was researchable—the ability to follow research where it led—was put into the hands of state agents when faculty were required to seek permission from administrators prior to accessing sexually explicit research materials via the Internet. Rather, the court held that academic freedom was the prerogative of the institution, not the individual.

Throughout the Fourth Circuit's judgment, faculty at public universities in Virginia were treated primarily as state employees rather than as professionals with autonomy in their fields of expertise:

The speech at issue here—access to certain materials using computers owned or leased by the state for purposes of carrying out employment duties—is

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clearly made in the employee's role as employee. . . . It cannot be doubted that in order to pursue its legitimate goals effectively, the state must retain the ability to control the manner in which its employees discharge their duties and to direct its employees to undertake the responsibilities of their positions in a specified way. (*Urofsky v. Gilmore* 2000, 7)

The Court understood that the issue was academic freedom, noting that the professors claimed that “by requiring . . . [them] to obtain university approval before accessing sexually explicit materials on the Internet in connection with their research, the [Virginia] Act infringes this individual right of academic freedom.” The Court rejected this position and concluded that “to the extent the Constitution recognizes any right of ‘academic freedom’ above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors, and is not violated by the terms of the Act” (*Urofsky v. Gilmore* 2000, 7).

According to the Court of Appeals, the AAUP had conceived of academic freedom as a professional norm, not a legal one,<sup>17</sup> and the U.S. Supreme Court had “never recognized that professors possess a First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship, despite opportunities to do so” (*Urofsky v. Gilmore* 2000, 11). Rather, “to the extent it [the Supreme Court] has constitutionalized a right of academic freedom at all, [it] appears to have recognized only an institutional right of self-governance in academic affairs.”

The Court saw the First Amendment as protecting professors in their capacity as private citizens speaking on matters of public concern, not their right to speak as experts employed at public universities. In other words, the “public employer’s interest in what the employer has determined to be the appropriate operation of the workplace” (*Urofsky v. Gilmore* 2000, 5) overrides claims to individual academic freedom. The case was appealed to the U.S. Supreme Court, which refused to hear it.

In the many commentaries on the case, scholars have argued that the Court misread *Pickering*, which balances knowledgeable public employees’ rights to speak as public employees against mere employee disputes, which are not protected (*Harvard Law Review* 2002; Williams 2002; Lynch 2003). Several scholars say, as does Lynch, that the Fourth Circuit’s “categorical denial of constitutional academic freedom to professors in *Urofsky v. Gilmore*” is “clearly [an] incorrect result” (Lynch 2003, 1). But attorneys and judges can and do have

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different interpretations of the law. The Fourth Circuit is relatively conservative, and a similar case tried in another circuit may have a different result. However, as Jorgensen and Helms conclude, after reviewing proliferating academic freedom legal cases that involve conflicting “stakeholders”—faculty, students, administrators, citizen, and religious groups—“when faced with competing claims, courts usually conflate academic freedom with the idea of judicial deference and then apply it in support of institutional or employer prerogatives to exercise authority . . . the [current] case law suggests that rights traditionally associated with academic freedom attach primarily to institutions and that institutions, not faculty, exercise primary control over those rights” (2008, 19).<sup>18</sup>

*Urofsky* illustrates how social conservatism shapes state legislation in ways that challenge the norms of the academic profession. Prior to *Urofsky*, the academic profession, as represented by organizations of professors qua professor such as the AAUP, the National Education Association, and the American Federation of Teachers, invoked U.S. Supreme Court First Amendment cases in which academic freedom was at issue to uphold professional norms that conferred autonomy derived from expertise on individual professors. Social conservatives challenged this position through the Virginia Act. The act illustrates socially conservative values in that it upholds a morality that constrains access to explicitly sexual images by employees in state agencies, which include public universities. The focus of the act on computers, the Internet, and the World Wide Web perhaps arose from the perceived danger of a new media through which images were immediately available for professorial use and distribution, creating the possibility of corruption of the student body.

The Virginia Act is not an isolated instance of social conservatism gaining ground within state agencies. Federal administrative law with regard to stem cell research also illustrates conservative social values, as does state legislation that provides equal time for creationism and evolution. These changes in the state, at its several levels, substitute political judgment for professional expertise within the public sector of education, constraining academic freedom.

The Virginia Act does not forbid professors from accessing sexually explicit material. Rather, it requires professors to secure permission from a state agent, such as a dean. Although the shift in locus of authority from individual

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professor to state agent was likely made to ensure that professors did not access sexually titillating computer material on state time and with state resources, the recognition of an institutional rather than an individual right of academic freedom inadvertently shifts the balance of power within academe, reinforcing neoliberal tendencies within public institutions. “New public management” (Amaral, Meek, and Larson 2003) emphasizes increasing efficiency and reducing cost within public entities through market-like behavior and relies heavily on strong administrators able to make rapid decisions.

The professors who engaged in litigation in *Urofsky* very likely did not anticipate a ruling that established an institutional rather than an individual right to academic freedom. However, the decision suggests that socially conservative legislation, enacted within a state increasingly dominated by neoliberalism, can have unanticipated consequences. Beginning with the Reagan administration’s approach to deregulation, neoliberals have favored the “theory of the unitary executive,” asserting the supremacy of the executive over the regulatory functions of government (Light 2008; Moraff 2008, 32–36). Reagan Executive Order 12211 gave the Office of Information and Regulatory Affairs the authority to review all federal regulations, using risk assessment and cost-benefit analysis; Executive Order 12498 called for regulatory review to ensure that new regulations reflected administrative policy objectives. Such efforts continued, with some modifications during the Clinton presidency, to the present, when George W. Bush issued Executive Order 13422, in which agencies that propose new regulations must specify the market failure they address. *Urofsky* led to indirect U.S. Supreme Court affirmation of institutional rather than an individual faculty right to academic freedom, a position in keeping with the strong executive authority preferred by a neoliberal state. Deans and administrators, supported by segments of the faculty, may use the concept of institutional academic freedom to pursue initiatives favored by a neoliberal state, such as the increase of public-private partnerships, which raise their own set of challenges to academic freedom, as illustrated by the *Novartis* case.

#### The *Ward Churchill* Case at the University of Colorado

After World War II, the liberal state initiated the Cold War, characterized by Keynesian welfare/warfare or guns and butter programs. The U.S.

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Congress and various state legislatures initiated a number of academic freedom cases, most of which turned on the Cold War and national security. Among the most prominent were the *Oppenheimer* and *Lattimore* cases (Bird and Sherwin 2006; Lattimore, Cook, and Lattimore 2003). McCarthyism challenged academic freedom on many fronts (Lazarsfeld and Thielens 1958; Schrecker 1986). Professors were swept up in academic freedom cases as a result of their participation in political activities in their capacity as private citizens (Lewis 1988). For example, Oppenheimer was brought before the U.S. Senate Committee not because of his work as a physicist, but because he was suspected of being a member of the Communist Party.

The liberal state continued to focus on loyalty to the nation in the Vietnam War, but rather than being dismissed for membership in the Communist Party, professors were dismissed for critique of the Vietnam War and support of social unrest at home. Among the more notable cases were historian Staughton Lynd, who was denied employment at the University of Illinois because of a trip to Vietnam; Michael Parenti, a political scientist at the University of Vermont who was denied tenure because of professional conduct detrimental to the image of the university; and Morris Starsky, a philosophy professor fired from Arizona State University for dereliction of duty stemming from involvement in antiwar activities (Goldstein 1978; Slaughter 1980, 46–61). The *Angela Davis* case was also a famous Vietnam-era case, but unlike others, Davis had been a member of the Communist Party.

The *Churchill* case shows the state, in this case the University of Colorado, continuing the liberal tradition of punishing professors who strongly critique an ongoing war.<sup>19</sup> As in the cases mentioned above, free speech was allegedly not the issue. Rather than bringing charges against Churchill for what he said and wrote about the World Trade Center bombings, the University of Colorado instead focused its case against Churchill on research misconduct.

Shortly after the 9/11 attacks on the World Trade Center and the Pentagon, Ward Churchill, a tenured professor of Ethnic Studies at the University of Colorado–Boulder, wrote an essay, “Some People Push Back: On the Justice of Roosting Chickens,” in which he argued that the World Trade Center bombing was the “blowback” from the United States’ interventions in the Middle East. The section of the essay that triggered the most criticism was his argument that World Trade Center victims were not innocent, but rather “little Eichmann’s” who benefited from U.S. foreign policy.<sup>20</sup>

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Widespread reaction to the essay did not come until 2005, when Churchill was invited to speak at Hamilton College in a forum on the limits of dissent. Professors at Hamilton who were unhappy with the Churchill invitation circulated his essay on September 11. The text of Churchill's essay was picked up and quoted on *The O'Reilly Factor* on the Fox News Channel, and Bill O'Reilly made reference to Churchill's work in several other segments of his program. Shortly after the first O'Reilly mention, Governor of Colorado Bill Ritter called for Churchill's dismissal, and the Board of Regents of the University of Colorado adopted a resolution apologizing to America for Churchill's essay. In May, the president of the University of Colorado System, Hank Brown, recommended firing Churchill (*Wikipedia*, Ward Churchill 9/11 controversy).

The University of Colorado determined that the First Amendment protected Churchill's speech, and rather than dismissing him for his unpopular essay, the interim chancellor of the University of Colorado initiated a review of Churchill's work by the university's Standing Committee on Research Misconduct. The Standing Committee appointed an Investigative Committee that looked at complaints of plagiarism and falsification as well as fabrication of data. It found Churchill guilty of six charges of research misconduct but disagreed on the punishment, with only one committee member firmly recommending firing (Wesson et al. 2006). The five-person Standing Committee accepted the findings of the investigating committee (Jaschik 2007). On appeal, the Appeals Panel of the Privilege and Tenure Committee found only three of the charges valid, and again the vote was split. The Board of Regents fired Churchill in an eight-to-one vote in July 2007 (Jaschik 2007).

As the case progressed, University of Colorado students voted for Churchill to receive a teaching award sponsored by the Alumni Association, which withheld the award (Newsome 2005). There was serious division within the national scholarly community about the findings of Colorado's Investigative Committee, with some scholars accusing the committee of stacking the deck against Churchill by appointing only one non-Eurocentric member to represent the field of Native American Studies, while others vehemently disagreed and supported the committee (*Open Anthropology*, April 25, 2007; Perez 2005). A number of University of Colorado faculty made countercharges, accusing the Investigative Committee of bias, and threatened to file research misconduct charges against the committee (*Open Anthropology*, April 25, 2007). In 2009, a Denver jury found that CU unlawfully fired Churchill for

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exercising his right to free speech but awarded him only \$1 in damages. After considering the jury's ruling, Chief Denver District Judge Larry Naves decided against awarding Churchill his job back at CU or any compensation (*Boulder Daily Camera* 2010). In February 2010, Churchill began an appeal based on the argument that the trial court was wrong to grant CU regents absolute immunity, and given that there was a proven First Amendment violation, the presumed equitable remedy is reinstatement (Myers and Silverstein 2010).

The *Churchill* case illustrates that aspects of the liberal state continue in a neoliberal era, or that warfare calls forth state mechanisms—regardless of the dominant state form—that exert control over First Amendment rights, whether in academe or other sectors of society (Dadge 2004). The *Churchill* case differs from cases of previous eras, however, in that the issue of research misconduct directs attention to the scholarship of professors engaged in critique. In the McCarthy era, professors were charged with supporting the wrong side in the Cold War through membership in the Communist Party. In the Vietnam era, professors were dismissed on various technicalities, ranging from conduct unbecoming to professors to missing classes in order to engage in social protest. In the *Churchill* case, the charges of research misconduct are directed not toward professors' activities outside the university, but scholars' academic inquiry. Research misconduct calls for heightened scrutiny of academic work, raising the bar beyond what is required by peer review in making decisions about the merit of academic scholarship. In other words, faculty who engage in critique could be subjected to a higher standard of review than other scholars.

### Conclusion

The point I have tried to make in this essay is that changes in state forms pose challenges to academic freedom because the state plays a large part in framing what is possible: the legislative branch enacts laws that impinge on academic freedom, the executive branch structures state agencies and administrative laws that reshape academic freedom, and the judiciary interprets these in new and sometimes unexpected ways. The cases examined highlight the direction of change. Generally, the state agencies are moving from liberal to neoliberal policies and practices, although some agencies have turned in socially conservative directions while others continue on a liberal course.

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Examination of the context of the *Novartis* case illustrates the complexity and degree of change that has occurred with regard to the promotion of market activity through privatization, deregulation, and commercialization of state agencies. As discussed earlier, national competitiveness legislation, signified by the Bayh-Dole Act of 1980, reshaped the importance of intellectual property for universities. State legislation played a similar role, again beginning approximately in the 1980s, with legislation such as the California Enterprise Zones and Economic Incentive Areas, as well as legislation enabling state university system-wide incentives, for example, the University of California Biotechnology Research and Education Program, which put tens of millions of dollars into biotechnology aimed at technology transfer (Peters and Fisher 2002). The executive branch of government was as important as the legislative. At the national level, mission agencies—the National Institutes of Health, National Science Foundation, Department of Defense, Department of Energy, and the National Aeronautics and Space Agency—all developed university-industry-business partnerships in which most research universities became involved (Slaughter and Rhoades 1996). The California pattern of fostering market activity was repeated in many states: economic development agencies and universities frequently worked together to develop biotechnology initiatives, research parks, and incubators, all of which encouraged closer relations between universities and corporations.

When external partnerships with corporations are embedded in the fabric of the university, so are market values. Historically, market values contrast sharply with professional norms (Brint 1994). Markets value risk, market discipline, and profit. Professional norms for faculty emphasize research, teaching, and service as well as discovery, critique, and a disinterested habit of mind. These very different sets of values are not easily melded together, as the Berkeley-*Novartis* agreement demonstrates. Professors and administrators who auction off departments are likely to use their authority within the university to quell critiques of the knowledge they produce, posing problems for the academic freedom of professors who challenge them. In other words, the neoliberal state has created an institutional climate in public research universities in which market values collide with academic freedom as well as other professional norms and values (Pestel and Radermacher 2000). The governance structures developed by faculty seem unequal to the task of defending academic freedom in an increasingly segmented academy.

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The *Urofsky* decision suggests that social conservatism continues to be able to shape legislation in ways that challenge academic freedom. The Virginia Act embodied socially conservative values by preventing faculty from accessing the Internet to view sexually explicit materials without permission from a supervisor, restricting faculty ability to pursue research as individual scholarly actors. Historically, social conservatives have tried to legislate morality with regard to sexuality and were sometimes successful (Lane 2006). The *Urofsky* case indicates that this struggle continues.

Although social conservatives were probably not concerned with the power of administrators, the Fourth Circuit Court was, illustrating the way in which politico-legal initiatives can be reformulated by a judiciary located in an increasingly neoliberal state. The Court affirmed the power of state agencies to subject professors to approval from supervisors prior to using the Internet to conduct some kinds of research and also unexpectedly affirmed an institutional right to academic freedom rather than individual professors' rights. The judiciary may continue to recognize institutional autonomy and defer to colleges and universities, but that is very different from recognizing individual professors' right to academic freedom in their area of expertise.

When the Fourth Circuit's decision was appealed to the U.S. Supreme Court, the Supreme Court let *Urofsky* stand. This was in keeping with a number of decisions the Supreme Court made about public sector employment in the 1990s (*Jett v. Dallas* 1989; *Waters v. Churchill* 1994) that favored institutions over individual plaintiffs, suggesting that public employees should be treated more like corporate employees, realigning public work practices with those of private corporations, where employees, regardless of their professional status, do not have much voice. In 2006, the Court confirmed this approach to professional employees in *Garcetti v. Ceballos* when it held that the speech of an assistant district attorney speaking correctly to his superior with regard to the factual basis of his work was unprotected (*Garcetti v. Ceballos* 2006; Jorgensen and Helms 2008, 8). As commentators on academic freedom have noted, "this ruling appears to threaten the basic notion that academic freedom should protect faculty speech related to official duties of research and scholarship." In these rulings, the courts are taking a neoliberal position in preferring manager/administrators to professors and giving managers—as "agency heads"—more authority than professors. Modeling public institu-

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tional practices after private may constrain academic freedom in that administrator/managers may be able to more easily make decisions without the faculty consultation on which academic freedom depends (see Baez and Slaughter 2001).

The *Churchill* case illustrates the state's enduring preoccupation with security in time of war, which includes silencing critics of war. As was the case with the Cold War, the War on Terror has created a number of challenges for academic freedom, ranging from increased secrecy and classification with regard to government information to cases like Churchill's (Bird and Brandt 2002; Cole 2003; Jaeger et al. 2004). Although wartime concern with security and containment of critique may be a feature of all state forms, whether liberal, socially conservative, or neoliberal (Gruber 1975; Summerscales 1970), I have read the War on Terror as an extension of Cold War policies, largely because both depend on the idea of *permanent* ideological mobilization against an axis of evil that divides the world. Moreover, the War on Terror uses many of the same agencies and techniques as the Cold War. However, there are differences—Homeland Security broadens the ability of the state to monitor citizens' activities, as do technological advances. The *Churchill* case, with its focus on research misconduct, indicates that universities and faculty continue to be willing to participate in policing professors engaged in critique. And charges of research misconduct are a new mechanism of surveillance that raises the bar for those who engage in critique, making them subject to increased scrutiny.

It is unlikely that we will be able to easily or quickly return to the status quo ante of the liberal state, which provided the basis for academic freedom from the 1950s through the 1980s. To do so, we would have to repeal a great deal of legislation that shifted state agencies in a neoliberal direction—for example, the array of competitiveness laws—dismantle agencies or parts of agencies like state and university economic development offices, and reverse two decades of judicial decisions at the state, court of appeals, and federal levels. We would also have to confront socially conservative state agencies and rewrite legislation to protect faculty as civil servants who possess expertise necessary to the public good, even when such expertise is threatening to conventional morality. And we should remember that the status quo ante presented substantial problems for academic freedom, as the many cases from the Cold War era indicate.

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However, the difficulty of protecting academic freedom under new state forms, such as neoliberalism, should not cause us to abandon it. Rather, we should work to develop new politics and new strategies to reinvigorate the disciplines and professions that were responsible for beginning the struggle for academic freedom at the turn of the twentieth century. The biggest challenge will very likely be to get members of professions and disciplines—the organizations that began the defense of academic freedom at the turn of the twentieth century—to agree on what they want from the state. Some segments of these professions and disciplines have pushed to expand the neoliberal state and its opportunity structures—for example, intellectual property rights, differentiated salaries, reduced teaching loads—while other segments have tried to contain the neoliberal state by mobilizing against it, as did Ignacio Chapela at Berkeley. While disciplines and professions and the professors within them that benefit from the neoliberal state may not intend to constrain academic freedom, embrace of market values may nonetheless have that effect unless we are able to reformulate academic freedom in ways that respond to changing state forms.

If faculty are to be part of an academic profession rather than “mere employees,” they have to develop means of defending academic freedom and asserting professional autonomy. If faculty cannot protect their exercise of expertise, then their status as professionals is jeopardized. Employers, state agencies, and political actors, whether students or citizens, can substitute their judgment for that of professionals, so that politics and power trump expert knowledge. Although faculty are not innocent of maneuvering with regard to power and politics and the research questions they ask have high political stakes (for example, climate change research) and professors sometimes fail to see their own biases (as is the case with social scientists and “market fundamentalism”), they nonetheless have to try to craft policies and positions in universities, state agencies, and the legal system that allow the possibility for relatively disinterested knowledge proved in the peer review process to have authority.

#### NOTES

1. Liberalism, or embedded liberalism, was a reaction to classic liberalism and sought to constrain capitalism to avoid depression, poverty, and social unrest. To achieve these ends, social and political oversight and regulatory and planning func-

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tions were embedded in the state. The common goals of embedded liberal states were full employment, economic growth, and the welfare of the citizenry. If necessary, the state would intervene in market processes to reach these goals. Keynesian monetary policies were characteristic of the embedded liberal state. See Blythe 2002 and Carnoy and Levin 1985. In contrast, neoliberalism is “a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices.” While neoliberalism is presented as the key to freedoms of conscience, speech, meeting, association, and employment, this form of liberalism, as pointed out by Karl Polanyi in 1944, also allows “the freedom to exploit one’s fellows, or the freedom to make inordinate gains without commensurable service to the community, the freedom to keep technological inventions from being used for public benefit, or the freedom to profit from public calamities secretly engineered for private advantage,” and generally confers freedom on those “whose income, leisure and security need no enhancing,” leaving little for others. Although neoliberal theory minimizes the role of the state, in practice state subsidies and oversight are not minimized; rather, they shift to new areas. See Harvey 2005 (quotes at p. 2). In particular, and important with regard to higher education, subsidies shift from broad general appropriations for the public good (for example, low tuition) to user taxes and fees (for example, high tuition) that emphasize individual rather than social gains accrued as a result of higher education. Generally, a neoliberal state shifts higher education from a public good knowledge/learning regime to what we have called an academic capitalist knowledge/learning regime. See Slaughter and Rhoades 2004.

2. Social conservatism is a political or moral ideology that sees government as having a role in encouraging or enforcing traditional values or behaviors. The meaning of traditional morality often differs from group to group within social conservatism. See Formicola 2008 and Lane 2006.

3. See the Amicus brief in Urofsky for AAUP’s position with regard to constitutional right for academic freedom. See also Williams 2002. For alternative views see Lynch 2003 and Whitmore 2008.

4. See Busch et al. 2004. This study was commissioned by the University of California–Berkeley as an external review as protest and questions were raised about Novartis’s relationship to UC Berkeley. It is a comprehensive, in-depth, sensitive case study of the Novartis–UC Berkeley partnership. Busch makes many of the points I do with regard to academic freedom.

5. This was reduced to \$23,944,000 over the five years because of inability to agree on a building and various other items.

6. For examples of funding that embrace departments or large segments of departments see Krinsky 2003.

7. Although most contracts between business and industry do not specifically arrange for a corporation to have access to professors’ knowledge gained from work-

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ing on concurrent federal research projects, this may happen inadvertently, despite disclosures and confidentiality, because knowledge is held in the person of the professor who uses it to develop a variety of new approaches. See Slaughter, Archerd, and Campbell 2004.

8. However, Chapela eventually did receive tenure. His case became a celebrated cause among environmentalists, and Chapela prepared to sue the UCB for \$25 million. For details see Maitre (n.d).

9. Chapela's Web site is [www.pulseofscience.org/](http://www.pulseofscience.org/) and has links to [www.pulseofscience.org/chapelalawsuit](http://www.pulseofscience.org/chapelalawsuit) and [www.pulseofscience.org/chapelalawsuit.pdf](http://www.pulseofscience.org/chapelalawsuit.pdf) (accessed February 19, 2006; site discontinued). For an updated site, but without access to the brief, see <http://ecnr.berkeley.edu/facPage/dispFP.php?I=568>.

10. For an account of legal cases in the 1990s that led to neoliberal rules for research universities' engagement with the economy, see Baez and Slaughter 2001.

11. See [www.ucop.edu/ott/genresources/equi-pol.html](http://www.ucop.edu/ott/genresources/equi-pol.html), [www.ucop.edu/ott/patentpolicy/patentpo.html#pol](http://www.ucop.edu/ott/patentpolicy/patentpo.html#pol), and <http://patron.ucop.edu/ottmemos/docs/ott02-01.html>.

12. See n. 11.

13. See Lazarsfeld and Thielens 1958 for the chilling effect that McCarthyism had on American social science. Although McCarthyism drew on quite different social forces than university-industry partnerships, such partnerships may engender similar responses from universities in that universities may be willing to "police" faculty to keep external constituencies happy.

14. See Krinsky 2003. See also Clark 2006 for a chilling discussion of the "neofeudal order of academic plutocrats" (474).

15. Virginia Code Ann. 2.2-2827. My account of the case prior to the en banc hearing by the 4th Circuit in 2000 relies heavily on Williams 2002 and Lynch 2003.

16. Some institutions devised novel approaches to dealing with the act. The University of Virginia granted some of its departments blanket approvals—for example, the Health Sciences Center and the Office of Information Technology (*Urofsky v. Allen* 1998).

17. Indeed, the AAUP, which first formulated principles of academic freedom in 1915, did so in part to distinguish themselves from free speech advocates such as the International Workers of the World, who engaged in free speech political actions that relied on the First Amendment when they publically attempted to educate the masses. See Silva and Slaughter 1984.

18. Jorgensen and Helms explain the Supreme Court's shift from acknowledgment of academic freedom in the 1950s and 1960s to conflating academic freedom with First Amendment law as a result of proliferation of litigation by a variety of stakeholders and by "path dependence," which means that legal and administrative decisions in policy arenas depend on precedents in the larger body of case law. That may be the case, but it does not explain the neoliberal direction of the shift,

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which favors employers and economic stakeholders, regardless of First Amendment issues.

19. Of course, there is the obvious difference that the neoliberal state no longer supports the welfare aspect of the welfare-warfare state, at least in terms of social programs for the citizenry. Generally the neoliberal state has cut back social welfare programs or attempted to privatize them, sometimes unsuccessfully, as in the case of Social Security.

20. I was unable to locate the original essay, which may have been posted on Churchill's Web site, which no longer resides at the University of Colorado. For later versions, see Churchill 2003, 2005.

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