

Academic Freedom in Political Perspective

Derrick Bell

Freedoms protected by the Bill of Rights are time-sensitive. This is particularly true of the First Amendment's free speech rights that courts tend to give an expansive reading of in peacetime and far more restrictive interpretations of during war or in periods of supposed peril. So in the years since the 9/11 attacks in 2001, the politically progressive may be shocked, but should not be surprised, by the degree to which the straightforward First Amendment command barring "abridging the freedom of speech" has been undermined and ignored by both policymakers and the courts. Critics of the government's heavy-handed efforts to fight terrorism are deemed unpatriotic, even traitorous, and are subject to penalties and restrictions scantily clothed in the garb of objectivity and due process.

This is no less true for academics with tenured positions in major universities seemingly protected by the tradition of academic freedom as well as First Amendment rights. In fact, academics expressing critical views about the country and its wartime policies face special dangers because most faculty, stifled rather than liberated by the protection of tenure, are unwilling and often too fearful to stand up on behalf of colleagues who have, in their cautious view, sacrificed their entitlement to support by straying too far beyond the bounds of consensus thinking.

The Supreme Court on a few occasions over the years has sought to encompass academic freedom within the First Amendment's protective umbrella.¹ It has not done so definitively save in cases decided during its effort to recover from the widespread fears in the late 1940s and early 1950s McCarthy era of anticommunist witch hunts and loyalty oaths. During that period, the Court upheld the Smith Act² and affirmed the convictions of individuals sentenced to long prison terms for teaching four books written by Stalin, Marx, Engels, and Lenin. There was no accusation that the defendants had done anything other than teach these works. The Court's plurality speaking through Chief Justice Vinson, however, found the defendants' teachings posed a clear and present danger. The reasoning: The government need not wait

until the putsch is about to be executed, the plans have been laid and the signal is awaited [. . .]. The damage which such attempts created both physically and politically

WORKS AND DAYS 51/52, 53/54: Vols. 26 & 27, 2008-09

to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt.³

As is often the case with academics, no such serious assertions were made by school officials before dismissing Professor Ward Churchill from his tenured position at the University of Colorado at Boulder (also noted as “CU”).⁴ His experience is summarized by Professor Richard Delgado in a review (“Shooting the Messenger”) of Churchill’s book, *On the Justice of Roosting Chickens: Consequences of U.S. Imperial Arrogance and Criminality*. The book grew out of a controversial essay, “Some People Push Back’: On the Justice of Roosting Chickens,” that Churchill wrote shortly after the traumatic events of September 11, 2001. Delgado suggests Churchill’s book—one of the most talked-about, but least read, books of recent years—launches a frontal attack on two widely held beliefs of Americans:

that the United States is a peace-loving country and that we are a nation of laws. Churchill counters both notions by means of lengthy chronologies accompanied by interpretive essays. The first chronology—according to the author the only one of its kind—is entitled “That ‘Most Peace-Loving of Nations,’” covers 46 pages, and includes every significant use of official force against a domestic or foreign target. The second, entitled “A Government of Laws?” spans 165 pages and lists actions that, according to Churchill, violate international law or custom. (479)

Based on this history, Churchill uses the historical account cited above to support his 9/11 contentions about American culpability. Delgado explains, “when, on September 11, 2001, 19 Arabs commandeered planes and flew them into the World Trade Center towers and Pentagon, the United States deserved and should have expected retribution. In the popular phrase, we ‘had it coming’” (478). Delgado’s review then considers “Churchill’s provocative corollary that the victims of the World Trade Center conflagration were ‘little Eichmanns’ mindlessly complicit in their country’s illegal conduct and thus richly deserving of their fate” by “spell[ing] that argument out, outlin[ing] its structure, separat[ing] out its factual and moral premises” (478). Moreover, the review “addresses the First Amendment implications of the controversy raging in Colorado over whether Churchill’s remarks justify firing him from his tenured position and [examines] what that controversy means for academic freedom and the right to criticize government” (478). Delgado also offers a detailed analysis of the major points in Churchill’s book, accepting some and offering criticism of others:

Ward Churchill’s essay and book stirred intense opposition, especially at the University of Colorado, where he teaches in the Ethnic Studies department at the flagship Boulder campus. More than three years after he wrote the essay that he later developed into [*On the Justice of Roosting Chickens*], Churchill received an invitation to speak at Hamilton College, a small liberal arts school located in rural New York. A storm of protests broke out when a

detractor discovered the essay posted on the Internet and mentioned it to a few others. After receiving a blizzard of angry e-mails and letters, some threatening violence, the college reluctantly cancelled Churchill's invitation. Several other universities followed suit. (491-92)

Additionally, Delgado describes the Colorado citizens who became angry after the national media began covering the story. By every means of communication, they demanded that state officials dismiss Churchill immediately, demands with which in strongly worded public statements, legislators, the governor, and members of the CU Board of Regents were ready to comply. The university chancellor, after declaring that he found Churchill's statements "repugnant," formed a three-person committee, including himself, to read all of Churchill's writings and determine whether they exceeded the bounds of academic propriety.

In carrying out its work, the CU Investigative Committee unearthed complaints charging that in addition to making unpopular statements about U.S. foreign policy, Churchill was guilty of four other types of misconduct. Recognizing that his statements might be found protected by the First Amendment, university officials combed through a media barrage of unfounded allegations and his more than 20 books, 100 articles, and over 12,000 footnotes, and determined to fire him for six instances of alleged improper footnoting or author attribution.⁵

Based on these findings, the committee found and the university concurred that Churchill should be dismissed. The suit he filed will come to trial next spring. During the months-long controversy, only a small number of Colorado faculty members spoke in his defense. Delgado concludes that:

Churchill's fate in the wake of writing his book—hounded, deprived of speaking opportunities, reviled on Fox TV nightly for two weeks running, forced to step down from his department chairmanship, his life threatened, his car defaced, his career ruined—illustrate two of his principal contentions: America brooks no dissent, is cruel to its enemies, and does not fight fair or even abide by its own rules. (494)

In October 2006, the University of Colorado at Boulder AAUP chapter issued a carefully worded, unenthusiastic statement of support.⁶ The national AAUP refused to take any action in the case. The points made in this article regarding the political selectivity of First Amendment protection may also be applied to Norman G. Finkelstein, a political scientist deemed controversial because of his criticism of Israel in its treatment of the Palestinians. Finkelstein, following a major campaign against him led by Harvard Law School's Alan Dershowitz, was denied tenure by DePaul University and has since been unable to find a job.⁷

The politically influenced protection of the First Amendment denied Churchill and Finkelstein can profitably be compared with that provided to John Yoo, a tenured constitutional law professor at the UC Berkeley's Boalt Hall School of Law. While working with the Justice Department,

Yoo drafted a memo in August 2002, providing the legal basis to justify torture in interrogating terrorism suspects (Mazzetti n. pag.; Yoo 1-81). It was his contention that habeas corpus and other legal protections do not apply to CIA detainees because Guantánamo Bay and Abu Ghraib are not on United States soil. His memo was later rescinded by the Justice Department, and in subsequent litigation the Supreme Court voided many of Yoo's arguments.

Even so, Carolyn Jones of the *San Francisco Chronicle* reported that some fifty protesters at the law school's graduation in May 2008 demanded that Yoo be fired and disbarred as a war criminal for authoring the Bush administration's torture policies (B1). The story points out that while many of his colleagues and students are disturbed by Yoo's opinions, Christopher Edley, Jr., the dean of the Boalt Hall School of Law, said that Yoo is protected by the First Amendment and campus policies on academic freedom. Edley said in a statement:

"My sense is that the vast majority of legal academics with a view of the matter disagree with substantial portions of Professor Yoo's analyses, including a great many of his colleagues at Berkeley. If, however, this strong consensus were enough to fire or sanction someone, then academic freedom would be meaningless." (B1)

Dan Ferger, a member of my Spring 2008 constitutional law class compared the different statuses of Churchill and Yoo in an online essay (not publicly accessible) that, with his permission, I am setting out in full:

John Yoo, a tenured professor of law at UC Berkeley Boalt Hall School of Law, is no Ward Churchill. Despite calls for his termination in the wake of the Department of Justice "torture memo" scandal, he will keep his job. Churchill was less fortunate.

As we discussed at great length [in class] during Hypo 19 [raising the free speech issues involved in the Churchill dismissal], Ward Churchill's controversial claim that WTC workers were "little Eichmanns" cost him his tenured position at the University of Colorado. The wisdom of making such an inflammatory statement was clearly questionable, but the Salem-style investigation into Churchill's scholarship which followed, as well as the refusal of his faculty colleagues to stand by him in his free speech fight, was, to me, even more shocking.

Churchill's First Amendment rights were sacrificed on the altar of post-9/11 patriotism, yet the University officials who fired him told themselves they had done the right thing because his termination ostensibly was not about punishing constitutionally protected speech, but rather about policing against shoddy scholarship.

Alleged "war criminal" John Yoo, on the other hand, has the backing of Boalt's Law School Dean Christopher Edley, Jr. and seems unlikely to be fired any time soon, notwithstanding the fact that the National Lawyers Guild and other organizations are calling for his dismissal. While at the Justice Department, Yoo was the principal

author of a controversial legal memo making the incredible assertion that in order for U.S. agents to violate domestic and international law forbidding torture, an individual “must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result” (45).

Beyond the superficial issue of Yoo’s position on questions of “patriotism,” which admittedly goes a long way to explaining why his statements haven’t been met with the same near-universal opprobrium as were Churchill’s, what other differences explain the divergent outcomes in these two tenure revocation battles?

[. . .] First, the debate about Yoo’s “speech” has been framed less around the First Amendment than by the context in which that speech was made. As a government attorney, Yoo was providing “legal advice” to his client. As such, that advice was arguably about laying out the “state of the law” for the Bush administration, which then chose a course of action based upon the advice it received. Indeed, Yoo drops a footnote in his memo to disclaim any responsibility for choosing how or when to employ the interrogation methods he authorizes.

By contrast, because Ward Churchill was not a lawyer giving legal advice, his speech was not granted the special status afforded to attorney-client communications, either by his employer or by the public at large. Never mind that Yoo’s memo arguably aided and abetted serious war crimes while not a single person was physically harmed by Churchill’s inflammatory statements; it seems clear that the context in which one speaks, and what one has to say, is determinative of how public opinion (and the law) will treat such speech. (n. pag.)

It is difficult to find fault with Mr. Ferger’s analysis of the two cases, but if submitted to a national opinion poll, most would assert that Churchill should be punished and Yoo should be praised. And in that likely result one can see the paucity of the promise and the sizeable limitations of the First Amendment. Initially, of course, the First Amendment—like the Bill of Rights generally—was intended to protect vested property interests from being silenced by government. Despite their concerns, those empowered by money and position, often deemed synonymous with government and certainly more influential in our lives, utilize the First Amendment to enable them to get out their messages in a myriad of ways that today includes ownership of the major television media.

For the rest of us, popular speech, with which all or most agree, needs little protection. It is applauded or more likely ignored, not challenged. And yet when speech is seen as threatening, whether or not true, it is attacked rather than debated—that is, when it can break through and be heard at all. Consider again Churchill’s challenge to the generally held view that: (1) This nation is peace-loving and goes to war only in self-defense; and (2) The nation’s policies are always in keeping with our ideals of furthering democratic systems and

undermining dictatorships. His heavily documented support of his position that these generally held views about the country's foreign policies are wrong and the opposite of these views quite often accurate, were ignored as possible motivations for the 9/11 attacks. Churchill would likely have welcomed intellectual debate on his statements; rather, the media quickly condemned him as "un-American," even "traitorous." University of Colorado officials, in agreement with the media, followed a pattern of condemnation and punishment adhered to throughout history, particularly in times of war or other crisis. They honed in on Churchill's controversial statements without which his carefully documented critique of American foreign policy—like the hundreds of sources he cited—would never have come to light. Their commitment to condemnation overwhelmed reason or tolerance, and any consideration of free speech and academic freedom was rationalized away or simply ignored.

Churchill, Finkelstein, and likely many others who dared speak out too strongly against the country's position, joined those whose experiences are covered well by Geoffrey R. Stone, a University of Chicago law professor, in his engaging book *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*. The government policies initiated since the 9/11 attacks, like those enacted in earlier wars, endanger the speech rights of all, not just the outspoken critics. They include the USA PATRIOT Act used to smuggle into law several investigative procedures that have little to do with fighting terrorism—even less in the way of checks and balances—which, as a result, currently threaten an unnecessary invasion of constitutional rights. Then there were the indefinite suspensions and arbitrary deportations of thousands of Arabic non-citizens, who were in this country lawfully and charged with no crime. There was blanket secrecy concerning the identity of detainees, who were denied access to lawyers or contact with family members. Many of these detainees were summarily deported to countries with which they had no ties. The holding and interrogation under horrible conditions of so-called "enemy combatants" in the Guantánamo prison has been an international scandal. All of this and more have been justified as necessary in the fight against terrorism.⁸

With too few exceptions, most measures have been approved by Congress and the courts over the strong objections of civil libertarians who have claimed with little success that many of these policies violate the First Amendment. There may not have been criminal prosecutions of those who dared criticize the administration's policies as happened in earlier wars, but officials have been willing to tar critics as disloyal under the aegis of President Bush's warning: "You are either with us or against us." More importantly, as indicated above, much of the media is now corporate-owned and either partisan to administration policies or so determinedly neutral that it is hard to distinguish them from the staunch supporters of the war on terror and policies asserted as necessary to pursue it effectively.

The future of academic freedom for teachers, whose speech and writings fall outside of generally acceptable parameters, particularly during times of crisis, is quite predictable based on both past and

current events. Protests by some faculty members at the University of Colorado and civil liberties groups like the Society of American Law Teachers, insisting that Ward Churchill's statements are protected by the First Amendment, are useful.⁹ However, they are unlikely to persuade administrators and politicians in the absence of strong support by large numbers of faculty members demanding that the precepts of academic freedom be recognized, even as to those whose manifestations are deemed objectionable, insensitive, and wrong.¹⁰

The obligation and the opportunity of giving concepts of academic freedom meaning and value rests with academics who are its potential beneficiaries. This is the essence of the message Margaret D. LeCompte, a University of Colorado professor of education, conveyed in an April 19, 2007, letter to her mostly silent colleagues. It is a heartfelt missive well worth sharing as an indication of what faculty members with few exceptions have not done, and incentive for what tenured faculty *must do* to provide protection to those in their ranks who need it most:

To Whom It May Concern,

I am writing in response to the refusal of many of my academic colleagues to look carefully at the firing of Professor Ward Churchill at the University of Colorado [at] Boulder. It is true that many people disagree with some of Professor Churchill's stances, and others find his controversial statements to be offensive. However, even the University of Colorado found that his statements were, in fact, protected under the United States Constitution.

What I find profoundly disturbing is the fact that people do not seem to be able to distinguish between supporting a principle and supporting a person. It is our ethical obligation to support principles of integrity, objectivity, due process, and academic freedom, even if we detest the individual whose acts are under consideration. Further, I find it appalling that many of my colleagues who refuse to support Professor Churchill are doing so in ignorance of what really has actually transpired here at the University of Colorado and with a profound lack of information about the facts of the case on the ground. Let me explain, and let me assure you that I am not a "Churchill groupie!" I, too, once had serious misgivings about Professor Churchill's scholarship, given the media firestorm that surrounded this case and the nearly total blackout on any alternative perspectives on the matter.

It is critical to realize that one very important fact of academic life has haunted this entire process: Faculty naïvely have come to trust that the procedures governing reviews, due process, academic freedom[,] and faculty governance are, in fact, fair, appropriate, and duly constituted. The University of Colorado administration has capitalized cynically on that trust in ways that [have] allowed said administration to put together what looks like a fair process, but which, in fact, has been totally hijacked. What has happened at the University of Colorado makes a mockery of both due process and academic freedom protections, *and* what faculty believe. It is a cruel violation of the delicate balance between faculty

rights and administrative responsibilities. What happened at CU has allowed the CU administration to argue that the process worked and that faculty themselves found that Churchill should be fired. Unfortunately, that isn't what happened.

Many scholars refuse to question the outcomes of the Churchill case on the grounds that duly constituted faculty and administrative bodies have found serious misconduct on Churchill's part. If only this were true. The truth is that the special investigating committee only appeared to be duly constituted. In fact, some of its members were biased against Churchill from the outset and the body itself did not constitute an appropriate investigative body. Its chair already had preconceived negative opinions about Professor Churchill. It did not include anyone from Churchill's own specific area, and thus, he was not judged by a jury of his disciplinary peers. The one person with expertise in Indian Affairs was an expert in Indian law only, not the only area in which Churchill writes. Most egregious, the committee inappropriately relied on very limited information from sources known to be biased against Professor Churchill and his perspectives in American Indian scholarship to create their report. Even the charges of plagiarism, those most disturbing to competent scholars, do not hold up. The entire process was a sham—imitating the form, but not the intent, of due process and fair, objective, scholarly investigation. The actions of the committee violated the intent of laws of the CU Regents, and both the intent and the form of AAUP guidelines on due process and academic freedom, guidelines which CU says they uphold. Clearly, CU did not uphold these guidelines in the Churchill case and others on campus. Clearly, the hijacking of once-revered procedures poses a danger to all of us. Ward Churchill could be any of us. This could happen to *any* of us.

Many academics also have argued that if an investigation, even one generated for motives that are questionable, nonetheless turns up evidence of serious misconduct, that misconduct must, in fact, be addressed and punished. If only the investigation had really turned up such evidence in the record of Professor Churchill! However, even a cursory examination of the investigatory report itself reveals it to be fatally flawed with error and misrepresentation. One of these errors was admitted by the chair of the investigatory committee on April 9, just days after it had been revealed to the press by Dr. Eric Cheyfitz of Cornell University, a distinguished scholar in both Indian studies and Indian law. Dr. Cheyfitz, in fact, argues that the [*Investigatory Committee Report*] should be rescinded as a disgrace to scholarship—an opinion with which I concur. I urge fellow academicians to read Dr. Cheyfitz's analysis of the facts of the report, as well as the [*Investigatory Committee Report*] itself. They are revelatory. The actions of the committee are far worse than any of the charges leveled against Churchill; at least his errors, even if they were true, did not stand to ruin a human being's reputation and a scholar's career. This could happen to *any* of us.

I do urge you to look a bit more deeply into this important case. It is not limited to Colorado. In fact, it is

a test case by the U.S. right-wing to emasculate faculty rights in U.S. universities. It is spearheaded by ACTA, the Association of College Trustees and Alumni, and other similar organizations. Should you feel that I am exaggerating, I simply refer you to ACTA's own publications, including [*The Colorado Model: Any State Can, How Many Ward Churchills?*, and most recently, *Friends in High Places*]. It is very important that all of us who value academic freedom and the integrity of the university stand up and support the campaign to prevent witch hunts such as have occurred with Professor Churchill from ever occurring again.

Margaret D. LeCompte, PhD
Professor of Education
University of Colorado [at] Boulder
(President, CU-AAUP Chapter) (n. pag.; emphasis in original)

In my over fifty years of work on race issues in this country, I have determined that antiracist policies and judicial decisions are less the result of either the degree of discrimination suffered by blacks or other peoples of color or the quality of argument or protest mounted against this discrimination. Rather, change occurs when there is recognition by policymakers that it is in their and the country's interest to acknowledge and to some extent remediate this discrimination. For example, nowhere mentioned in the Supreme Court's opinion in *Brown v. Board of Education*, a major motivation for outlawing racial segregation in 1954 as opposed to the many failed opportunities in the past, was the major boost that this decision provided in the country's competition with communist governments abroad and the campaign to uproot subversive elements at home.¹¹ This fortuity continues a long history of similar coincidences motivating the advancement or sacrifice of black interests. These self-interest convergences were present in the abolition of slavery in the northern states, the Emancipation Proclamation, and the Civil War amendments to the Constitution.¹²

Prompted by Professor Richard Delgado, I find that there is a similar convergence in academic freedom challenges, but one often working in reverse. That is, the principles of academic freedom are viewed in the abstract as worthy and in keeping with free speech rights protected by the First Amendment. And yet, when speakers criticize important government policies during times of crisis, academic freedom concepts are perceived as in conflict with generally held views during speech sensitive times. The speakers, particularly those holding posts in academia, are widely criticized and often condemned as unpatriotic, their views unworthy of protection because they are not consistent with the country's policies and beliefs in a time of danger. The concepts of academic freedom and even basic principles of due process and fairness are set aside, creating in the process precedents that further undermine protections for all in the academy.

Interest convergence with race or, as with academic freedom, interest nonconvergence, are insights without remedies. They offer instead a view of reality out of which remedies or at least a greater understanding may come.

Notes

¹ See, e.g., *Keyishian v. Board*. Justice Brennan wrote, “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.” But the connection has often been tangential. The *Keyishian* case, as a later court of appeals noted, “dealt with that brand of regulation most offensive to a free society: loyalty oaths. The [U.S. Supreme] Court’s pronouncements about academic freedom in that context, however, cannot be extrapolated to deny schools command of their own courses. See *Bishop v. Aronov* and *Metzger* for related case citations. Hence, phrases like “pall of orthodoxy” are rhetoric, not a statement of law. For a full discussion of the very loose connection of academic freedom with the First Amendment, see *Standler*.

² See *Smith Act*. Under the act, it was unlawful for any person “to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence [. . .].” Any attempt or conspiracy to attempt any of the acts was similarly unlawful.

³ See *Dennis v. United States*. The *Smith Act* set no new precedent. In 1798, Congress, fearing war with France, enacted and the Supreme Court approved the *Alien and Sedition Acts*. These acts restricted aliens and also curtailed Republican Party opponents’ press criticism of the government by silencing their printing presses. For example, ten persons were imprisoned for referring to President Adams as a “hoary-headed incendiary.” The laws were repealed or allowed to expire after Thomas Jefferson won the presidency in 1802.

In 1862, during the Civil War, President Lincoln suspended the writ of habeas corpus, enabling the detention of some really severe critics of the war without allowing them access to the courts. Some thirteen thousand persons were arrested under martial law and when Chief Justice Roger Taney issued a writ of habeas corpus to bring a secessionist before him, the military refused and Lincoln ignored the ruling. After the war, the Supreme Court restored habeas corpus in 1866, *Ex Parte Milligan*, 71 U.S. 2 (1866).

Widespread opposition to the U.S. entry into World War I in 1917 led a Congress that feared radical uprisings to enact the *Espionage Act of 1917* and the *Sedition Act of 1918*, both of which threatened imprisonment for up to twenty years of persons convicted of false statements made with the intent to interfere with the military or aid the enemy, or to use disloyal, profane, scurrilous, or abusive language to harm the government or the war effort. The Supreme Court upheld both statutes rejecting challenges that they violated First Amendment rights. See, e.g., *Schenck v. United States*; *Frohwerk v. United States*; *Debs v. United States*; and *Abrams v. United States*. In later cases, the Court extended its concept of free speech to protect a significant amount of such speech. See *Fiske v. Kansas* and *DeJonge v. Oregon*.

The pattern was repeated after the McCarthy era when cases like *Dennis* were replaced with decisions expanding First Amendment rights. See *Yates v. United States*, and later *Brandenburg v. Ohio*, finding that under the constitutional guarantees of the First Amendment states cannot “forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”

⁴ Full disclosure requires acknowledgment that I am a strong supporter of Professor Churchill and believe his statements taken in context with the writings supporting them are entitled to First Amendment protection. Colorado officials do not disagree with my assessment (see endnote 5).

⁵ See "A Filing of Research." In response to the charges, fifteen professors and two attorneys in April 2007 filed two sets of formal research misconduct allegations against the investigative committee which wrote the report used to justify sanctions. These illustrate that the committee members were so determined to convict Churchill that *they* engaged in falsification and fabrication of evidence, twisting the facts to fit their conclusions. The violations include:

- relying on a biased and flawed source for major arguments;
- improper exclusion of reputable independent sources that contradict the *Investigative Committee Report's* argument;
- suppressing text from a cited source that contradicts the *Investigative Committee Report's* argument;
- excluding valid scholarly interpretations at variance with the *Investigative Committee Report's* claims;
- rhetorically exaggerating the strength of the case against Professor Churchill.

As to the plagiarism charges, the group wrote:

Nor is credibility of the Report enhanced by its treatment of the three plagiarism charges against Professor Churchill. One of these charges is quickly dismissed, but immediately (and improperly) resurfaces as an ad hoc misconduct charge proscribing the practice of ghost writing. The other two plagiarism charges involve persons or organizations that once worked collaboratively with Professor Churchill. None of the authors supposedly plagiarized by Churchill ever filed a formal charge, and administrators at the University of Colorado were aware of these issues for over a decade without taking action. The plagiarisms attributed to Professor Churchill involve only a tiny fraction of his work and must be deemed insubstantial or even trivial, especially in light of other elite universities' repeated refusal to sanction truly egregious plagiarisms by eminent faculty members. Professor Churchill's actions could only be regarded as punishable misconduct for someone already defined as a political pariah and by an investigating body that had adopted an adversarial stance towards him. (2)

⁶ See *Statement of the AAUP*. The statement read in part: "[F]aculty members whose research results in unpopular conclusions should not be held to a higher standard than scholars whose work is popular or uncontroversial. The University of Colorado at Boulder AAUP also believes that serious charges of misconduct leveled against faculty should be investigated. However, the credibility of those charges should be investigated as well, in order to protect faculty against politically motivated witch hunts. Finally, we believe that defending academic freedom by protecting faculty members from vindictive attacks and maintaining a presumption of innocence for faculty members accused of misconduct until investigations are concluded is a central mission of the University."

⁷ See Wilson; Cohen; and Holtschneider. Finkelstein said he clearly "met the publishing standards and the teaching standards required for tenure" and that DePaul's decision was based on "transparently political grounds" and an "egregious violation" of academic freedom (Cohen n. pag.). *The New York Times* further reported that "DePaul's political science department had voted to award [. . .] Finkelstein tenure, but the University Board of Promotion and Tenure rejected his bid, and [the University president] upheld that decision" (n. pag.).

In a letter to Mr. Finkelstein, [University President] Father Holtschneider wrote that Mr. Finkelstein is an excellent teacher and a nationally recognized public intellectual but does not "honor the obligation" to "respect and defend the free inquiry of associates."

[. . .] In a full-court press against [. . .] Finkelstein, [Alan] Dershowitz lobbied professors, alumni[,] and the administration of DePaul, a Roman Catholic university in Chicago, to deny him tenure. Many faculty members at DePaul and elsewhere decried what they called [. . .] Dershowitz's heavy-handed tactics. (n. pag.)

A copy of the Holtschneider letter is posted on the official Web site of Norman G. Finkelstein at <http://www.normanfinkelstein.com/pdf/tenure%20denial/Finkelstein,Norman06.08.2007.pdf>.

⁸The USA PATRIOT Act, (Public Law Pub. L. No. 107-56), introduced in the wake of the 9/11 attacks, was supported in Congress by large majorities of both parties, and was signed into law by President Bush in October 26, 2001. The acronym stands for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001." Civil libertarians have criticized its authority as undermining rights protected by the Constitution. Efforts to amend the law to provide protection for civil liberties generally failed and the Act was reauthorized in March 2006.

⁹In August 2006, a group called Defend Critical Thinking Initiative reported: "Faculty at Boulder have stepped forward to form a group to oppose this decision and issue a public call to defend Ward Churchill; a number of letters and articles opposing this decision have appeared in the Boulder papers, at various Web sites, and in the current issue of *Anthropology Today*; a petition circulated by Teachers for a Democratic Society has already been signed by over 450 professors nationwide, and the NACCS conference (National Association for Chicana and Chicano Studies) held in Guadalajara, Mexico, in July passed a resolution opposing this firing." See "Defend Dissent."

¹⁰In an e-mail to me, Professor Richard Delgado notes: "The most likely counsel for someone like Churchill would be from the ACLU or AAUP. In fact, the former organization delights in representing Nazis, skinheads, and others 'whose speech we hate.' (It makes them feel quixotic and virtuous). But no such organization is likely to come to the defense of someone like Churchill because of the pretext angle. The university is careful to charge him or Finkelstein not with making unpatriotic statements, but some sort of borderline plagiarism or other unseemly behavior. As soon as they do this, the ACLU and their friends melt away. Who wants to defend a plagiarist?" Even without the pretexts of academic wrongdoing or inadequacy, Delgado would likely agree that political pressures to censor controversial speech would overwhelm free speech and academic freedom protections.

¹¹ See Dudziak 18-78.

¹² See Bell 49.

Works Cited

- Abrams v. United States, 250 U.S. 616 (1919).
 Bell, Derrick. *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform*. Oxford: Oxford UP, 2004.
 Bishop v. Aronov, 926 F.2d 1066, 1075 (11th Cir. 1991).
 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
 Brown v. Board of Education, 347 U.S. 483 (1954).
 Churchill, Ward. *On the Justice of Roosting Chickens: Consequences of U.S. Imperial Arrogance and Criminality*. Oakland: AK P, 2003.

- _____. "Some People Push Back': On the Justice of Roosting Chickens." *NCAC.org*. 12 Sept. 2001. National Coalition Against Censorship. 21 July 2008 <http://www.ncac.org/media/related/20050208~USA~Ward_Churchill_Some_People_Push_Back.cfm>.
- Cohen, Patricia. "Outspoken Political Scientist Denied Tenure at DePaul." *New York Times Online* 11 June 2007. 19 July 2008 <http://www.nytimes.com/2007/06/11/arts/11depa.html?_r=1&oref=slogin>.
- Debs v. United States, 249 U.S. 211 (1919).
- "Defend Dissent and Critical Thinking on Campus—An Urgent Call to Organize Opposition to the University of Colorado's Decision to Fire Ward Churchill." *IUPUI.edu*. Aug. 2006. IUPUI University Library Special Collections and Archives. 16 Aug. 2008 <<https://archives.iupui.edu/bitstream/2450/431/3/CallForAction8-WardChurchill.pdf>>.
- DeJonge v. Oregon, 299 U.S. 353 (1937).
- Delgado, Richard. "Free speech defense." E-mail to Derrick Bell. 1 June 2008.
- _____. "Shooting the Messenger." Rev. of *On the Justice of Roosting Chickens: Consequences of U.S. Imperial Arrogance and Criminality*, by Ward Churchill. *American Indian Law Review* 30.2 (2005-06): 477-94.
- Dennis v. United States, 341 U.S. 494 (1951).
- Dudziak, Mary. *Cold War, Civil Rights: Race and the Image of American Democracy*. Princeton: Princeton UP, 2000.
- Ferger, Dan. "Unpopular Speech: War Crimes, and Tenure." Unpublished essay, Spring 2008.
- "A Filing of Research Misconduct Charges Against the Churchill Investigating Committee" (Exhibits to Churchill Submission to Regents: Exhibit C). *Ward Churchill.net*. 10 May 2007. Ward Churchill Solidarity Network. 21 Dec. 2008 <http://wardchurchill.net/files/c_may_10_2007_rm_complaint.pdf>.
- Fiske v. Kansas, 274 U.S. 380 (1927).
- Frohwerk v. United States, 249 U.S. 204 (1919).
- Holtzman, Dennis. Letter to Norman Finkelstein. 8 June 2007.
- Jones, Carolyn. "Torture Protesters Bring Issue to Boalt Hall Graduation." *San Francisco Chronicle* 18 May 2008, 5star., Metro.: B1.
- Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).
- LeCompte, Margaret D. Letter to AAUP. 19 Apr. 2007.
- Mazzetti, Mark. "'03 U.S. Memo Approved Harsh Interrogations." *New York Times Online* 2 Apr. 2008. 6 July 2008 <http://www.nytimes.com/2008/04/02/washington/02terror.html?_r=2&adxnnl=1&oref=slogin&adxnnlx=1215389049-305ZC7m3q4YPTSWEV4EYmA>.
- Metzger, Walter P. "Profession and Constitution: Two Definitions of Academic Freedom in America." *Texas Law Review* 66 (1988): 1265, 1293.
- Report of the Investigative Committee of the Standing Committee on Research Misconduct at the University of Colorado at Boulder concerning Allegations of Academic Misconduct against Professor Ward Churchill (IC)*. *University of Colorado at Boulder Online*. 9 May 2006. Regents of the University of Colorado. 13 July 2006 <<http://www.colorado.edu/news/reports/churchill/download/WardChurchillReport.pdf>>.

- Schenck v. United States, 249 U.S. 47 (1919).
- Smith Act 54 Stat. 670, 671 (18 June 1940).
- Standler, Ronald B. "Academic Freedom in the U.S.A." *Dr. Ronald B. Standler Web site*. 1999-2000. Dr. Ronald B. Standler. 6 July 2008 <<http://www.rbs2.com/afree.htm#anchor333333>>.
- Statement of the AAUP Chapter at the University of Colorado at Boulder Regarding the Investigation and Recommended Termination of Professor Ward Churchill*. AAUP-CU.org. 25 Jan. 2007. AAUP University of Colorado. 21 July 2008 <<http://www.aaupcu.org/publications/chapterstatements.html#churchill>>.
- Stone, Geoffrey R. *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*. New York: W.W. Norton & Co., 2004.
- Wilson, Robin. "Closed Out? Norman Finkelstein, Controversial Scholar Denied Tenure, Can't Find a Job." *Chronicle of Higher Education Online* 7 July 2008. 9 July 2008 <<http://chronicle.com/news/article/4796/closed-out-norman-finkelstein-controversial-scholar-denied-tenure-cant-find-a-job>>.
- Yates v. United States, 354 U.S. 298 (1957).
- Yoo, John. "Memorandum for William J. Haynes, II, General Counsel of the Department of Defense (14 Mar. 2003)." *New York Times Online* 2 Apr. 2008. 22 Nov. 2008 <http://graphics8.nytimes.com/packages/pdf/national/OLC_Memo1.pdf> and <http://graphics8.nytimes.com/packages/pdf/national/OLC_Memo2.pdf>.