

BLOGSTUDENTS' RIGHT TO FREE INQUIRY VS. A.I. USAGE
POLICY AT SCHOOLS AND UNIVERSITIES*Martin Kwan****A.I. usage policy should not ignore Students' right to free inquiry**

The use of generative artificial intelligence (A.I.) tools, such as ChatGPT, has been a disruptive development given their powerful yet controversial capacity to replace human input. It has received mixed reception in the education sector. Some U.S. universities embrace their use with an open mind and have even integrated it into the curriculum.¹

But many other U.S. (and also foreign) universities are limiting students' use of A.I. tools.² This situation is not limited to higher education, but also in some K-12 schools.³

The scope of the imposed limits varies widely depending on the institutions. Some schools have banned A.I. usage completely;⁴ some limit the number of use of such

* 2023-24 Affiliate, Center for Information, Technology, & Public Life (CITAP), University of North Carolina at Chapel Hill; Honorary Fellow, Asian Institute of International Financial Law, University of Hong Kong; Associate, Centre for Development Economics and Sustainability, Monash Business School. The views are my own. Contact: martinkwan11@gmail.com.

¹ See, e.g., Tate Ryan-Mosley, *How One Elite University is Approaching ChatGPT this School Year: Why Yale Never Considered Banning the Technology*, MIT TECH. REV. (Sept. 4, 2023), https://www.technologyreview.com/2023/09/04/1078932/elite-university-chatgpt-this-school-year/?truid=%7CLINKID%7C*&utm_source=the_download&utm_medium=email&utm_campaign=the_download.unpaid.engagement&utm_term=%7CSUBCLASS%7C*&utm_content=%7CDATE:m-d-Y%7C*.

² See, e.g., Pranshu Verma, *Professors Have a Summer Assignment: Prevent ChatGPT Chaos in the Fall*, WASHINGTON POST (Aug. 13, 2023), <https://www.washingtonpost.com/technology/2023/08/13/ai-chatgpt-chatbots-college-cheating/>.

³ See, e.g., Regina Ta & Darrell M. West, *Should Schools Ban or Integrate Generative AI in the Classroom?*, BROOKINGS INSTITUTION (Aug. 7, 2023), <https://www.brookings.edu/articles/should-schools-ban-or-integrate-generative-ai-in-the-classroom/>.

⁴ See, e.g., Verma, *supra* note 2; Vishwam Sankaran, *Japanese Universities Become Latest to Restrict Use of ChatGPT*, INDEPENDENT (Apr. 10, 2023), <https://www.independent.co.uk/tech/japanese-universities-chatgpt-use-restrict-b2317060.html>.

tools per academic year (as in Hong Kong where ChatGPT is not free to use);⁵ many leave the choice to be determined by individual professors;⁶ some require disclosure of usage or even the prompts/instructions given to the A.I. tool;⁷ some have set a prohibitory default rule, namely students cannot use unless allowed;⁸ etc.

Yet, surprisingly, there is little discussion on whether and how students' academic freedom has been duly taken into account when their academic use of generative A.I. tools is limited. It is observable that many schools have not formalized or elaborated much on their A.I.-usage policy, reflecting that their stance and policy are still constantly developing.⁹ For example, the University of Dayton (UD) explained their approach that “until there’s greater knowledge on the pros and cons of AI’s effect on student learning, UD shouldn’t rush into policy making just yet.”¹⁰ Others, such as Rutgers University, have issued “suggestions” for faculty to choose from, meaning that there is yet a uniform binding policy.¹¹

In light of this, this article highlights the relevance of students' right to free inquiry. This is an essential consideration to be taken into account when balancing the pros and cons of such use.

⁵ Lea Mok, *Top Hong Kong University Drops Ban on ChatGPT in Coursework by Students*, HONG KONG FREE PRESS (Aug. 4, 2023), <https://hongkongfp.com/2023/08/04/top-hong-kong-university-drops-ban-on-chatgpt-in-coursework-by-students/>.

⁶ See, e.g., Verma, *supra* note 2; Jordan Hart & Aaron Mok, *College Professors are Going Back to Paper Exams and Handwritten Essays to Fight Students Using ChatGPT*, INSIDER (Aug. 13, 2023), <https://www.businessinsider.com/chatgpt-driving-return-to-paper-exams-written-essays-at-universities-2023-8>.

⁷ Eari Nakano, *Universities Still Grapple with ChatGPT Use Ahead of New Year*, GOVERNING (Aug. 17, 2023), <https://www.governing.com/policy/universities-still-grapple-with-chatgpt-use-ahead-of-new-year>.

⁸ *Id.*

⁹ Even for those institutions which have published a guideline, it is often brief and defers to individual professors. This means there is not yet a very comprehensive and structured set of instructions, which could have taken the form of a detailed guideline giving clear-cut directions, examples of best practices on when not to use, etc. See, e.g., *Student Guide to ChatGPT*, SUFFOLK UNIV. L. SCH., <https://lawguides.suffolk.edu/chatgptstu> (which simply refers students to the general academic integrity requirement of presenting original work, and if they are “not sure, it would be best to check with your professor before going forward.”).

¹⁰ Lucy Waskiewicz, *Is AI a Threat to College Writing? UD faculty Aren't Convinced*, FLYER NEWS (Feb. 1, 2023), <https://flyernews.com/campus/is-ai-a-threat-to-college-writing-ud-faculty-arent-convinced/02/01/2023/>.

¹¹ Rutgers University's Office of Teaching Evaluation and Assessment Research, *Artificial Intelligence (AI) in Higher Education*, <https://otear.rutgers.edu/teaching/ai> (also emphasizing that their policy continues to develop as the University is “following these discussions carefully and staying up-to-the-minute.”).

What is academic freedom in this regard?

Academic freedom is a notion that has multiple facets applicable to different academic stakeholders, and it generally refers to the freedom to teach and the freedom to learn.¹² It applies to students, teachers, and the education institutions. Although it is not explicitly provided in the Constitution or federal law, it has nevertheless been widely recognized by the U.S. courts, as was noted by the New York District Court in *Albaum v. Carey*:

The Supreme Court has been a particularly jealous guardian of First Amendment rights when academic freedom is threatened. As Mr. Justice Harlan put it: When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion * * * into this constitutionally protected domain.¹³

The court will declare unconstitutionality in violation of the First Amendment if a public policy “tends to hinder the quest for knowledge, [and/or] restrict the freedom to learn.”¹⁴ In *Sweezy v. New Hampshire*, the Supreme Court affirmed its significance:

Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.¹⁵

To students, academic freedom denotes their right to learn. This right is sometimes referred as “free inquiry.” It applies not just in the tertiary education context, but also to students in K-12 schools. The New York District Court in *Albaum v. Carey* explained that the protection of students’ free inquiry in K-12 education is necessary to benefit “students who do not go on to college,” as “even those who go on to higher education will have acquired most of their working and thinking habits in grade and high school.”¹⁶

Students’ right to free inquiry has also been reinforced by Executive Order 13864 of 2019. The Order recognizes that:

¹² See, e.g., Todd A. DeMitchell & Vincent J. Connelly, *Academic Freedom and the Public School Teacher: An Exploratory Study of Perceptions, Policy, and the Law*, 1(4) *BYU EDUC. & L.J.* 83, 88-89 (2007).

¹³ *Albaum v. Carey*, 283 F. Supp. 3, 10 (E.D.N.Y. 1968) (quoting *Barenblatt v. United States*, 360 U.S. 109, 112, 79 S. Ct. 1081, 1085, 3 L. Ed. 2d 1115 (1959)); see also *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978) (“Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”).

¹⁴ *Epperson v. Arkansas*, 393 U.S. 97, 100 (1968). The courts have in the past applied the unconstitutionality analysis to public schools and universities’ policies. See, e.g., *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (ruling against Michigan Law School’s diversity policy for admissions).

¹⁵ *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

¹⁶ *Albaum*, 283 F. Supp. at 10.

Free inquiry is an essential feature of our Nation’s democracy, and it promotes learning, scientific discovery, and economic prosperity. We must encourage institutions to appropriately account for this bedrock principle in their administration of student life and to avoid creating environments that stifle competing perspectives, thereby potentially impeding beneficial research and undermining learning.¹⁷

Given the socio-legal importance of free inquiry, the legal right to learn should not be restricted hastily or unnecessarily, unless there are compelling justifications.

Why does using A.I. tools matter to students’ free inquiry?

In this modern digital age, using generative A.I. tools to boost productivity and to save time and cost is an indispensable skill in the workplace. A major goal of education is to prepare students for a better future, including enhancing their competitiveness.

Using generative A.I. tools requires experience and skills, such as asking the most befitting prompt question, fact-checking, and embellishing the A.I.-prepared prose. *Utilizing* it requires even more—in terms of judgmental skills like how and when to use it (creatively, legally, safely, etc.), and how to supplement human input.

If students are prevented from using it for their main responsibilities and tasks, they are effectively precluded from being trained on how to use it. It is important to bear in mind that the freedom to learn requires the provision of both “opportunities and conditions” to students.¹⁸ Justice Frankfurter in the Supreme Court case of *Sweezy v. New Hampshire* recognized that schools are supposed to be the place for “speculation, experiment and creation,” and universities have to provide such an “atmosphere.”¹⁹

One cannot compellingly counter-argue that students can test the A.I. tools outside school, i.e., in their private capacity. First, using a tool for completing actual work and duties is different in nature. The latter setting requires *formal* accountability to a third party – i.e., to the school, teacher, and the students themselves. Besides, not all students can afford private unlimited access to the generative A.I. tools.²⁰

¹⁷ Exec. Order No. 13864 of Mar. 26, 2019, s. 1.

¹⁸ This is a principle endorsed by many universities. *See, e.g., General Principles*, PRINCETON UNIV., <https://oac.princeton.edu/compliance/principles>; *Faculty Legislation II-700: Student Freedom*, UNIV. WISCONSIN-MADISON, <https://policy.wisc.edu/library/UW-875>; *Joint Statement on the Rights and Freedoms of Students*, WESLEYAN UNIV., https://www.wesleyan.edu/acaf/faculty/faculty-handbook/3_standards-of-conduct/student-freedoms-rights.html.

¹⁹ *Sweezy*, 354 U.S. at 263.

²⁰ Shivali Chikkaswamy, *The Evolving Business of A.I. in Education*, BUS. REV. BERKELEY (Aug. 22, 2023), <https://businessreview.berkeley.edu/the-evolving-business-of-a-i-in-education-2/> (“Educational developers are looking to monetize their collaborations with OpenAI, leaving many students unable to afford the technology offered.”).

The proffered justifications for the imposed limitation are weak

A study by Freeman-Wong, Munguia & Mohr (2023) has conveniently listed the major justifications as to why educational institutions limit students' use of generative A.I. tools.²¹ There are two prevalent reasons, namely (1) relying on the A.I.-generated answer is a form of cheating/plagiarism, and (2) students are prevented from learning properly when the A.I. tools spoon-feed an immediate answer.

(There are also other justifications, such as the avoidance of training A.I. tools,²² which are seemingly unrelated to students' quality learning. They beg the question of whether students' right to learn should be sacrificed for such causes. But this article will focus on two most prevalent, education-related causes, namely preventing plagiarism and reduced learning.)

Given the importance of academic freedom to our society, it should only be limited when the justifications are "exigent and obviously compelling."²³ Yet, the two major justifications have already been doubted. Some have compared the use of A.I. tools to the normalized reliance of calculators and computers, which neither constitute cheating nor hinder proper learning.²⁴

The inability to use essential tools efficiently and smartly – be it PowerPoint templates or now A.I.-generated draft – is a clear sign of not learning skills properly. I have argued elsewhere that, if A.I. tools can already perform a certain task satisfactorily, then schools should re-consider whether students should still be forced to master that matter.²⁵ Learning the fundamentals are important, but learning to create/supplement human input (that is irreplaceable by A.I.) is *far more* important. Learning *useful* skills is what students' right to learn entails. The Supreme Court in *Meyer v. Nebraska* stated very clearly that the Fourteenth Amendment on liberty protects "the right ... to *acquire useful knowledge*" – an entrenched understanding that was reiterated by the same Court in *Epperson v. Arkansas*.²⁶

²¹ Jessica Freeman-Wong, Daisy Munguia & Jakki J. Mohr, *Building a Strategy to Harness ChatGPT in Education*, CALI. MGT. REV. (Aug. 20, 2023), <https://cmr.berkeley.edu/2023/08/building-a-strategy-to-harness-chatgpt-in-education/>.

²² See, e.g., Elias J. Schisgall, *Harvard Releases Guidance for AI Use in Classrooms*, HARVARD CRIMSON (Sep. 1, 2023), <https://www.thecrimson.com/article/2023/9/1/fas-ai-guidance/> ("[e]nsuring the data entered will not be used to train any public AI tools"). By "data," Harvard University refers to confidential information, "including non-public research data, finance, HR, student records, medical information, etc.," because "[i]nformation shared with Generative AI tools using default settings is not private and could expose proprietary or sensitive information to unauthorized parties." See *Initial guidelines for the use of Generative AI tools at Harvard*, HARVARD UNIV., <https://huit.harvard.edu/ai/guidelines>.

²³ *Sweezy*, 354 U.S. at 262.

²⁴ See Nakano, *supra* note 7.

²⁵ Martin Kwan, *How to Co-Exist with Tech is ChatGPT's Lesson*, EDUCATIONWEEK (Jan. 31, 2023), <https://www.edweek.org/technology/opinion-how-to-co-exist-with-tech-is-chatgpts-lesson/2023/01>.

²⁶ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (emphasis added); *Epperson v. Arkansas*, 393 U.S. 97, 105 (1968).

Plagiarism can refer to posing as the actual creator/author of the A.I.-generated idea.²⁷ Handing in A.I.-prepared work could be seen as committing such wrong. But this is something resolvable, and the corresponding measures should be proportionate when a fundamental right (involving the right to learn, free speech, free thought, etc.) is restricted. It arguably justifies the requirement for students to disclose usage – but not enough to justify banning its use.

A.I.-generated materials are, as has been held, not copyrighted,²⁸ meaning that there is legally no need to attribute to the source.²⁹ The A.I.-generated materials can be seen as public domain materials meant to be freely exploited, just like using open-source photos. In this sense, it does not constitute stealing an actual person’s idea when “the work is generated by *something* rather than *someone*.”³⁰ When the materials are generated by the use of A.I. tools (especially when some usage has to be paid for)³¹, it is questionable if it is just as morally blameworthy to take credit of the fruit, not to mention commanding with the right/best prompt requires effort. Imagine a student has an innovative idea of combining multiple objects into one artwork, a restriction or ban on the use of A.I. tools to create the art – in effect – curbs creativity and free inquiry.

The risk of over-reliance without independent input or critical thinking, or the current inability to detect undisclosed reliance, are not adequate justifications for completely banning its use. When a tool is subject to the risk of misuse, just like any weapons, the proper way is to train and guide proper usage. Schools are the very place for students to learn accountability and integrity as adults-to-be or as young adults. To achieve this, students should be able to freely use, learn and explore the A.I. tools in order to fully appreciate its implications. The Court of Appeals for the Ninth Circuit in *C.F. v. Capistrano Unified School District* emphasized that “[t]o prepare students for adult roles in a democratic society, teachers and the schools *must try to maintain an atmosphere of free inquiry*.”³²

²⁷ See, e.g., Office of the Vice President and General Counsel, *Plagiarism vs. Public Domain*, VILLANOVA UNIV.,

<https://www1.villanova.edu/villanova/generalcounsel/copyright/edumaterial/plagiarism.html>.

²⁸ Blake Brittain, *AI-Generated Art Cannot Receive Copyrights, US Court Says*, REUTERS (Aug. 21, 2023), [https://www.reuters.com/legal/ai-generated-art-cannot-receive-copyrights-us-court-says-2023-08-](https://www.reuters.com/legal/ai-generated-art-cannot-receive-copyrights-us-court-says-2023-08-21/#:~:text=Aug%2021%20(Reuters)%20%2D%20A,Washington%2C%20D.C.%2C%20has%20ruled.)

[21/#:~:text=Aug%2021%20\(Reuters\)%20%2D%20A,Washington%2C%20D.C.%2C%20has%20ruled.](https://www.reuters.com/legal/ai-generated-art-cannot-receive-copyrights-us-court-says-2023-08-21/#:~:text=Aug%2021%20(Reuters)%20%2D%20A,Washington%2C%20D.C.%2C%20has%20ruled.)

²⁹ Rich Stim, *Public Domain Trouble Spots*, STANFORD LIBRARIES: COPYRIGHT & FAIR USE, <https://fairuse.stanford.edu/overview/public-domain/trouble-spots/>.

³⁰ Sofia Barnett, *ChatGPT is Making Universities Rethink Plagiarism*, WIRED (Jan. 30, 2023), <https://www.wired.com/story/chatgpt-college-university-plagiarism/>.

³¹ Brody Ford, *Adobe Will Charge Less Than OpenAI for Image Generation Tool*, BLOOMBERG (Sep. 13, 2023), <https://www.bloomberg.com/news/articles/2023-09-13/adobe-firefly-will-cost-less-than-openai-s-dall-e-for-ai-to-generate-images#xj4y7vzkg>.

³² *C.F. v. Capistrano Unified School District*, 654 F.3d 975, 988 (9th Cir. 2011) (emphasis added).

Final thoughts

This article is not suggesting that the right to learn dictates a particular outcome, such as a completely unrestricted use of A.I. tools. Rather, it is pivotal to duly/procedurally consider students' right to learn and free inquiry when implementing a policy on the use of generative A.I. tools. However, there are some indications that this has not been satisfactorily done.

Preventing (1) plagiarism and (2) reduced learning are supposedly meant to improve learning quality. But the plagiarism standard is arguably outdated and *incompatible* with generative A.I.: The plagiarism rule emphasizes original work, but the very nature/beauty of generative A.I. is to create materials for humans. The plagiarism rule should be re-interpreted in modern lens, particularly when relying on tool-generated material is very different from using an actual real person's ideas without attribution.

Learning is about solving problems in work and in life. If a tool can most efficiently resolve a problem or deliver a desirable outcome, future-proof education not only has to teach students the use of that tool. But even more importantly, education should also instill the streetwise mindset of looking for the most effective and accessible solution.

The burden of justification should be reversed: Instead of requiring justifications for relaxing the use of generative A.I. tools, there should be justification as to why students are still expected to learn the basics easily replaceable by tech. After all, the Supreme Court has rightly stated that "teachers...from the primary grades to the university...must be exemplars of open-mindedness and free inquiry."³³

In other words, before limiting students' usage of AI tools, there are multiple (non-exhaustive), indispensable considerations *from students' angle* that are warranted by their right to free inquiry/academic freedom:

- a. whether an "open-minded" teacher should limit students' usage;³⁴
- b. whether students are "given an opportunity to participate openly if [they are] to become the kind of self-controlled, individually-motivated and independent-thinking person who can function effectively as a contributing citizen in a society of ordered liberty."³⁵ This corresponds to the above argument that students should learn to use a powerful tool with a sense of responsibility and embrace disruptive technologies;
- c. whether students are precluded from acquiring genuinely "useful knowledge" amidst the current Fourth Industrial Revolution;³⁶ etc.

³³ *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952).

³⁴ *Id.*

³⁵ *Cary v. Bd. of Ed. of Adams-Arapahoe, Etc.*, 427 F. Supp. 945, 953 (D. Colo. 1977).

³⁶ *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

The overwhelming capacity of generative A.I. tools have led to “fear” and “anxiety.”³⁷ There are already concerns about making certain professions and academic degrees obsolete.³⁸ Under such highly uncertain circumstances—even Deutsche Bank describes the age of AI as a “turning point for humanity - for better and for worse”³⁹—it is even more important to provide an educational environment fostering the freest-possible inquiry, in order to prepare students for the fast-changing future. After all, teachers are role models or “exemplars” to students.⁴⁰

³⁷ See, e.g., Lauren Leffer, ‘AI Anxiety’ is on the Rise—Here’s How to Manage It, SCIENTIFIC AMERICAN (Oct. 2, 2023), <https://www.scientificamerican.com/article/ai-anxiety-is-on-the-rise-heres-how-to-manage-it/>; Josie Cox, *AI Anxiety: The Workers Who Fear Losing Their Jobs to Artificial Intelligence*, BBC (July 13, 2023), <https://www.bbc.com/worklife/article/20230418-ai-anxiety-artificial-intelligence-replace-jobs>; Reid Blackman, *Generative AI-nxiety*, HARVARD BUS. REV. (Aug. 14, 2023), <https://hbr.org/2023/08/generative-ai-nxiety>.

³⁸ Brooke Kato, *How AI Threatens to Make Traditional College Degree ‘Obsolete’: Experts*, N.Y. POST (Oct. 5, 2023), <https://nypost.com/2023/10/05/how-ai-threatens-to-make-traditional-college-degree-obsolete/>; Tom Carter, *Workers are Worried About AI Taking Their Jobs. Artists Say it’s Already Happening.*, BUS. INSIDER (Oct. 1, 2023), <https://www.businessinsider.com/ai-taking-jobs-fears-artists-say-already-happening-2023-10>.

³⁹ Deutsche Bank, *Generative AI Represents a Turning Point for Humanity - For Better and For Worse*, DEUTSCHE BANK RSCH. (May 22, 2023), <https://www.dbresearch.com/>.

⁴⁰ See *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952); see also Office of the Executive Vice President and Provost, *Frequently Asked Questions About Gen-AI: How Can I Discourage My Students from Using Gen-AI Inappropriately?*, UNIV. VA., <https://provost.virginia.edu/subsite/genai/faqs> (Faculty should “[a]cknowledge that these tools can be used to aid learning, and encourage your students to use them in appropriate ways. This will convey that any restrictions you place on the use of these tools are a thoughtful response to the emergence of this technology rather than simple technophobia.”).