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The Specific Theory of Academic Freedom and the General Issue of Civil Liberty

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ABSTRACT: Academic freedom has been blurred in law and in popular usage. Its clarification should enable the Supreme Court to grant it explicit protection under the Constitution as an identifiable subset of First Amendment freedoms. Its identification with the professional endeavors of faculty members, moreover, should reduce the tendency of institutions to intrude upon the aprofessional personal liberties of the faculty even while adequately protecting the extramural professional pursuits of the faculty and assuring them of equal protection in their interests as private citizens. Adjustments of standards by the American Association of University Professors, more definitely distinguishing the special accountability of faculty members for the integrity of their professional endeavors from their roles as private citizens, is long overdue.

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† Because portions of this essay bear directly on certain standards of the American Association of University Professors (AAUP), it is of more than customary importance to stress that my statement of views is wholly personal.

A HALF-CENTURY ago, the Constitution was misconstrued to provide no positive law support for John Stuart Mill's *Essay on Liberty*. Insofar as the free exercise of political liberty was tied to a job, neither professors nor policemen could safely pursue their civil liberties without anxiety that they would be fired. The utter insecurity of liberty and status, even against abridgments by government itself, was underscored by the laconic dictum of Oliver Wendell Holmes, Jr., in 1892:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. . . . There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.[1]

The point was not lost on the academic profession in the dismal outcome of the Scopes Monkey trial, in 1927:

> [Scopes] had no right or privilege to serve the state except upon such terms as the state prescribed. . . . In dealing with its own employees engaged upon its own work, the state is not hampered by the limitations of . . . the Fourteenth Amendment to the Constitution of the United States.[2]

AN OVERVIEW

It was exactly during this same period that American professors, familiar with the tradition and values of *Lehrfreiheit* in German universities, began to domesticate it and to propound the concept of "academic freedom" as a principle worthy of general respect to fill up the void of the positive law in this country. Given the circumstances —given the surprising success of the infant American Association of University Professors (AAUP), founded in 1915 and at once startled by the extent to which its good offices were sought by aggrieved faculty members—it is not remarkable that an ineluctable tendency developed to expand upon academic freedom to make it perform a larger service. From the solid and fortified arguments sustaining academic freedom as a logical imperative if academicians were to fulfill the cardinal expectation laid upon their professional employment, the principle was pressed into the larger field of civil liberties whether or not such liberties were professionally linked. In the absence of other sources of employment security protecting professors from dismissal in pursuing conventional political activities off-the-job and on their own time, or entering into ordinary public assemblies and taking personal positions on social issues simply as private citizens and not as professional scholars or researchers, academic freedom offered itself as an irresistibly attractive umbrella. Gradually, the phrase slipped away from a close association with protection of the academic in his professional endeavors and assumed a new synonymy with the general civil liberties of academics—and especially their general political liberties. Accordingly, the protection of an academic in respect to the exercise of his aprofessional political liberties was argued into position as a subset of academic freedom. The effort so far succeeded that it has long been routine for AAUP Committee A Reports to describe the dismissal of professors on account of aprofessional political activity as a violation of their "academic freedom." Professor Fritz Machlup accurately reports the situation in the new *Encyclopaedia of Higher Education:* "Academic freedom (in its modern conception, though not in the past) in-

1. *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 518 (1892).

2. *Scopes* v. *State*, 154 Tenn. 105, 111–12, 289 S.W. 363, 364–65 (1927).

cludes the right of the academic individual to engage in political activity." [3]

Damaging to the profession

It is the seemingly small and reactionary purpose of this essay to suggest that this development in the usage of academic freedom was never sound and that it ought now to be abandoned. Far from continuing to be helpful to the profession, moreover, I believe the continued use of the phrase in this expanded sense is damaging to the profession in three important ways.

First, the ubiquitousness of indiscriminate claims to academic freedom, in respect to aprofessional political activity, provides substance to a widespread belief that the professoriat sees itself as an extraordinary elite, since we tend to associate our claim to protection not with the general case for civil liberties, but rather as a special case or subset of academic freedom. As implied in the following observation by Glenn Morrow in his effort to rationalize the defense of academic freedom, the sprawling claim seems, without reason, to be indifferent to the indistinguishable predicament of other citizens:

> The justification of academic freedom cannot be based merely on the right to freedom of thought and expression enjoyed by all citizens of a liberal society, for academic freedom implies immunity to some natural consequences of free speech that the ordinary citizen does not enjoy. An ordinary citizen who expresses unpopular opinions may lose customers if he is a merchant, clients if he is a lawyer, patients if he is a physician, advertisers or subscribers if he is the editor of a newspaper, or suffer other forms of social or economic penalty resulting from disapproval of his expressed opinion. . . . The justification of academic freedom must therefore be sought in the peculiar character and function of the university scholar.[4]

The obvious point is that others who work for a living may also wish to affiliate with unpopular causes or to speak freely about political issues of the day without reference to their regular work or professional endeavors, sometimes, as in our own case, even in sharp opposition to the known wishes of the institutional employer. Manifestly, it must—and does—strike them as odd that professors nevertheless insist on having an extra right to be protected in these aprofessional pursuits and to do such things—a claim which is sublimely stronger than their own. Professors insist that such activities are part of their academic freedom and a special contribution to the social good; whereas such activities by others are merely an ordinary matter of common liberty to be tolerated in a liberal society but not, of course, of the same rank of special social good as the protection of academic freedom.

The consequent tendency of class cleavage and cost in good will that I wish to emphasize, however, is not simply the apparent and suspect elitism of our claim; for if the claim were well taken, it would be a sufficient answer that we must simply try harder to persuade a larger public that it is indeed a correct one. Rather, the price we pay is the much greater cost of the lad who cried "wolf" so often when it was false that few would pay attention when it was true: an errant claim of academic freedom obscures the vital importance of academic freedom as more modestly conceived and thereby engenders public indifference even when an authentic issue of academic freedom is clearly and unmistakably involved. I mean to

3. Fritz Machlup, "Academic Freedom," *Encyclopaedia of Higher Education* (1972), vol. 1, pp. 6, 8.

4. Glenn Morrow, "Academic Freedom," *Encyclopaedia of Social Sciences* (1968), vol. 1, pp. 4, 6.

argue, of course, that while a professor's ordinary freedom of speech is not a subset of his academic freedom, academic freedom is itself a special subset of First Amendment freedoms. Its importance as a special subset is likely to be obscured and ignored, however, if we ourselves do not hold to the distinction.

Postponed constitutional status

Second, although I cannot prove the correctness of the impression, I believe that the earlier and errant expansion of academic freedom claims beyond the boundaries of its core rationale has inadvertently delayed the specific assimilation of academic freedom into constitutional law. In 1958, the Supreme Court interpreted the First Amendment in a manner to provide separate and distinct protection for freedom of association, deriving the sense and substance of that freedom from three other clauses—those dealing with freedom of speech, freedom of assembly, and the right to petition for redress of grievances—but nevertheless marking it with a character of its own with certain instrumental features different from those of its parent clauses.[5] Nothing equivalent has yet developed in respect to academic freedom, however, in spite of the fact that the Court has often made highly honorable mention of the phrase in the adjudication of First Amendment claims.[6] The prolonged

5. See M. W. Solter, "Freedom of Association—A New and Fundamental Civil Right," *George Washington Law Review* 27 (1959), p. 653; T. Emerson, "Freedom of Association and Freedom of Expression," *Yale Law Journal* 74 (1964), p. 1. The initial case was *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958), which on its face required but the slightest extension of free speech and assembly precedents. By the time additional cases involving quite different interests had been decided, clearly it had become more useful and accurate to speak of a distinctive freedom of association. See, for example, *N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963); *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 529 (1963); *Brotherhood of R.R. Trainmen* v. *Virginia State Bar*, 377 U.S. 1 (1964).

6. The Supreme Court has often adverted to academic freedom in dicta. See, for example, *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967): "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"; *Griswold* v. *Connecticut*, 381 U.S. 479 (1965): "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach . . .—indeed the freedom of the entire university community"; *Barenblatt* v. *United States*, 360 U.S. 109, 112 (1959): "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 by Congress into this constitutionally protected domain"; *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250–51, 261–64 (1957): "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . 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. . . . We do not now conceive of any circumstance wherein a state interest would justify infringement of rights in this field"; *Wieman* v. *Updegraff*, 344 U.S. 183, 195–98 (1952): "By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by

gestation of academic freedom as an identifiable First Amendment claim, a special subset of vocational freedoms readily derived from, but not simply fungible with, freedom of speech doctrine or general First Amendment doctrine in respect to public employees, may ironically be the consequence of our own previous tendencies to blur the distinctions. In possession of a persuasive justification in defense of academic freedom, and finding the general protection of other civil liberties so hopelessly inadequate in respect to the security of employment and the exercise of free speech in general, we too expediently extended the rhetoric of academic freedom to press for additional degrees of protection which other kinds of employees were denied at the time. The cost of the inaccuracy, however, has been the indefinite postponement of constitutional status for academic freedom as a separate, albeit limited, First Amendment right. The chances for the specific constitutional protection

the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. . . . They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checked history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by National or State government. The functions of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of these limitations upon State and National power"; *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960): "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools"; *Whitehill* v. *Elkins*, 389 U.S. 54, 59–60 (1967): "We are in the First Amendment field. The continuing surveillance which this type of law places on teachers is hostile to academic freedom."

Additionally, a number of writers have previously urged the judiciary to acknowledge a separately identifiable First Amendment right to academic freedom. See, for example, W. Murphy, "Academic Freedom—An Emerging Constitutional Right," *Law and Contemporary Problems* 28 (1963), p. 447; T. Emerson and D. Haber, "Academic Freedom of the Faculty Member as Citizen," ibid., p. 525; David Fellman, "Academic Freedom in American Law," *Wisconsin Law Review* 1961 (1961), p. 3; W. Van Alstyne, "The Constitutional Rights of Teachers and Professors," *Duke Law Journal* (1970), p. 841. Nevertheless, it is clear that closure between the First Amendment and a distinct right of academic freedom has not yet been made. The current situation is summed up in Justice Holmes' observation about the work of a colleague: "I used to say that he had a powerful vise the jaws of which couldn't be got nearer than two inches to each other." [Quoted in E. J. Bander, ed., *Justice Holmes, Ex Cathedra* (Charlottesville, Va.: Michie, 1966), p. 235.]

The lack of closure is illustrated by *Epperson* v. *Arkansas*, 393 U.S. 397 (1968), invalidating a state criminal statute prohibiting public school teachers from adverting to any theory regarding the origin of man not consistent with the Bible. Despite the Court's many previous references to academic freedom, Mr. Justice Black saw no substantive difficulty with the statute and concurred in the result solely because he thought the statute to be impermissibly vague, that is, as a criminal statute it provided insufficient notice of the exact conduct teachers were expected to avoid. [See also his dissenting in *Tinker* v. *Des Moines School District*, 393 U.S. 503, 521–22 (1969).] While disagreeing that this was the sole fault of the statute, Mr. Justice Steward suggested only that the statute raised a substantial question in light of "guarantees of free communication contained in the First Amendment," that is, a general free speech issue without any more specialized features peculiar to academic freedom. The Opinion for the Court went no further, moreover, than to hold the statute invalid as a violation of the religious establishment clause—leaving one to wonder whether the case has any significance at all beyond the religion-related novelty of the particular kind of statute involved in the case.

of academic freedoms, as a subset of First Amendment rights, would very likely be improved if we ourselves had managed to respect the difference.

Third, there is a marvelous irony in the fact that the condition of constitutional law has not remained static since the policeman's case of 1892, or the *Scopes* case of 1927. Rather, the extent of positive law protection of public employees in general now extends fully to threats against their employment in retaliation for the exercise of freedom of speech, and not merely to threats of fines or jail. The point was again made by the Supreme Court during this most recent term, clearly reiterating that even simple nonrenewal of an untenured faculty member by a public institution would violate the First Amendment if it was premised upon personal political activity otherwise protected by that amendment:

> The first question presented is whether the respondent's lack of a contractual or tenure right to re-employment, taken alone, defeats his claim that the nonrenewal of his contract violated the First and Fourteenth Amendments. We hold that it does not.[7]

Even more, the Supreme Court has recognized that a teacher would be so greatly inhibited vis-à-vis other citizens were he constrained by a strict professional standard of care, accuracy, and courtesy in the rough-and-tumble of ordinary political discussion that the First Amendment will protect his employment from jeopardy where his departure from that standard related only to his aprofessional political utterances as a citizen, and not to his teaching, research, professional publication, or to similar institutional responsibilities of a professional character.[8] Not only has the practical reason which provided the incentive—if not a compelling logic—for the earlier view that an academic's civil liberties are a specific subset of his academic freedom been largely removed,[9] therefore, but the continued insistence upon that view may even work against the equal protection of professors as citizens. In having rested the right of the academic to pursue ordinary political activity specifically as a manifestation of his academic freedom, we have invited institutional employers to interest themselves in the "professionalism" which the academic employee reflects in that activity. The wooden insistence that academic freedom is at the heart of an academic's right to engage in political activity has repeatedly drawn the sharp riposte that, given this rationale, the political liberties of academics must be correspondingly reviewed by a higher standard—

7. *Perry* v. *Sindermann, U.S. Law Week* 40 (1972), pp. 5087, 5088. See also W. Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," *Harvard Law Review* 81 (1968), p. 1439.

8. *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), and see discussion in text at n. 16 p. 153, of this article.

9. "Largely" is used advisedly in acknowledgment of the fact that neither the Bill of Rights nor the Fourteenth Amendment is applicable to institutions uninvolved with government. For a consideration of this issue, see *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Pennsylvania* v. *Board of Trusts*, 353 U.S. 230 (1957); *Coleman* v. *Wagner College*, 429 F.2d 1121 (2d Cir. 1970); *Powe* v. *Miles*, 407 F.2d 73 (2d Cir. 1968); *Commonwealth* v. *Brown*, 392 F.2d 120 (3rd Cir. 1968), *aff'g* 270 F. Supp. 782 (E.D. Pa. 1967), *cert. denied*, 391 U.S. 921 (1968); *Grossner* v. *Trustees of Columbia University*, 287 F. Supp. 535 (S.D.N.Y. 1968); *Greene* v. *Howard University*, 271 F. Supp. 609 (D.D.C. 1967), *dismissed as moot*, 412 F.2d 1128 (D.C. Cir. 1969); *Guillory* v. *Administration of Tulane University*, 203 F. Supp. 855 (E.D. La.), *vacated*, 207 F. Supp. 554, *aff'd*, 306 F.2d 489 (5th Cir. 1962). See also R. O'Neil, "Private Universities and Public Law," *Buffalo Law Review* 19 (1970), p. 155; R. Schubert, "State Action and the Private University," *Rutgers Law Review* 24 (1970), p. 323.

that is, a professional standard—than the like activities of others It thus presumes to make professors subject to a greater degree of overall employment accountability than others generally owe in respect to their private freedom, virtually as an elitist's concession of noblesse oblige given in exchange for the special academic freedom claim: that the claim of general civil liberty by academics is more important to society than the claim of general civil liberty of others. The instances in which educational institutions have acted on this concession are legion, as many of the published Committee A reports attest. Respectfully, I do not think we can avoid some shared responsibility for this unhappy tendency, given our past practice of claiming so much for academic freedom and so little for civil liberty. We may hope to get out of this thicket more swiftly, however, by returning to the fundamentals of academic freedom and simultaneously insisting upon the uniform and robust protection of civil liberties.

The proposition that academic freedom is a special subset of First Amendment freedoms, but that it is distinguishable from other civil liberties, necessarily means that it is not uniformly available in defense of a teacher's or scholar's purely aprofessional pursuits, including even some involving his general freedom of speech. The acknowledgment that this is so, however, is not meant to imply that we lack a suitable forensic or constitutional basis to secure these other liberties from institutional or legislative abridgment, or that the AAUP should be less vigilant than it has been in reporting conditions in higher education inimical to those liberties. Indeed, I mean to argue that in certain important respects, exactly the converse is more nearly true: that the special constraints of academic freedom cannot be invoked to arrest that latitude of general free speech and personal liberty teachers are fully entitled to enjoy as citizens on equal terms with all other citizens, free from any intrusion of institutional or legislative power associated solely with their academic and job-related responsibilities. The legitimate claims of personal autonomy possessed equally by all persons, wholly without reference to academic freedom, frame a distinct and separate set of limitations upon the just power of an institution to use its leverage of control. More than the profession may generally know (and far more than an undifferentiated theory of academic freedom—with its excess baggage of general responsibility—may itself allow), moreover, the judicial recognition of these general limitations upon institutional authority has already taken hold. Part of this essay will attempt to make the case that the specific theory of academic freedom is entirely congenial to this welcome development in constitutional law and that it may contribute far more toward the equal treatment of teachers and scholars in the enjoyment of their personal liberties than the less discriminating theory which treats an academic's political freedom as a subset of his academic freedom.

THE DEFINITION, RATIONALE, AND SYSTEM OF ACADEMIC FREEDOM

The phrase "academic freedom," in the context "the academic freedom of a faculty member of an institution of higher learning," refers to a set of vocational liberties: to teach, to investigate, to do research, and to publish on any subject as a matter of professional interest, without vocational jeopardy or threat of other sanction, save only upon adequate demonstration of an inexcusable breach of professional ethics in the exercise of any of them. Specifically, that which sets academic freedom

apart as a distinct freedom is its vocational claim of special and limited accountability in respect to all academically related pursuits of the teacher-scholar: an accountability not to any institutional or societal standard of economic benefit, acceptable interest, right thinking, or socially constructive theory, but solely to a fiduciary standard of professional integrity. To condition the employment or personal freedom of the teacher-scholar upon the institutional or societal approval of his academic investigations or utterances, or to qualify either even by the immediate impact of his professional endeavors upon the economic well-being or good will of the very institution which employs him, is to abridge his academic freedom. The maintenance of academic freedom contemplates an accountability in respect to academic investigations and utterances solely in respect of their professional integrity, a matter usually determined by reference to professional ethical standards of truthful disclosure and reasonable care.

Academic freedom is a "freedom"—rather than a "right"—in the sense that it establishes an immunity from the power of others to use their authority to restrain its exercise without, however, necessarily commanding a right of institutional subsidy for every object of professional endeavor that might engage the interest of the individual professor. In cleaving to a limited program or in husbanding its scarce financial resources, for instance, the decision of an institution not to offer a particular subject or not, itself, to provide means for a particular line of research may be faulted as educationally unenlightened, but it would not, on that account, constitute an abridgment of academic freedom. At the same time, however, academic freedom would be abridged were any form of sanction threatened against a faculty member because of any of his professional pursuits, even assuming that the individual's interest pertained to a subject that the institution declines itself to support and may thoroughly disapprove. A principle of educational pluralism may excuse an act of institutional parochialism in what it is prepared to offer as an institution of higher learning, but the principle of academic freedom clearly condemns any act of institutional censure in respect to the professional endeavors of its faculty, assuming only no failing of professional integrity in the pursuit of those endeavors. Similarly, academic freedom protects the vocational discretion of faculty members to conduct whatever instruction and research they may be retained to provide consistent with standards of professional integrity.

Three cases

We may concretely illustrate the several foregoing observations by briefly stating three cases, all of which lie easily within the uniform protection of academic freedom:

Case 1. A faculty member is assigned to teach a course in biology inclusive of theories respecting the origin of man. A state law provides that a teacher may be fired and fined if he adverts to any theory of evolution or point of view respecting the origin of man inconsistent with the literal story of Genesis. The law is an infringement of the teacher's academic freedom insofar as it forecloses a professionally responsible treatment of the subject.[10]

Case 2. An English professor assigns a particular short story to give her students a better understanding of one genre of Western literature. Conceding that the professor's ability and particular treatment of the subject are above

10. Compare *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), discussed in n. 6.

reproach, the president of the college nonetheless admonishes her to discontinue the assignment because in his judgment the story is garbage, the philosophy of the story is destructive, and because several parents have complained. Following her statement that she believes she has a responsibility to teach the story consistent with a professional treatment of the subject she has been engaged to teach, she is fired. Her dismissal clearly violated her academic freedom, assuming only that her selection of the story was not otherwise a clearly inappropriate professional means of fulfilling her academic responsibilities.[11]

Case 3. A professor of anthropology, interested also in genetics, prepares a paper which he presents before an off-campus symposium in which he reviews the basis for a particular hypothesis—that significant evidence suggests the inheritability of variable intelligence linked to race. Although his utterances are extramural, they are clearly academic in character. Assuming only that he has been guilty of no failure of professional integrity in the manner in which he has presented his hypotheses, his conduct is fully protected by fundamental principles of academic freedom. Accordingly, no matter how unpopular, distasteful, socially destructive, or embarrassing his extramural presentation may seem to the university where he is employed, no action may appropriately be taken against him.[12]

The mechanism in common use in the United States for the protection of academic freedom reflects the political and institutional circumstances of the academic profession in this country. Were teachers and scholars sole practitioners, certified by licensure agencies in the manner of doctors or lawyers, we might expect that questions of professional integrity would be reserved primarily to these agencies—otherwise leaving to individual clients or educational "customers" the separate determination of whether each teacher or scholar is good enough in his profession to warrant being retained as an educational mentor or as an independent contractor to engage in research. There are no such agencies in higher education as in law and medicine, however, and one will tend to starve as a sole practitioner. Nor is today's academy at all like the original *Akademeia*—simply a place on the outskirts of Athens where Plato could be found by anyone interested in his professions. Neither are universities under the benign protection of powerful autocrats, such as a German prince or a powerful ecclesiastical organization which, while brooking no academic freedom at all for criticism of themselves or of the doctrines associated with their power, might otherwise offer protection against the hostilities of all others. Nor are entire faculties in this country endowed as Oxford or Cambridge with sufficient assets that the faculties may largely control their own situation.

Rather, it is all very familiar that the academic profession is practiced in this country in association with public and private educational enterprises: that one's capacity for the exercise of academic freedom is inextricably tied to his university employment, that the ultimate financial resources of the institution are largely beyond the control of the faculty, that ultimate managerial responsibility is not lodged within the faculty, and that issues of professional

11. Compare *Parducci* v. *Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970), possibly the first decision clearly identifying academic freedom as a separate and distinct First Amendment freedom.

12. The similarity of this hypothetical to news accounts of Professor Arthur Jensen's work is, of course, not accidental.

integrity are resolved not by licensure or professional associations in the main, but within each institution—at least in the first instance. Insofar as public institutions are concerned, the power of the demos to force hemlock upon a modern Socrates is constrained by the Constitution—indeed, the power of the people even to secure an end to his academic freedom by having him fired is thus constrained. In the development of a more general mechanism within each institution for protecting academic freedom, however, no satisfactory reason has been given to distinguish between the two kinds of academic institutions—public and private. The fact that the Constitution makes such a distinction for purposes of positive law is largely beside the point.

In the absence of state, regional, or national professional licensure agencies composed of professional teachers and scholars, the mechanism of professional accountability common in the United States has gradually developed through the utilization of standing faculty committees within each institution in which the professional teacher or scholar is employed. Consistent with what we have already said about academic freedom, however, the charge of each such committee is strictly limited: it is to ignore the particular impact of any teacher's exercise of his academic freedom upon the institution and to concern itself solely with the question of whether the teacher or scholar has been guilty of such an inexcusable breach of professional ethics as to warrant his termination, the penalty of dismissal being appropriate only as a necessary means of vindicating the very functions which the system of academic freedom is itself meant to serve.

For several reasons, largely related to the practical necessity of using local review committees, the judgment of these standing committees is not final. Against the chance that the committee members—themselves nearly always drawn from within the institution—may show undue favor from too close an identification with a colleague, an authority of limited review is recognized in the hierarchy of administration. Against the chance that the committee members may show bias against him—as from fear for their own status, from a commitment to a given professional dogma, or from professional envy or sheer personal dislike—a more generous appeal may lie through the hiearchy of administration and thereafter to other bodies—like the AAUP—and, on occasion at least, to the courts. Indeed, the academic maverick may sometimes need more protection against the entrenched dogmas of his immediate peers than against anyone else, thus necessitating some right of appeal from a local judgment to the judgment of others who have less of a vested interest than they in the maintenance of a given "truth."

This system does not always operate to accomplish the end for which it is designed, of course, as when a coincidence of prejudices—albeit often of different kinds—may operate against the faculty member at every level; but superior alternatives are not readily apparent. After all, no freedom, including even academic freedom, can claim exemption from some degree of accountability. Under current conditions of educational organization in the United States, we have yet to discover a safer choice than to entrust that accountability in respect to the responsibilities of academicians in the first instance to professional peer groups within each institution, acting under the specific constraint of confining their review solely to an examination of the professional integrity of the manner in which the individual discharged his professional responsibilities.

Under more and less constraint

This system, developed specifically for the maintenance of academic freedom, obviously differs from that which generally prevails in ordinary employment relations. Significantly, however, in respect to his academic freedom, the teacher or scholar is simultaneously under more constraint as well as under less constraint than would ordinarily obtain. Clearly he is under less constraint, of course, to the extent that the standard is more protective of him than if it were the standard common to employment relationships in general; that is, Did he perform his assignment as directed by management, did he avoid any indiscretions clearly forbidden by management, and has he otherwise conducted himself in a manner not injurious to the economic well-being of the enterprise? We have already noted that none of these considerations is permissible where the committee concludes that the professions or conduct for which the faculty member has been called to account were otherwise within the prerogative of his academic freedom. What is less obvious, however, is the one respect in which the exercise of academic freedom is also under considerably greater constraint than if the conduct in which it is implicated were governed only by ordinary standards of accountability to one's employer: as professional peers are admonished to be less concerned than the administration or trustees to consider any institutional repercussions resulting from what a given faculty member may have done professionally wholly consistent with the ethical use of his academic freedom, they are admonished to be far more concerned than others in making certain of that ethical use. The price of an exceptional vocational freedom to speak the truth as one sees it, without penalty even for its possible immediate impact upon the economic well-being of the employing institution, is the cost of exceptional care in the representation of that "truth," a professional standard of care. Indeed, a grave ethical failure in the integrity of a teacher's or scholar's academic representations, no matter of how little notice or coincidental concern it may happen to be to the particular institutional employer, is precisely the kind of offense to the contingent privilege of academic freedom which states a clearly adequate cause for a faculty recommendation of termination. The very reason for specially protecting the profession is itself frustrated, for instance, if experimental undertakings are knowingly falsified, or positions of professional responsibility are sought to be gained through false representations of originality—that is, plagiarism; it is of no consequence that neither offense may violate any general law, or that it may turn out to be a matter of indifference to a particular board of trustees. In either case, the trust of academic freedom has been violated and strict accountability is in order.

In this way, then, academic freedom speaks directly and distinctly to the special critical role of the professional teacher and scholar. He is encouraged in the development of all of his academically related activities to ply a bold and innovative critical acumen. On the other hand, he is accountable to those who share a like duty and a similar commitment as his own, to answer at a professional level for the ethical integrity of his work so to establish by the fact of that integrity that he fully justifies the contingent privilege of academic freedom which he has claimed.

The distinction of academic freedom from the general protection of free speech is precisely located in its immediate and indissoluble nexus with the cardinal social expectation laid

upon the particular profession with which it is identified—that there shall be a vocation to examine received learning and values critically, a vocation expected to do so and to make itself useful by the fact of disseminating its work. In this sense, it is the element of academic freedom which specifically identifies the profession: It is simply contradictory to lay that expectation upon the profession and then to prevent its accomplishment by deterring its fulfillment through rules which punish its exercise. As Arthur Lovejoy, who helped to found the AAUP, correctly observed:

> It [that is, the social function of academic freedom] is rendered impossible if the work of the investigator is shackled by the requirement that his conclusions shall never seriously deviate either from generally accepted beliefs or from those accepted by the persons, private or official, through whom society provides the means for the maintenance of universities.[13]

ACADEMIC FREEDOM AS A SUBSET OF FIRST AMENDMENT RIGHTS: A COMPARISON WITH THE GENERAL ISSUE OF CIVIL LIBERTY

As an identifiable subset of First Amendment freedoms, academic freedom requires a significant modification in the standards of judicial review otherwise applicable to freedom of speech. Specifically, for instance, it clearly ought not be enough in a given case to uphold the discharge of a faculty member that the state may have generally criminalized any use of pornography, or that the university may have similarly presumed to forbid that use, even assuming that the material is not redeemed by standards the Supreme Court has otherwise developed in determining whether sex-related material is protected by the First Amendment.[14] If it were true that even the hardest-core obscenity were being received, read, and shared with immediate professionally involved colleagues in what could be shown to be a professionally responsible study of the subject, the fact of the academic context is not irrelevant to a determination of the case and may, indeed, be controlling. Professionally related efforts directed in good faith precisely to fulfill the social directive of the academic profession, that is, to examine received learning and values critically and to report the results without fear of reprisal, will make the case appropriate for the constitutional protection of academic freedom when the absence of these elements might otherwise spell its failure.

There is, of course, nothing in this formulation that assumes that the First Amendment subset of academic freedoms is a total absolute, any more than freedom of speech is itself an exclusive value prized literally above all else. Thus, the false shouting of fire in a crowded theater may not immunize a professor of psychology from having to answer for the consequences of the ensuing panic, even assuming that he did it in order to observe crowd reaction first-hand and solely to advance the general enlightenment we may otherwise possess of how people act under great and sudden stress. It is to observe, however, that the context of academic setting provides an additional constitutional consideration—the specific consideration of academic freedom—which may well be determinative

13. Lovejoy, "Academic Freedom," *Encyclopaedia of the Social Sciences* (1930), vol. 1, p. 384.

14. See *Roth* v. *United States*, 354 U.S. 476 (1957); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Massachusetts*, 383 U.S. 413 (1966); *Stanley* v. *Georgia*, 394 U.S. 557 (1969); *United States* v. *Reidel*, 402 U.S. 351 (1971); *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971).

under circumstances where a free speech claim would otherwise fail. Where other societal values are not so clearly conflicted by the particular manner in which academic freedom is exercised that the manner of that exercise can reasonably be described as professionally reprehensible—as would assuredly be true in the risking of human life in the "controlled experiment" to determine how crowds react to panic—the law or institutional rule which operates to abridge the exercise of that academic freedom should be held invalid as applied to the particular case. In this sense, then, it is proper to speak specifically of academic freedoms as a subset of First Amendment rights and not to regard them as simply fungible with freedom of speech in general.

Simultaneously, we are bound to acknowledge that when no claim of professional academic endeavor is present, neither can one lever himself into a preferred First Amendment position by invoking a claim of academic freedom. Granted that the proper characterization must sometimes be difficult and even elusive, we must admit that not all that a faculty member does in respect to his freedom of speech is a manifestation of professional endeavor. Indeed, a great deal of it is neither professional nor unprofessional—that is, done under professional auspices, but in a clearly unprofessional manner. Rather, it is simply aprofessional, and the distinction is not a trivial one: what is lost in respect to the special protection of academic freedom may be more than offset in a particular case by a different kind of gain—a gain in being freed from the special accountability of academic freedom.

We have hesitated to acknowledge the distinction between professional and aprofessional activity, even when the difference was abundantly clear, partly from an understandable anxiety that had we done so, that is, had we dispensed with the academic freedom claim, we might then have been without a place to stand in defending the faculty member or in reproving the institution that sought to dismiss him. In this, I think we have been mistaken and that the proper place to stand is the same place occupied by so many others—on the general issue of civil liberties and the just limitations on the relational authority of institutions. It was just this principle, for instance, that President Lowell reflected in risking the loss to Harvard of a ten-million-dollar bequest, which was threatened to be annulled unless an openly pro-German professor was deprived of his chair. What is so instructive of the episode is that Lowell did not state his position in terms of claiming that what the professor had done was an exercise of academic freedom. Indeed, had Lowell done so, presumably he would then have felt called upon to say a great deal more, to justify the faculty member's utterances as sufficiently restrained, rigorous, and consistent with professional integrity, as not to call into question his ability to continue at Harvard. Eschewing this approach, Lowell declared instead:

> If a university or college censors what its professors may say, if it restrains them from uttering something it does not approve, it hereby assumes responsibility for that which it permits them to say. This is logical and inevitable. If the university is right in restraining its professors, it has a duty to do so, and it is responsible for whatever it permits. There is no middle ground. Either the university assumes full responsibility for permitting its professors to express certain opinions in public, or it assumes no responsibility whatever, and leaves them to be dealt with like other citizens by the public authorities according to the laws of the land.[15]

15. Recounted and discussed in R. Hofstadter and W. Metzger, *The Development of*

It is perfectly clear that Lowell was himself making an implicit distinction between alleged abuses of academic freedom—for which Harvard would doubtless admit its responsibility of review of its own faculty—and alleged abuses of free speech and the general issue of civil liberty. The distinction is eminently correct and must not be placed in jeopardy by what may now be seen as the pyrrhic success of having extended the claim of academic freedom in a manner that invites more, rather than less, institutional monitoring of general civil liberties.

It is an altogether congenial development in our constitutional law that the Supreme Court has come to essentially the same conclusion in respect to the general civil liberties of those who teach: that at least where there is no affectation of professional endeavor in the aprofessional expressions of a faculty member—and no false trading upon his institutional affiliation—there is correspondingly no sufficient justification for the institution to presume to review the conduct of the faculty member by the more taxing fiduciary standard of professional care. Thus, should one be moved even casually to write a letter to the editor expressing his sentiment on some political issue of the day, it is entirely unjust for the institution that employs him to call his professional integrity into question according to that standard of carefulness and rigor that may appropriately qualify his professional undertakings and the contingent special protection of academic freedom. Indeed, to do so is in fact to disadvantage him in his prerogatives as a citizen, as the Supreme Court noted in *Pickering* v. *Board of Education:*

> What we do have before us is a case in which a teacher had made erroneous statements [in a public newspaper] upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operations of the schools generally. *In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.*[16]

This "First Amendment" view of the matter seems to me to be entirely sound and desirably free from the false freight of special accountability which attached itself whenever we tried instead to justify the aprofessional expressions of faculty members as an act of academic freedom, rather than as an unexceptional claim to the equal protection of freedom of speech. As a valid principle which is clearly to be commended as a reasonable standard of self-restraint for all institutions of higher learning, moreover, there is no basis for us to hold it less applicable to private institutions than to public ones.

THE RECONSTRUCTION OF THE 1940 STATEMENT OF PRINCIPLES

If there is any inhibition which currently restrains the AAUP from maintaining that the aprofessional activities of faculty members are not subject to institutional review by the same fiduciary responsibility for which they may

Academic Freedom in the United States (New York: Columbia U.P., 1955).

16. *Pickering* v. *Board of Education*, 391 U.S. 563, 572–73 (1968). For more extended analyses of *Pickering*, see O'Neil, "Public Employment, Antiwar Protest, and Preinduction Review," *U.C.L.A. Law Review* 17 (1970), pp. 1028, 1040–53; W. Van Alstyne, "The Constitutional Rights of Teachers and Professors," *Duke Law Journal* (1970), pp. 841, 848–54.

be asked to account through academic due process in respect to their academic freedom, it may be thought to arise from the troubling ambiguity of the following paragraph from the 1940 *Statement of Principles:*

> The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, *but his special position in the community imposes special obligations.* As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he 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 he is not an institutional spokesman. (Emphasis added.)[17]

If this paragraph were taken as a statement of professional aspiration addressed to the good sense and *esprit* of the academic fraternity, it might well be thought to state a highly commendable view. If it is a statement which means to encourage institutional review —and possible dismissal—of faculty members because aprofessional utterances may sometimes lack the degree of accuracy and restraint not improperly expected of their professional endeavors, however, it is radically unfair to the equal civil liberties of academics and needs to be revised. As it happens, neither of these alternatives quite describes the present situation.

A clarification was provided of the critical "but" clause in 1963, in the course of a Committee A review of a case involving an assistant professor's letter to the editor of a student newspaper published and distributed at the University of Illinois.[18] The ad hoc investigating committee of the AAUP read the critical clause of the 1940 statement exclusively as an admonition addressed to the professional conscience of the faculty alone:

> The *ad hoc* committee is of the opinion that . . . as applied to a faculty member having definite or indefinite tenure, making public utterances on matters of general concern to the community, the standard of "academic responsibility" is not a valid basis for reprimand, dismissal, or other official discipline.[19]

Nevertheless, the plurality opinion for Committee A disagreed. From its assessment of the legislative history of the 1940 statement, it concluded that the "but" clause was not a precatory statement; rather, the clause was intended to recognize the legitimacy of university authority to discipline faculty members for violating norms of accuracy, self-restraint, and courtesy even in respect to professionally unrelated extramural utterances:

> In light of Committee A's understanding of the 1940 Statement, together with the legislative history of the document and its "interpretation," the Committee disagrees with the authors of the report that "the notion of academic responsibility, when the faculty member is speaking as a citizen, is intended to be an admonition rather than a standard for the application of discipline.[20]

Left alone, this position would appear to embrace the most self-effacing—and simultaneously self-righteous—position of all. The fact that Committee A went on to stress the ameliorative influence of academic due process in such cases—and to disapprove the particular dismissal of the faculty member as

17. Reprinted in *AAUP Policy Documents and Reports* 2 (1971).

18. See "Report on Academic Freedom and Tenure: The University of Illinois," *A.A.U.P. Bulletin* 49 (1963), pp. 25ff.

19. Ibid., p. 36.

20. Ibid., p. 41.

"outrageously severe and completely unwarranted" under the circumstances —does little to relieve one's objection to the interpretation itself as a matter of sound principle. On the one hand, it appears to forswear any special claim of academic freedom in respect to a faculty member's personal prerogative of general public discussion "when he speaks or writes as a citizen," and not under pretense or claim of professional endeavor. At the same time, it appears simultaneously to accept the legitimacy of institutional restraint even in respect to such ordinary political rhetoric by the exceptionally inhibiting standards of accuracy, care, restraint, and courtesy identified with the individual's professional status, that is, with his status "as a man of learning and an educational officer." In this respect, the trade-off the AAUP appeared to have accepted with the Association of American Colleges in 1940—namely, to cultivate public confidence in the profession by laying down a professionally taxing standard of institutional accountability for all utterances of a public character made by a member of the profession—is substantially more inhibiting of a faculty member's civil freedom of speech than any standard that government is constitutionally privileged to impose in respect to the personal political or social utterances of other kinds of public employees.

Immediately subsequent to its report in 1963—but consistent with other portions of that report—however, Committee A adopted a more strict construction of the 1940 statement. This strict construction disarms that statement to a considerable extent and brings it, as thus construed, much closer to the position the Supreme Court adopted on First Amendment grounds in 1969:

> The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his position. Extramural utterances rarely bear upon the faculty member's fitness for his position. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar. In the absence of weighty evidence of unfitness, the administration should not prefer charges; if it is not clearly proved in the hearing that the faculty member is unfit for his position, the faculty committee should make a finding in favor of the faculty member concerned.[21]

Even conceding that this Committee A construction may go nearly as far as the AAUP can proceed in light of the phrasing and legislative history of the 1940 statement, it remains subject to criticism.[22] One step that may easily be taken is the more emphatic clarification of the standard of institutional review—assuming that such review is ever called for, or at least that the 1940 statement, unless amended, provides for the possibility—in cases where no claim of academic freedom is asserted and no willful trading upon professional status has been involved in the personal activity of a faculty member whose institutional position is thereby drawn into question by the character of the activity.

What needs to be done, however, is

21. Committee A Statement on Extramural Utterances (1964), reprinted in *AAUP Policy Documents and Reports* 14 (1971). See also "Advisory Letter from the Washington Office," *A.A.U.P. Bulletin* 49 (1963), pp. 393, 394, and the discussion in "Report on Academic Freedom and Tenure: The University of California at Los Angeles," *A.A.U.P. Bulletin* 57 (1971), pp. 382, 394–400, 404, 405.

22. See, for example, Remarks by President J. W. Maucker of the University of Northern Iowa (on the occasion of receiving the Tenth Alexander Meiklejohn Award), *A.A.U.P. Bulletin* 54 (1968), pp. 251, 253–54; Schier, "Academic Freedom and Political Action," *A.A.U.P. Bulletin* 53 (1967), p. 22.

not merely to make clearer that a faculty member may not properly be held to answer to an institution for the integrity of his general utterances by the same standard by which he may have to account for his academic freedom, but to enlarge upon the implication of our position that his substantive accountability for such utterances will ordinarily not run to the institution at all. For an alleged abuse of freedom of speech, general provisions of law are available to provide for measures of redress and sanction so far as it has been thought both safe and just to allow. As a consequence, society may not expect, nor should the standards of the AAUP contemplate, that recourse for alleged abuses of ordinary civil liberty may be compounded by the gratuitous use of institutional disciplinary processes. It may be conceded that circumstances will sometimes arise where the personal conduct of a faculty member may so immediately involve the regular operation of the institution itself or otherwise provide firm ground for an internal grievance that internal recourse, consistent with academic due process, is offensive neither to the general protection of civil liberty nor to the standards of this Association. Decisions such as that in the *Pickering* case are instructive, however, that this exception is not nearly so broad as the presumption of custom has supposed.