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Academic Freedom: A Prologue

Steve Sheppard*

Academic freedom has been a problem for twenty-five hundred years. How should society protect—or punish—teachers, students, schools, and researchers? What is the legal framework that determines who is subject to the immunities—or the liabilities—that result?

The standard reference to start this story is, of course, the trial of Socrates, the great philosopher of ancient Greece. In 399 B.C.E. Socrates was condemned to death by the jury of Athens for corrupting its young by teaching them to question the received wisdom of their elders. His trial and death have been a metaphor to generations of teachers, though the metaphor may signify various things.¹

One reading is that good teaching challenges the orthodox. An effective teacher will always be hated by conservative elements in society by requiring the young to question the assumptions and commitments of the old. Thus are creative destruction and growth fueled by education, and so are the animosities of those wedded to the past incurred.

Another reading is that the function of education is to identify and preserve orthodoxy. The proper role of the teacher is to instill in the young a reverence for the values

*Judge William Enfield Distinguished Professor of Law, University of Arkansas. I am grateful to the Hartman Hotz Trust for sponsoring the talks of Robert Post and Fred Schauer, which follow this elementary introduction to their topics, and to the staff of the Arkansas Law Review for their brilliance in hosting this event. My greater thanks, however, go to the speakers, Professors Post and Schauer, whose remarks follow. See Robert Post, Discipline and Freedom in the Academy, 65 Ark. L. Rev. 201 (2012); Frederick Schauer, The Permutation of Academic Freedom, 65 Ark. L. Rev. 191 (2012).

1. Journalist Isador Stone examined Socrates' trial in a lively and thoughtful essay that not only emphasizes the conflict in world view between the modern-thinking Socrates and the conservative Athenians but also clarifies the ease with which both sides could have avoided the tragic outcome. See I.F. STONE, THE TRIALS OF SOCRATES (Little, Brown & Co. ed., 1988).
of their elders. Thus is society preserved, and so are those who challenge its core truths to be weeded out and punished, not only to protect the young but also to warn other dissidents to stay in line.²

Teachers who think of themselves as modern prefer the first reading. Their critics prefer the second—at least most of the time. The shoe can sometimes be on the other foot.³ The tension between these modern and orthodox readings persists not only in American education (particularly in higher education) but also in the legal assessment of the educational enterprise.⁴

The United States inherited an educational tradition from Europe. U.S. laws have recurrently but slowly reflected European approaches to education.

The faculties of medieval colleges were effectively guilds with their own rules, though the rules were sometimes set by the teachers, sometimes by the students, and sometimes altered by the church or the monarchs.⁵ Teachers of pupils younger than the collegiate were beholden to their employers, either the church, the patron, or (eventually) the burghers of the towns that employed them. At all levels, in a largely illiterate world, teachers were usually given deference by cultural leaders, in part

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². Thomas Hobbes was a lively critic of academic freedom along these lines, complaining that the universities were the core of rebellion, leading to the English Civil War. See THOMAS HOBBES, BEHEMOTH, OR THE LONG PARLIAMENT 38 (Ferdinand Tönnies ed., University of Chicago Press, 1990) (1681); MARK H. CURTIS, THE ALIENATED INTELLECTUALS OF EARLY STUART ENGLAND, PAST & PRESENT 25 (1962).


⁴. On this point, I am grateful to Robert Post's thoughtful division of educational purposes recognized by the courts among civic education, democratic education, and critical education. My dichotomy between the modern and orthodox readings of the trial of Socrates is nicely illuminated by noting the orthodox reading of the trial fits well with civic education and very uncomfortably with democratic education; the modern reading of the trial fits easily with critical education and comfortably but not perfectly with democratic education. See Robert C. Post, Racist Speech, Democracy, and the First Amendment, 32 WM. & MARY L. REV. 329-25 (1991).

owing to the value placed on their learning, in part owing to
the near mystical relationship between literate knowledge
and religious belief, and in part owing to the agreeability of
the scholarly lifestyle. As long as the college lecturer did
not unduly challenge the authority of the church or the
monarch, the church and the monarch protected the
lecturer from the perils of ordinary disagreements.

This is not to say the occasional collegian did not stray
into trouble with either power. Famously, in 1616, Galileo
taught math and astronomy at the University of Padua and
wrote his Dialogue on the Great Systems.\textsuperscript{6} This book
earned him a trial before the Inquisition in 1633, which left
him reading psalms under house arrest for the remainder of
his days.\textsuperscript{7} Less well known now are the occasional purges
of Oxford dons for not timely altering their loyalties or
religious inclinations as various monarchs took the English
throne (or were taken from it).\textsuperscript{8} One could, of course, find
trouble from both quarters. By royal command, the name
of John Locke, a tutor at the College of Christ Church,
Oxford, was erased from the list of students at Christ
Church in 1684, and, following a debate with Archbishop
Stillingfleet, in 1701 Locke's great book, An Essay
Concerning Human Understanding, was nearly banned
from use in Oxford instruction.\textsuperscript{9}

College life in early America echoed the need to
conform to extracurricular political and religious dogma.
Henry Dunster, Harvard's first president, resigned from

\begin{itemize}
\item \textsuperscript{6} GALILEO GALILEI, DIALOGUE CONCERNING THE TWO CHIEF WORLD
SYSTEMS, PTOLEMAIC & COPERNICAN (Stillman Drake trans., Albert Einstein
forward, Univ. of Cal. Press 1967).
\item \textsuperscript{7} The most satisfying account in English may be MAURICE A.
FINOCCHIARO, RETRYING GALILEO (Univ. of Cal. Press 2005). The trial materials are accessible
through ANTONIO FAVARO, GALILEO E L'INQUISIZIONE: DOCUMENTI DEL
PROCESSO GALILEIANO ESISTENTI NELL'ARCHIVIO DEL S. UFFIZIO E
NELL'ARCHIVIO SEGRETO VATICANO (G. Barbare 1907). Of course, Brecht's
examinations of the role of the scientist in society remain the most vivid imaginings
of the trial itself. See BERTOLT BRECHT, GALILEO (Charles Laughton, trans.)
(Grove Press, 1994).
\item \textsuperscript{8} See, e.g., SIR JOHN PECHELL, THE HISTORY OF THE UNIVERSITY OF
OXFORD: FROM THE DEATH OF WILLIAM THE CONQUEROR TO THE DEMISE OF
QUEEN ELIZABETH 218-19 (1773).
\item \textsuperscript{9} JOHN YOLTON, JOHN LOCKE AND THE WAY OF IDEAS 11 (Oxford Univ.
Press 1956).
\end{itemize}
office in part owing to his dispute with the church that regulated the commonwealth and the college: the church ordaining that infants shall be baptized, Dunster refused to baptize his own.10 Even so, the pragmatic benefits of religious toleration were widely understood by colonial and early federal leaders.11 The same, though, was not true of political toleration, including both squabbles over loyalty to crown or colony in the Revolution and—in several celebrated cases—problems for southern professors who failed to support slavery or the Democratic Party. Indeed, no less a personage than Chancellor Frederick Barnard at Ole Miss was closely investigated for suspicion of abolitionist views and only kept his position when his slaveholding sympathies were proved.12

The role of the professor in the United States changed considerably over the nineteenth century, and the institutional ideal of academic freedom emerged during this change. In the early 1800s, the college teacher was seen as little more than a senior tutor, teaching advanced subjects but still largely thought to instill the knowledge drawn either from the scholarship of others or from the wisdom of the ages. Granted, college lecturers wrote books and pamphlets, but the role for most was that of an instructor and not a researcher. By mid-century, that role was changing. In the depths of the American Civil War, the federal Morrill Acts established the nationwide system of state land-grant universities to provide a liberal and practical education to the working classes, with the expectation that faculty would develop new ideas and devices in those fields.13 The controversial and

12. See Walter Metzger, The Old-Time College, in RICHARD HOFRADSTDER AND WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 209, 257 (Columbia Univ. Press 1955). Barnard, who was later president of Columbia College in New York, fell under suspicion for accepting the testimony of a slave against a student.
experimental nature of science and the arts developed alongside an American culture that was increasingly industrial, urban, and transient. New doctoral programs were established in deliberate emulation of English and German models of research, such as those at Johns Hopkins University and the Harvard of Charles Elliot.14

The influence of German academics and their model of research in the United States was particularly significant because of its acceptance of the Prussian ideal of lehrfreiheit, the freedom to teach as one chooses, and lernfreiheit, the freedom to study as one chooses.15 This freedom of the lecture hall was essential to the new ideal of the university as a training ground for democracy as well as a source of change, and by the end of the nineteenth century, the university professor was expected not only to be an agent of invention but also an agent of social change and of economic improvement.16

Despite the more intellectually robust character of the university researcher, the old model of the teacher beholden to the college patron was reborn, with industrialists and politicians supplanting the role once held by bishops and princes. In 1900, Edward Ross, a young economist and criminologist at Stanford University, was fired from his position there, largely because university trustee Jane Stanford disagreed with his racist views of Chinese laborers.17 Despite (or because of) the progressive

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17. Jane Stanford was not only a trustee; she was the widow of Governor Leland Stanford and the university’s co-founder. The dispute between the trustees, led by Mrs. Stanford, and Prof. Ross, whose views were much more socially acceptable at the time than might appear today, is nicely chronicled in ORRIN L.
ideology of the university position and the racist views of the professor, other professors were incensed at the treatment of their peer. Six resigned, and fifteen years later the incident was sufficiently memorable to spur Arthur O. Lovejoy and John Dewey to organize the Association of American University Professors ("AAUP"), which was to develop and protect a standard of academic freedom for its members and their peers. The immediate spur to that project, however, was the drumbeat of similar firings. In 1913, LaFayette College fired John Mecklin for the clash between his liberal views and the college president's Presbyterian conservatism. In 1915, the University of Pennsylvania fired Scott Nearing, an economics professor whose public speeches against child labor were challenged as political activism. Thus, the new AAUP confronted issues of academic freedom for professors speaking not just in their classes and writings but beyond the campus walls. The result was a statement of principles, issued in 1915, which became the basis for the professional understanding of academic freedom in the United States.

A pivotal moment in American academic freedom arose not from the urban college classrooms of Stanford and Penn but from a high school in rural Dayton, Tennessee, where football coach and science teacher John T. Scopes was arrested, not just fired, in 1925 for teaching evolution in violation of state law. Though the charges originated in a collusion between the school superintendent and the defendant to gain publicity for the town, the trial

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19. See JOHN M. MECKLIN, MY QUEST FOR FREEDOM (Scribners 1945).


attracted famous lawyers and global attention to the arguments for and against the need to teach science according to its own discipline rather than religious or political preferences. Scopes was convicted, but the idea that the discipline must be taught by its standards rather than legislative whim gained a firm hold in the national consciousness.²²

Twentieth-century American universities, however, were as influenced by world events as by the local reflection of those events in society. The perils of war and national upheaval had profound and sometimes conflicting effects in the United States. On the one hand, the more tolerant and protective environments of American universities contrasted well to the anti-Semitism and nationalist persecutions of academics in Germany and Russia, which led teachers like Albert Einstein to the United States.²³ Some of the principles underlying this environment were integrated with the 1915 principles, which were reduced to a code in 1940 by the AAUP and the Association of American Colleges, ensuring freedom in research and teaching.²⁴ Yet the tide seemed all too often to flow against

²². The conviction was later overturned on the technical grounds that the judge rather than the jury determined the penalty. See Jeffrey P. Moran, The Scopes Trial: A Brief History with Documents (St. Martin’s Press 2002); Edward J. Larson, Summer for the Gods: The Scopes Trial and America’s Continuing Debate over Science and Religion (Basic Books 2006).

²³. It must be hastily noted, though, that despite opportunities at the New School for Social Research and other universities, quotas for Jewish students, latent anti-Semitism, and academic tribalism limited Jewish success in the American academy until well past the second world war. See Edward S. Shapiro, The Friendly University: Jews in Academia since World War II, 46 Judaism 365 (1997).

²⁴. The principles of academic freedom protected by academic tenure, established in 1940 between the AAUP and what is now the Association of American Universities and Colleges, provides:

1) Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

2) Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the
such toleration, as faculty snobbery and bigotry abetted governmental purges of anarchists, syndicalists, unionists, and communists. The AAUP continues to be the champion of academic freedom in the United States, and its Committee on Academic Freedom and Tenure hears claims that institutions of higher learning have violated its principles. These claims are investigated by the AAUP staff and committee, which censures universities who violate AAUP principles.

Academic freedom exists in the law as well as in professional guidelines. As an initial matter, twentieth-century courts did not welcome the notion that academics have a privilege greater than others to challenge the public consensus of prevailing morality. Yet as the scope of the institution should be clearly stated in writing at the time of the appointment.

3) College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.


25. One of the more profound demands resulting from such tension during the world wars and the Cold War was the evolution of loyalty tests and oaths required of faculty members. See, e.g., GEORGE R. STEWARD, THE YEAR OF THE OATH: THE FIGHT FOR ACADEMIC FREEDOM AT THE UNIVERSITY OF CALIFORNIA (Doubleday 1950). The oath requirement is still enforced in some states. See, e.g., California Const. art. XX, § 3. In 2008, a Quaker professor at the California State University at Fullerton was fired, though she was reinstated when a modification of the oath was made available to her. See, e.g., Nanette Asimov, Quaker Teacher Fired for Changing Loyalty Oath, SFGATE (Feb. 29, 2008), http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/02/29/BAQPVAUVO.DTL.


27. In 1940, the courts of New York judicially barred the appointment of Bertrand Russell, then one of the leading thinkers in the English speaking world, as a professor at City College of New York because he lacked the requisite character and fitness. Kay v. Bd. of Higher Ed. of N.Y., 18 N.Y.S.2d 821 (Sup. Ct.), aff'd, 20
First Amendment widened, it encompassed free speech in the academy, and academic freedom acquired a constitutional dimension distinct from its professional contours.

The first federal recognition of academic freedom addressed the rights of high school teachers. In 1952, Justice William O. Douglass dissented from a decision upholding a New York law regulating teacher speech, noting: “The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher.” That same year, the Court moved toward a form of academic freedom when it struck down an Oklahoma statute banning teachers and other civil servants who would not subscribe to a loyalty oath, finding that its failure to give sufficient notice of a liability in belonging to a proscribed organization violated the teachers’ rights to due process of law. Concurring in that case, Justice Frankfurter made clear its implications for protecting a freedom of inquiry for teachers, a point Justice Douglas later made in the majority opinion in Griswold.

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N.Y.S.2d 1016 (App. Div.), appeal denied, 29 N.E.2d 657 (N.Y. 1940). Among Russell's works that Justice McGeehan found proved his unfitness to teach were Russell's views that “all sex relations which do not involve children should be regarded as a purely private affair, and that if a man and a woman choose to live together without having children, that should be no one's business but their own.” Id. at 827. The academic reaction to this result was fierce but not terribly significant. See The Bertrand Russell Case: The History of a Litigation, 53 Harvard L. Rev. 1192 (1940); The Bertrand Russell Case (John Dewey and Horace M. Kallen eds., Viking 1941). Though perhaps it added interest at the time, much of the criticism of the court’s ruling is blunted for the modern reader by sexist criticism of the plaintiff in Russell’s case. See, e.g., Walton H. Hamilton, Trial by Ordeal, New Style, 50 Yale L.J. 778 (1941).

28. Some state recognition of academic freedom preceded its federal development. One example is the refusal by the Nebraska courts to allow a state law requiring courses to be taught in English to apply to a private school, a decision not based on the freedoms of the teachers or their students but on the interest of parents and school owners, based as much on property rights and equal protection as on a claim or free expression. See Neb. Dist. of Evangelical Lutheran Synod of Mo., Ohio, & other States v. McKelvie, 175 N.W. 531, 535 (1919).


31. Frankfurter echoed Douglas's opinion earlier that year when he wrote:
The idea that academic freedom is an aspect of the constitutional freedom of speech gained adherence in a majority opinion of the Court in 1957, when a state legislature’s investigation of a college lecturer’s loyalty was found to violate due process because, as Chief Justice Warren said, “Scholarship cannot flourish in an atmosphere of suspicion and distrust. 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.” That idea was more clearly enunciated a decade later by Justice Douglas: “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.”

Thus the courts have recognized constitutional dimensions to academic freedom, arising mainly from the First Amendment but potentially from the due process clauses and other doctrines. One critical aspect of the evolution of this freedom is that it evolved along with the constitutional rights of students, albeit not under the designation of academic freedom, which has been increasingly used only to describe such rights for professors or teachers and universities or institutions. This broad,

To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them.

*Wieman*, 344 U.S. at 196 (Frankfurter, J., concurring).
35. First Amendment protections of student rights were recognized first as protections under the Establishment Clause and then under the Speech Clause. See
constitutionalized freedom thus applies to professors, teachers, students, schools, and colleges, in dimensions like most constitutional rights, which have limits that vary according to context and claimant.  

Comparing the growth of institutional academic freedom and constitutional academic freedom, it is clear that academic freedom has varied sources, applied to various people and institutions in various academic roles. What is the role of academic freedom when the freedom of speech does not apply to the academic? It can be hard to determine the scope of a constitutional right to free speech in the domain of academic speech, which can be both broader and narrower than other forms of constitutionally protected speech. Perhaps unbelievably, the Supreme Court has recently held that speech might not receive protection for state-employed faculty members, when the speech is in the scope of the faculty members’ official duties. Yet it is still possible for speech to enjoy protection when it is protected speech used in an unprotected aspect of employment. Such complications arise frequently owing to the controversies in which academics find themselves.

Some of these controversies are the fruit of public or political dislike of the professor’s basic research, such as the recent persecution of climate scientists by those who dislike
the implications of their conclusions. Some controversies are rooted in political responses to professors who comment in public on matters of moment, attracting hostility for statements arising from their professional research or their personal politics and merely their beliefs. Some controversies are institutional, arising from donors, trustees, administrators, students, or colleagues, who oppose faculty members whose commentary on political issues offends them. Some arise from the statements or actions of faculty members outside of the university setting, before their appointments or while on leave from them.

To speak of academic freedom as a single concept might seem nearly impossible.

Following this prologue are two discussions of academic freedom that are important to understanding its significance and application in the United States. In these 2011 Hartman Hotz addresses at the University of Arkansas, Frederick Schauer first organizes the distinct and conflicting meanings of academic freedom as a topic of expression, properly focusing on the manner in which academic freedom affects various actors in the academy. He situates the government, the institution, the teacher, and the student in specific relationships to one another, and considers the role each has as an aspect of their freedom in performing that role. This taxonomy of academic freedom is essential to focusing the questions that arise from it. As a logical matter, without this sort of organization, there is no

39. See Michael E. Mann, The Hockey Stick and the Climate Wars: Dispatches from the Front Lines (Columbia Univ. Press 2012).
44. Schauer's analysis of academic freedom is derived in part and extended from his often-quoted article, Frederick Schauer, Is There a Right to Academic Freedom? 77 U. Colo. L. Rev. 907 (2006).
way to distinguish the academic freedom of the professor from the academic freedom of the university or the student. As a practical matter, without Schauer's organization and the differentiation of roles that it embraces, no meaningful academic freedom is likely: there is no reason to provide a greater degree of protection to the professor than to others.

Robert Post then provides an important theoretical evaluation of academic freedom as both a professional value and as a distinct constitutional value. He argues that academic freedom, beyond the mere protections of speech from government interference, is essential to democracy, as long as it is justified by and limited to the justification of expertise. Expertise as understood by the community of experts in a given field of scholarship—like chemistry, ethics, or climate science—is a powerful tool for sorting meaningful from spurious claims of academic freedom. His concept of expertise according to the principles of a discipline as the defining criterion of academic freedom is both useful and subtle, and it bears considerable weight in sorting out claims that deserve special protection in the academy from those that do not.

Post's idea that the standards of specific disciplines are the source of academic freedom resonates with a broader idea that a failure to recognize the role played by expertise may weaken democracy in many different ways. This broader argument, heightened by the recent popularity of the antithetical notion that knowledge is better found among the masses than in the labs, seeks to protect the benefits of complicated and evaluated data that can be refined by experts and applied in the assessment of knowledge. This is particularly important to the creation of

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policy and law, because the narrative of experts is so easily lost among the smug assertions of the crowd.\textsuperscript{49} Though Post’s argument is at a tangent to this counter-egalitarian line of inquiry, it nicely compliments it.

That is not to say that Post’s argument is a creature of the moment. Indeed, it has a distinguished lineage and echoes one of the earliest of all academic claims to freedom—Socrates’ own.

Meletus, the chief accuser of Socrates, argued that Socrates’ influence with his students was greater than their parents. Socrates admitted the charge but argued it should not be the basis of an offense, because his expertise as an educator was greater than that of the parents:

“I admit it,” Socrates replied, “at least where education is concerned. You see people know this is a special concern of mine. And when it comes to health people trust doctors rather than their parents. And in the meetings of the assembly, I’m sure that all the Athenians trust the ones who speak with the most intelligence rather than their own relations. And then, of course, don’t you choose as generals, in preference to your fathers and your brothers—and even, by Zeus, your own selves—whomever you regard as having the best judgment about warfare?

“That’s right, Socrates,” replied Meletus, “because it makes good sense as well as being the established custom.”

“Well then,” Socrates replied, “don’t you think it amazing that whereas the best practitioners in other areas of expertise are not only given an appropriate reward but are also highly esteemed, I myself who am considered by some to be the best judge about the greatest good for men—I mean education—that I am, for this very reason, indicted by you on a capital charge?”\textsuperscript{50}

\textsuperscript{49} For a more general argument along these lines, see Frank Fischer, \textit{Democracy and Expertise: Reorienting Policy Inquiry} (Oxford Univ. Press 2009).

\textsuperscript{50} Xenophon, \textit{Socrates’ Defense to the Jury}, in \textit{The Trials of Socrates: Six Classic Texts} 178, 182-83 (C.D.C. Reeve trans., Hackett Publ’g 2002).
Expertise is the reason teachers are assigned the roles they hold. (Or, at least it should be). The protections of academic freedom ought to apply to the use of that expertise, and in doing so, that freedom deservedly extends beyond the usual boundaries of freedom in expression, whether it is assured by a constitution or by contract. It is nice to agree with Socrates, and with Professor Post, in such a powerful argument.