

Jules LaPibus Lecture
Council of Graduate Schools Annual Meeting
December 4, 2021
“Academic Freedom: For Whom and For What?”
Frederick M. Lawrence*

It is a great honor to be asked to deliver the Jules LaPibus Lecture. LaPibus was a distinguished figure in higher education, serving as the President of the Council of Graduate Schools and before that as the graduate school dean and vice provost for research at Ohio State. His range of interests was inspiring – he was a medicinal chemist with a bachelor’s degree in pharmacy but after his career at the CGS, when he returned to Columbus, Ohio, he was a lecturer on recorded classical music at the Worthington Library. His path exemplifies the Phi Beta Kappa motto, *Philosophia Biou Cybernetes*, “love of learning is the pilot of life,” a journey of life-long learning.

It is a particular honor to be with you at the CGS annual meeting, because of the unique connection between CGS and Phi Beta Kappa, or I should say the unique connection among CGS, PBK and the ACLS. The three of us were jointly responsible for the creation of the National Endowments for the Humanities and the Arts in 1965.

Our topic today, Academic freedom “for whom and for what,” falls at the intersection of philosophy and law: why should we as a society, our legal system in particular, give special consideration to the particular rights of inquiry and expression possessed by academics?

After all, college and university professors represent a tiny proportion of people in our society. By one estimate there are roughly 135,000 professors in our country, about .04% of the

* Secretary and CEO, The Phi Beta Kappa Society and Distinguished Lecturer, Georgetown University Law Center.
© 2021.

population. In other words, 99.96% of the country does not get the protections of academic freedom. At least not directly.

I will suggest that in fact academic freedom has a reach well beyond that thin sliver of the American public who are in the professoriate. That may be in part why over 50 years ago, in *Keyishian v. Board of Regents* (1967), the Supreme Court declared that academic freedom is a “special concern of the First Amendment.” If that is so, our topic should be easy. But it is not. As former Yale Law School Dean Robert Post put it, “the doctrine of academic freedom stands in a state of shocking disarray and incoherence.”¹ Some of this doctrinal disarray and incoherence is no doubt caused by the tendency to conflate free speech and academic freedom as if academic freedom were just the special category of free expression enjoyed by college and university professors. Moreover, advocates of academic freedom may assert the right as a given, rather than grounding it in first principles.

My goal today is to provide some coherence to academic freedom, drawing on the underlying purposes of the doctrine and then applying it to our current moment. Along the way, we will see the academic freedom is certainly related to the Free Amendment freedoms of speech and expression, but it is not identical. Free expression is a broad right grounded in the very essence of what it is to be a human being. Academic freedom is a much more focused right, grounded in the very essence of what it is to be a scholar.

Academic freedom as we understand it may be traced back at least as far as the medieval period with the establishment of the first universities. These universities sought to protect their autonomy from the two main sources of encroaching power: the church and emerging nation states. Significantly, the autonomy they sought to defend was that of the institution more than

¹ Robert Post, *Democracy, Expertise, Academic Freedom* 62 (2012).

that of the individual scholar. A notion of individual academic freedom does not take shape until the 18th century. In *The Conflict of the Faculties*, in 1798, Immanuel Kant wrote of the establishment of universities that:

It was not a bad idea to handle the entire content of learning ... by a division of labor, so that for every branch of the sciences there would be a public teacher or professor appointed as its trustee, and all of these together would form a kind of learned community called a university The university would have a certain autonomy (since only scholars can pass judgment on scholars as such) and accordingly it would be authorized to perform certain functions through its faculties ... to admit ... students ... and, having conducted examinations, by its own authority to grant degrees....”

In Kant’s formulation, we see the tension at the heart of one of our questions for today: academic freedom *for whom*? Is this a right that belongs to the university as an institution or to the members of its faculty as individuals? We will return to this tension shortly.

Through the 19th century, basic principles of academic freedom were most developed in German universities – applying both to faculty members (*Lehrfreiheit*) and to students (*Lernfreiheit*). The first great touchstone of academic freedom doctrine in the United States is the Association of American University Professors (AAUP) *1915 Declaration of Principles on Academic Freedom and Tenure*. Perhaps dated in some ways, and largely replaced in AAUP circles by the influential *1940 Statement of Principles on Academic Freedom and Tenure*, the *1915 Declaration* is an essential starting point. It is first worth noting that the *Declaration* opened by expressing its exclusive focus to be *Lehrfreiheit* – “it need scarcely be pointed out that the freedom which is the subject of this report is that of the teacher.” This may have been a lost opportunity. Articulating a strong view of *Lernfreiheit* to accompany *Lehrfreiheit* would, among

other things, expand the reach and applicability of academic freedom. I mentioned a moment ago that less than 1/20 of 1 percent of the American public are professors. Contrast that with the nearly 20 million students in American colleges and universities and the nearly 94 million or 42% of Americans who hold some kind of college degree. The number who have attended college for a significant period of time is, of course, even greater. We will return to the role of *Lernfreiheit* later on as well.

The *1915 Declaration* located academic freedom in three contexts:

- Teaching – the literal meaning of *Lehrfreiheit*. The right of the faculty member over the curriculum and manner of instruction in her or his classroom.
- Research – always contemplated as part of *Lehrfreiheit*, suggesting that an academic’s research function is integrally related to their teaching.
- And, somewhat less obviously, extramural – beyond the classroom.

These three contexts map onto the three articulated functions of the university:

- promote inquiry and advance the sum of human knowledge
- provide instruction to students
- develop experts for various branches of the public service.

Implicit in this formulation is a critically important insight that is all too often overlooked today. Higher education institutions, both public and private, represent a public good. Their function is not only to educate individual students on a kind of “pay for services” model, but to produce knowledge that benefits the greater society. This is true in a somewhat abstract way – promoting inquiry and advancing the sum of human knowledge – and in a very concrete way – providing expert opinions and insights as a kind of public service to aid in societal decision-making.

The *1915 Declaration* advanced the argument that robust academic freedom is essential for is the university to fulfill its mission -- to advance knowledge, academics must be free to explore and express and inquire. Faculty are “appointees” of the trustees but not “employees” of trustees

- Trustees cannot evaluate – lack competency
- Recall Eisenhower story with Isadore Rabi at Columbia

Anticipating our moment, the authors of the 1915 Declaration warned that academic freedom would be a particular challenge for teaching (and research) in the social sciences:

- Private universities: donors, trustees, and parents of students likely to be more conservative and discourage certain kinds of inquiry and questioning
- Public universities: opinions of the state legislature or other authorities will create similar limitations.

In sum, the drafters of the *1915 Declaration* saw universities as a refuge from the tyranny of public opinion!

But of course, not all teaching challenges convention. Universities exist to transmit inherited knowledge, and to discover and create new forms of knowledge that are transmitted through our teaching and our scholarship. The *Declaration* thus understood that universities actually are designed both to protect the status quo and to challenge it. For both, broad academic freedom, *Lehrfreiheit*, is essential.

This now brings us to three key interrelated questions that we will take up in turn:

- What is the extent or nature of the right of academic freedom?
- Who possesses the right? Individual professor or the university itself?

- How is academic freedom similar to and how different from free expression as protected under the First Amendment?

The Contours of Academic Freedom

One of the classic statements of the scope of academic freedom began in a separate concurring opinion by Justice Felix Frankfurter in *Sweezy v. New Hampshire* (1957). Justice Frankfurter came to the Court directly from the academy; he has a professor at Harvard Law School. He and another academic turned justice, William O. Douglas, the youngest tenured professor in the history of Yale law school, in *Wieman v. Updegraff* (1952) authored the memorable phrase that teachers are the “priests of our democracy.”

In *Sweezy*, the Court threw out an effort by the New Hampshire state Attorney General, in his investigation of subversive activities, to summon Professor Sweezy who was asked among other things about lectures he gave at the University of New Hampshire on socialism. The Court did not do so expressly on academic freedom grounds, but Frankfurter, in his separate concurring opinion, focused on academic freedom and an unjustifiable interference with the right of university professor to his lectures.

Frankfurter articulated the “Four essential Freedoms of a University” which he drew from a statement of senior scholars at the two leading universities in South Africa – The University of Cape Town and the University of the Witwatersrand. It is for the university to determine for itself on academic grounds:

- Who may teach.
- What may be taught.
- How it shall be taught.
- Who may be admitted to study.

These four freedoms are cited by Justice Powell in his foundational opinion in *Bakke v. Regents of the University of California* (1978).

To these four freedoms we might add a fifth, drawing on one of the pillars of the *1915 Declaration* – freedom to determine the content of faculty member’s expert opinions that contribute to societal decision-making. Recall that the *1915 Declaration* did not just speak to the role of the university in to advance the sum of human knowledge but also to develop experts for various branches of the public service.

The relevance of these five prongs of academic freedom to our moment is compelling. Consider several examples

- The right of the university to determine who attends the institution situates the debate over affirmative action as one of academic freedom.
- The right of the university to determine who teaches at the institution demonstrates that the efforts of some state Board of Regents or legislators to reject or remove faculty implicates principles of academic freedom.
- The right of the university to determine what is to be taught and how it is to be taught counters efforts to restrict the teaching of critical race theory, or what is imagined to be critical race theory, by those whose comments suggest a limited understanding of the theory at best.
- The right of the university, perhaps even obligation of the university, to provide expert opinions for the benefit of society, counters the outrageous and quickly withdrawn effort by the University of Florida to preclude faculty from testifying against positions advanced by the state’s Governor.

Academic Freedom for Whom?

Having sketched out the contours of academic freedom, “academic freedom for what”, we should now turn to the question of “academic freedom for whom?”: do individual faculty members possess a free-standing right of academic freedom? The answer is “yes and no.” Yes, individual faculty members benefit from academic freedom and are protected by academic freedom. But they enjoy these benefits and protections in their capacity as members of academia, not as a free-standing rights they may claim as individuals.

A fairly straight-forward example will help us illustrate the point. “Do I have academic freedom in assigning my grades?” The answer turns out to be deceptively complicated. Let’s look at two federal Court of Appeals decisions, both from 1986. The holding in the first case will likely not surprise you. In *Parate v. Isibor*², Nitthu Parate was a contract professor at Tennessee States University. With the concurrence of his department chair, he changed one student’s grade and not another’s. The disappointed student complained to the dean of the school of engineering, Edward Isibor, who ordered Parate to change the other student’s grade. Parate refused and was not renewed, and he sued for violation of the First Amendment. The Court found for Parate, holding that this was a case of unconstitutional “forced speech.” A state university may not force a professor to change a grade. So far so good.

The second case is *Lovelace v. Southeastern Massachusetts University*³ Mathew Lovelace claimed that he was fired / not renewed because he graded too hard and gave too much work. The court, in an opinion joined by Stephen Breyer, then a Court of Appeals Judge, today a Supreme Court Justice, and another former academic (Harvard Law School) found for the

² 868 F.2d 821 (6th Cir. 1989).

³ 793 F.2d 419 (1st Cir. 1986).

university. The court held that there was no First Amendment right in how you grade, because the university gets to decide standards. Here's how they put it:

Whether a school sets itself up to attract and serve only the best and the brightest students or whether it instead gears its standard to a broader, more average population is a policy decision which, we think, universities must be allowed to set. And matters such as course content, homework load, and grading policy are core university concerns, integral to implementation of this policy decision.

Grading policies are set by the *university* – how a professor *applies* those policies is a right of the individual professor. The rights associated with academic freedom are, strictly speaking, rights that belong to the university, or perhaps better put, to the academic enterprise. A professor engaged in the academic enterprise is protected by these rights. But a professor acting outside the standards of the profession, has no additional protections provided by academic freedom.

The distinction between academic freedom and free expression

This brings us to our final question, that of the distinction between academic freedom and freedom of expression. Freedom of expression under our First Amendment is one of the core freedoms of our society and our system of government. Although worthy of an entire lecture (or several) on its own, suffice it to say for now that the basic principle of free expression is that the government may not regulate the speech of its citizens except in very narrow and specified circumstances such as actual threats, conspiracy to commit a crime or defamation. The state may regulate the time place and manner of speech – no loudspeakers after midnight – but all such speakers must be strictly content neutral. The government may not take sides in debates and cannot punish or restrict poorly reasoned claims or generally speaking even outright falsehoods.

As a limitation on governmental power, constitutional principles of free speech, therefore, apply to state educational institutions. This has been settled law for over half a century, since the Supreme Court decision in *Pickering v. Board of Education* (1968). Pickering was high school teacher who wrote a letter to the editor attacking the school board for a bond issue and its funding between athletics and academics. The Board of Education moved to dismiss him, but the Court held that First Amendment rights apply to public employee in this context, that is, outside of his professional role. His letter was written as a private citizen, and he was entitled to full protection from governmental interference to write a letter expressing his views.

Pickering was restricted in 2006 in a case called *Garcetti v. Ceballos*. Ceballos was a Deputy District Attorney who drafted a memo to dismiss a case and then unsuccessfully argued vociferously for doing so. The DA's office ordered him transferred and denied him a promotion. The Supreme Court held that the First Amendment does not protect a government employee from discipline based on speech pursuant to official duties. Ceballos was writing a memo in performance of his official duties and can be sanctioned by Government qua employer. *Pickering*, on the other hand, involved public speech by a citizen, not an employee per se, and was thus beyond reach of government.

What does *Ceballos* mean for a public university professor? This was an issue at the time of the decision, raised in a dissenting opinion by Justice David Souter, joined by Justices John Paul Stevens and Ruth Bader Ginsburg. They argued that placing speech that is in furtherance of a public employee's duties outside the protection of the First Amendment could affect professors whose writing might then also be beyond the reach of the First Amendment. Although the

Supreme Court has never dealt with this precise issue, two Courts of Appeals have, and each held that *Ceballos* cannot apply in the context of higher education.⁴

I believe that Justice Souter, and those two appellate courts, are correct. But it requires one further level of refinement. The government cannot regulate an academic's expression that is part of her or his official duties, that is to say, their teaching or scholarship. But someone may. Let me say the next sentence very carefully: we regulate and restrict expression in the academy all the time. When we evaluate a file for appointment, or promotion or tenure, we are attaching consequences, perhaps negative consequences, to the candidate's expression. Why is that permitted? It is permitted because now the right involved is not the right of free expression – largely without limitation. It is the right of academic freedom, governed by the standards of the academic profession. As both Kant and the *1915 Declaration* understood, non-academics are in no position to evaluate the professional standards of an academics' work – were the government to do so, it would be a violation of the First Amendment. But academics are in such a position and must apply professional standards to the evaluation of a colleague's work. Put simply, there is a First Amendment right to say silly and even indefensible things. But there is no right to receive tenure or promotion for doing so. Recall that academic freedom for the academic, *Lehrfreiheit*, fundamentally applies to the university itself. Individuals earn the protection of that freedom so long as they are performing as academics within the standards of our profession.

I promised earlier that I would return to the largely ignored aspect of academic freedom in American doctrine, *Lernfreiheit*, the academic freedom of students. Let me conclude with some brief observations in this regard. Students at public universities, like their faculties, are

⁴ *Adams v. Univ. of North Carolina Wilmington* (4th Cir. 2011); *Demers v. Austin* (9th Cir. 2013).

entitled to the protections of free expression. But what about those at private schools? And indeed, how should we understand the role of students altogether on the academy? We would do well to consider the role of students in the overall academic enterprise. They are not merely those to whom we transmit material; they are our partners in the academic process. Rabbi Chanina, a third century CE scholar said: “Much have I learned from my teachers, even more have I learned from my colleagues, but from my students I have learned more than from anyone else.”⁵

Of course, students on public university campuses should enjoy the same broad free expression rights that all members of our society have. But they and their colleagues in private colleges and universities should be granted rights of academic freedom as well. Moreover, they should be held subject to the *responsibilities* of the academic enterprise.

Academic freedom for all members of the academic community does more than protect us from undue interference. It challenges us to define the very essence of the university. The *1915 Declaration* asserted that “a university is a great and indispensable organ of the higher life of a civilized community.” But it reminded us that “it is ... not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion, and of teaching, of the academic profession,” that is at the heart of the matter of academic freedom. Academic freedom is essential for the creation and dissemination of knowledge, and as Francis Bacon taught us at the dawn of the modern age, knowledge is indeed power. Academic freedom is thus essential for a self-governing people, and ultimately is indispensable for our very democracy.

⁵ *Ta’anit* 4a.

