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# Seegers Lecture

## HOLOCAUST DENIAL AND ACADEMIC FREEDOM

Stanley Fish

### I.

On April 11, 2000, in a London courtroom, Judge Charles Gray declared in favor of defendant Deborah Lipstadt, author of *Denying the Holocaust*, and against David Irving, a freelance historian who had sued Lipstadt and her publisher, Penguin Books, for libel on the basis of her characterization of him as a Holocaust denier and a manipulator and distorter of historical evidence. Irving charged that Lipstadt's statements impugned his credentials as a historian and brought him into professional disrepute. Lipstadt and Penguin Books replied by asserting the truth of what had been published, and after massive expert testimony in support of their claim was presented, Judge Gray agreed, and ruled (among other things) that Irving would have to pay the costs of the defense, some two million pounds.

To date, the trial has been the subject of two books, a number of essays, and innumerable reports in newspapers and magazines. What is remarkable about these materials is the degree to which the issue is seen not as the accuracy of a particular historical account, but the honor of history itself and even the honor of Truth. Such rhetorical overkill has been a feature of discussions of Holocaust denial ever since the phenomenon became a matter of public comment. The subtitle of Lipstadt's book is *The Growing Assault on Truth and Memory*. In Michael Shermer's and Alex Grobman's *Denying History*, the concerns of Lipstadt's subtitle are raised to the position of the main title. A recent piece in the *New Yorker Magazine* ends with the portentous statement that "Irving's only victim was the truth."<sup>1</sup> In an essay published in *The Atlantic Monthly*, D.D. Guttenplan spends a final paragraph celebrating "the sanctity of facts."<sup>2</sup> In the eyes of these authors, Irving is a perpetrator of crimes against epistemology. Irving must be answered not so that a factual dispute can be resolved, but so that the very idea of fact can be protected from a deconstructive subversion. This line of

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<sup>1</sup> Ian Buruma, *Blood Libel*, NEW YORKER MAGAZINE, April 16, 2001, at 86.

<sup>2</sup> D.D. Guttenplan, *The Holocaust on Trial*, THE ATLANTIC MONTHLY, Feb. 2000, at 66.

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argument is, I believe, an error, both philosophical and tactical, and in what follows I will try to say why.

Let me begin by affirming some basic propositions. First, the Holocaust certainly did occur, and I say this not as an expression of opinion, but as a matter of fact about which I have no doubt. Second, Deborah Lipstadt is persuasive when, in *Denying The Holocaust*,<sup>3</sup> she links Holocaust denial to the traditional tropes of anti-semitism and locates the phenomenon on the radical right and the lunatic left where it makes company with various forms of racism and fascist ideology. Third, Professor Lipstadt is correct in her refusal to debate Holocaust deniers and in the reason she gives for that refusal: to debate would be to confer legitimacy on a vicious and evil argument by granting it the status of "the other side" in a controversy supposedly not yet settled by conclusive evidence. Fourth, Professor Lipstadt is also correct when she takes Holocaust denial seriously despite the relatively small number of those engaged in it; for, as she sees, while few may be actively promoting the gospel of denial, modern forms of communication make it possible for the words of a few to make an impression on multitudes, especially if they appear (however negatively labeled) in respectable venues like ABC News and the New York Times or are given representation on panels and conferences convened by universities and professional associations.

Now for the dropping of the other shoe. Although I admire Lipstadt's work and believe that on most substantive points she is right, I believe too that she is wrong about why she is right. She is wrong, that is, to rest her case for what is right (and true) on distinctions like those between "irrefutable evidence"<sup>4</sup> and myth, rationality and bigotry<sup>5</sup>, "reasoned dialogue and anti-intellectual pseudo-scientific arguments"<sup>6</sup> "reasonable inquiry" and "ideological extremism,"<sup>7</sup> genuine arguments and ad-hominem arguments.<sup>8</sup> The trouble with these distinctions is that they do their work—the work of marking off the legitimate from the illegitimate—only when the content of those categories has been specified in advance, that is, when you already know (at least to your satisfaction) what is legitimate and what is not. Lipstadt knows before she even encounters it that any argument denying or diminishing the Holocaust is

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<sup>3</sup> See generally, DEBORAH LIPSTADT, *DENYING THE HOLOCAUST* (1993).

<sup>4</sup> *Id.* at 21.

<sup>5</sup> *Id.* at 18.

<sup>6</sup> *Id.* at 25.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

specious and that the so called evidence it invokes is not really evidence at all but strained rationalization and downright fabrication; that is why she dismisses Holocaust denial as "the apotheosis of irrationalism."<sup>9</sup> And on the other side, her opponents know that any evidence supposedly supporting the myth of the Holocaust proceeds from the vast and well funded machinery of a Zionist conspiracy, and that in truth, in the words of Mark Weber, the myth's "underpinnings in the world of historical fact are non-existent--no Hitler order, no plan, no budget, no gas chambers, no autopsies of gassed victims, no bones, no ashes, no skulls, no nothing."<sup>10</sup> Neither party reaches its conclusion by sifting the evidence on the way to determining the truth of the matter; rather, each begins with a firm conviction of what the truth of the matter is, and then from inside the lens of that conviction receives and evaluates (the shape of the evaluation is assured) the assertion of contrary truths. In saying this I am not faulting either party, at least not on this score. As Augustine long ago taught us (in *On Christian Doctrine*)<sup>11</sup>, no sequence of reasoning can even get started without the anchoring presence of some substantive proposition it did not generate. That proposition may or may not be true, but its truth will be neither confirmed nor disconfirmed by the ratiocinative process it grounds and directs. True belief does not emerge from reason's chain; rather true belief--and false belief too--configure reason's chain and determine in advance what will be seen as reasonable and what will be recognized as evidence. Lipstadt is wrong to assert that "evidence plays no role for deniers"<sup>12</sup> or that deniers "repudiate reasoned discussion"<sup>13</sup>. Deniers' pages are no less full of evidence and reasoning than are her pages; it is just that what is evidence for them is absurdity for her and what is evidence for her is Zionist blindness for them. This does not mean that there is nothing to choose between them--I have already declared my choice and in unequivocal terms--but that the choice cannot be made on the basis of who uses evidence and who doesn't (that's just a version of name calling.)

How then does one choose? The question is misleading because it pictures choosing as an action performed by an intelligence abstracted or distanced from partisan affiliations, ethnic and religious background, educational history, and so on; some one who, in Jurgen Habermas'

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<sup>9</sup> LIPSTADT, *supra* note 3, at 20.

<sup>10</sup> Mark Weber, *Newsletter of the Institute for Historical Review* (1998)

<sup>11</sup> ST. AUGUSTINE, *ON CHRISTIAN DOCTRINE* BOOK II, XXX-XXXIV 397 (D.W. Robinson, trans., Bobbs-Merrill ed., 1958).

<sup>12</sup> LIPSTADT, *supra* note 3, at 21.

<sup>13</sup> *Id.* at 20.

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phrase, assents to nothing but the "better argument."<sup>14</sup> But there is no better argument in the sense Habermas intends, no argument whose "betterness" will impress itself on any person not in the grasp of some ideological obsession, no argument so little beholden to the variety of circumstances and assumptions that its rightness is self-evident. This is not to say that there are no better arguments, only that they emerge and are registered *as* better against the background of other arguments already identified as better, arguments long since accepted and now firmly in place as cornerstones in the sedimented structure of a mind whose categories and rubrics organize the world, not after perception but in the act of perception. I did not decide one day that the Holocaust did happen and was an undoubted fact. I grew up in a culture (post-war, American and Jewish) where the Holocaust (then not named) was a given, with relatives who had survived it, and a father who spent time and money bringing those relatives to the United States. It would no more have occurred to me to question either the fact or the enormity of the event than it would have occurred to me to question the fact that I was a resident of Providence, Rhode Island or that Ted Williams was the greatest living baseball player if not the greatest living American. As a result when I first heard about the phenomenon of Holocaust denial, I heard it as an obvious absurdity, as an outlandish thesis that had attached to it a burden of proof requirement so strong that nothing was likely to satisfy it.

That's the way it is with evidence; it doesn't just sit there unadorned and unencumbered asking for your independent evaluation; it sits in the midst of a structure (of belief and conviction) that precedes it and colors ones reception of it. Consider another, less culturally fraught, example. I make my honest living as a Miltonist, someone who teaches and writes about the poetry and prose of John Milton. Like the majority of Miltonists of the past one hundred and fifty years (pretty much the entire history of Milton studies), I move back and forth between the poetry and the polemic prose, reading one in the light of the other, and, again like the vast majority of my fellow Miltonists, I rely especially on Milton's massive theological treatise *De Doctrina Christiana, Christian Doctrine*.<sup>15</sup> A few years ago, William Hunter of the University of Houston, a distinguished Miltonist, published an essay and eventually a book asserting that *Christian Doctrine* was not written by Milton. I shall not here rehearse his arguments, which are well reasoned and supported

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<sup>14</sup> JURGEN HABERMAS, *BETWEEN FACTS AND NORMS* 35-36, 170 (1996).

<sup>15</sup> John Milton, *The Christian Doctrine*, in 17 *THE WORKS OF JOHN MILTON* (F.A. Patterson et al. eds., 1934).

by evidence in the usual literary-historical ways. I shall only report that those revisionist arguments have been rejected by most Miltonists and that the evidence adduced for them has been found unpersuasive. Now a cynic might say that this outcome only indicates the extent to which workers in a field will find a way to dismiss a thesis which, if it were accepted, would necessitate a re-evaluation and a downgrading of everything they had accomplished in the course of their careers; and it is certainly the case that the Milton who is presented in the books and essays written by members of the Milton Society of America (and we are all members) is a Milton whose beliefs and doctrinal affiliations are generally congruent with those found in *Christian Doctrine*. But this same observation might be made in a more generous (and accurate) spirit: insofar as there is a public entity called "John Milton", he is the product of the labors of men and women working within certain shared assumptions, including the assumption that he is the author of *Christian Doctrine* (an assumption they no more decided to believe in than I decided to believe in the factuality of the Holocaust). In effect these men and women were now being asked to assent to the proposition that the John Milton they intimately and confidently knew wasn't John Milton but someone else, a someone else whose life and works they would have to start constructing all over again. Of course they imposed a very severe burden of proof requirement and it is neither surprising nor the occasion for cynicism that in their judgment the requirement wasn't met.

Could William Hunter be right and the majority of Miltonists be wrong? Sure, there is always that possibility, not simply about this matter of dispute, but about any matter. But the fact that Hunter might turn out to be right in the long run is not a reason for withdrawing from our present conviction that he is wrong or for declaring the question to be in doubt because on some future day when more evidence is produced we might change our minds. Intellectual responsibility does not require us to be absolutely certain of the truths we affirm beyond the possibility of their ever being refuted (that requirement would make the assertion of truth impossible, for it could never be met) only to be certain that the truths we affirm square with the evidence provided by our best lights (which will not be everyone's best lights). As Judith Jarvis Thompson explains, when someone proposes a counterintuitive thesis (the Holocaust didn't happen; Milton didn't write Milton's *Christian Doctrine*), the burden of proof is his and "requires his producing what we—given our past experience—can see to be reason to revise our beliefs. For what is in question is whether *we* [a particular, situated *we*] would be acting responsibly in refusing to reverse ourselves—not whether an all knowing God would, but whether *we* would." That is why,

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Thompson concludes, "our acting responsibly in refusing to reverse ourselves is entirely compatible with our being mistaken" in the long run.<sup>16</sup>

What this means is that Lipstadt needn't make the strong claims that all the evidence is on her side, that her evidence is "irrefutable"<sup>17</sup>, that Holocaust deniers have no evidence, and have forsaken deliberative reason for ideology. But I would make the point more strongly: she *shouldn't* make those claims because they (implicitly) set the bar of validation too high and open up a space in which the deniers can play games they wouldn't have been able to play had the bar been set lower. Let me explain. If the standard of validation is the establishment of a truth that is invulnerable to challenge, no one, including Lipstadt, could meet it; and, moreover, in the gap between that unrealizable standard of proof and what *can* be proven according to standards less severe, there is room for all the little maneuvers deniers so skillfully employ – insisting that all points of view, and especially theirs, should have a fair hearing and not be discounted until they have been proven to be absolutely false (no such proof will ever be available); raising questions (about autopsies, budgets, master plans, precise numbers, etc) that cannot be definitively answered, and arguing that until they are answered the issue must remain open; invoking First Amendment considerations generally and Academic Freedom in particular as warrants for fully entertaining every proposed doubt lest the Marketplace of Ideas be shut down prematurely (in the knowledge that a strong First Amendment position mandates that the Marketplace of Ideas *never* be shut down).

These maneuvers are effective in part because they seem answerable to the criteria favored by Lipstadt and others – objectivity, disinterestedness, neutrality. Behind these words, as Lawrence Douglas has observed, is the demand that the past be approached "from a position of formal agnosticism,"<sup>18</sup> that is, from a position in which no belief is yet warranted and all matters wait to be proven by the independent processes of critical reason. This is, as Douglas goes on to say, "a weak position from which to defend the integrity of the historical record,"<sup>19</sup> because by suspending positive belief and putting everything

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<sup>16</sup> Judith Jarvis Thompson, *Ideology and Faculty Selection*, LAW AND CONTEMP. PROBS., Summer 1990, at 155, 160-161.

<sup>17</sup> LIPSTADT, *supra* note 3, at 21.

<sup>18</sup> Lawrence Douglas, *Policing the Past: Holocaust Denial and the Law*, in CENSORSHIP AND SILENCING 67, 82 (Robert C. Post ed., 1998).

<sup>19</sup> *Id.*

indifferently up for grabs, the historical record is rendered the play-thing of the infinite and infinitely contested assertions that can be made about it. When nothing is granted even a provisional certainty—when every fact must be tested down to its (non-available) ground—the category of the “taken-for-granted” or “what everyone knows to be true” loses its members, and no one can rely on truths commonly held or refute obvious falsehoods by simply declaring them to be such. The irony, as Douglas points out, is that the “evidentiary agnosticism”<sup>20</sup> or “discursive neutrality”<sup>21</sup> supposedly devised to safeguard truth and fact from the incursions of ideology, have instead “the effect of contributing to the erosion of the very boundary between truth and fiction”<sup>22</sup> it claims to police. This is a result usually attributed, mistakenly, to the arguments of postmodernism; but it is the arguments of liberal neutrality and objectivity that produce it and by producing it keep alive the Holocaust revisionism they are brought in to combat.

What then *does* one do in order to combat the virus of Holocaust denial? The answer to the question is contained in the Thompson-Douglas critique of evidentiary agnosticism and discursive neutrality. Don’t flee the historical record in the name of empty and manipulable abstractions. Resist appeals to fairness, process, free speech, academic freedom, or any other “principle” invoked in order to lend a veneer of legitimacy to arguments that would otherwise not be taken seriously. (These resonant words and phrases have done honorable work in the past, but in the present case they are being wielded as weapons and anyone who rises to their bait is saying “hit me again” and playing the game on the enemy’s terms.) Insist that truths generally acknowledged enjoy an earned privileged position and that anyone who seeks to dislodge them must jump over a formidable succession of hurdles; the playing field is not level and shouldn’t be. Rely without apology on the ordinary, tried and true, sources of authority—government agencies, official commissions of inquiry, standard works of scholarship, and the received wisdom of professional bodies and associations.

Thompson provides a model when she imagines the response a college committee charged with recommending a disciplinary home for an open chair might make to the suggestion that the chair be devoted to astrology. Presumably, she conjectures, the committee will vote the suggestion down, but then a “friend of astrology requests a hearing... at

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<sup>20</sup> *Id.* at 81.

<sup>21</sup> *Id.* at 83.

<sup>22</sup> *Id.* at 81.



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which he says, 'New ideas...AAUP...germination space...defenders of orthodoxy.'<sup>23</sup> "What," she asks, "do we reply?" Well, we might say that "astrology does not meet even the minimal standard and enterprise must meet if it is to count as a science."<sup>24</sup> But, as she points out, "the friend of astrology is not without a reply." He might, for example say "Prove it!," that is, prove that there is no relationship between the stars and the course of earthly events despite Shakespeare's apparent belief in stellar influence, the many civilizations in which astrological predictions have been and are still today accorded great authority, the millions of readers of professional astrologers compensated very handsomely by some of our leading newspapers. But, as Thompson sees, this is a trap; for it is a demand for a proof arrived at by setting aside (as biased, parochial, self-interested, tied to the status quo) the authorities and traditions of inquiry that led the college committee to reject the candidacy of astrology immediately, and beginning again from the ground up, from scratch. This, however, is not the way we make judgements or could possibly make judgments; for the very intelligibility of a scene of judgment depends on a background of prior judgments already made and taken for granted. It is only against such a background that alternative courses of actions are perspicuous and available for consideration; take the background away, and you are indeed back at ground zero with no resources to guide you and no defense at all against those willful polemicists who would substitute their history for the history you have unwisely surrendered. The request that we begin again from a position of neutrality and suspicion of currently prevailing views seems to breathe the spirit of critical reason, but in fact it is a device designed to afford conspiracy theorists a blank page on which to inscribe their fantasies.

Thompson is eloquent both on the false challenge of "Prove it" and the appropriate way of dealing with it:

To begin with, could we prove that astrology fails to meet the minimal standard, and is therefore not a science? Perhaps you could, but I can't. I can't even do much in the way of formulating an argument. I believe that the motions of the heavenly bodies do not influence the everyday affairs of ordinary people, but on what ground do I believe this? My believing is a product of a vague, loose conception of how the world works and of

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<sup>23</sup> Thompson, *supra* note 14, at 158.

<sup>24</sup> *Id.* at 159.

what causality involves and requires, picked up over the years from experience (which includes some snippets of science I have become acquainted with), and there is nothing I can produce in the way of compact, clear argument for my belief. Perhaps one of my colleagues in our physics department could do better than I can...but I say only perhaps, because demonstrating that the motions of the heavenly bodies do not influence the everyday affairs of ordinary people is not a task that the average physicist has ever thought of carrying out, and it is not obvious how he or she is to do so.

Does that mean that I acted improperly in voting against astrology? I should think not. To suppose it does is surely to indulge in excessive high-mindedness about what responsible decision-making requires. Since my belief really did issue from a conception of how the world works, acquired from past experience, I need not be capable of proving that there is no future in astrology in order to have acted responsibly in rejecting it.

Indeed, it would have been irresponsible for me to have acted otherwise... As a member of the committee, I was under a duty precisely to bring my past experience to bear on, among other questions, the question what fields are worth investing in. Given my past experience, I would have failed in that duty if I had refrained from voting against astrology.<sup>25</sup>

This is so good and so clear that it needs no gloss and allows us easily to transform the example, as Thompson later does, to one in which a Holocaust denier applies for a position in your History department. What you do is stand on your past experience, which includes the collective experience of the historical profession, mark the distance between what it tells you with all of the authority of many previous scholarly findings and what the denier now tells you, and reject the petition without engaging in any deep philosophical discussions ("excessive high mindedness") of what is and is not a fact, and of whether or not facts are socially constructed, and of whether the book of inquiry can ever be closed—all real questions to be sure, but not to the

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<sup>25</sup> *Id.* at 159-60.

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point here where you are making an institutional decision. Always remember, Thompson admonishes, that the denier must justify his candidacy "to us," not to some imagined committee of meta-historians or philosophers of language: "it is in light of our past experience with and in history that we must assess his competence for the position... And we have a principled defense of our assessment just to the extent that we have exercised due care [again a professional standard, not a philosophical one] in arriving at it."<sup>26</sup>

I would be remiss if I did not acknowledge that some of the opponents of Holocaust denial are already acting as Thompson advises them to do, but unfortunately they often weaken their stance by embroidering it with a rhetoric that leaves them vulnerable to the counter-strategies of their enemies. Consider, for example, an oft-cited declaration of principle produced by the Duke University History department in the wake of Bradley Smith's successful attempt to place a Holocaust denial ad in the student newspaper. The History department in its collective and unanimous wisdom said:

That historians are constantly engaged in historical revision is certainly correct; however, what historians do is very different from this advertisement. Historical revision of major events... is not concerned with the actuality of these events; rather, it concerns their historical interpretation—their causes and consequences generally. There is no debate among historians about the actuality of the Holocaust.

This statement has a good part and a bad part. In the bad part the members of the department try to separate themselves from deniers by distinguishing between the uncovering of fact (what they do) and subsequent acts of interpretation (what the other guys do), a distinction also declared by Lipstadt: "The historian does not create, the historian uncovers. The validity of a historical interpretation is determined by how well it accounts for the facts."<sup>27</sup> But the distinction works only if the historical facts are self-declaring, self-evident, just waiting to be uncovered by the first researcher with unbiased eyes (whatever they would be); then it would make sense to imagine (as Lipstadt does) rival interpreters setting their interpretations next to the facts in anticipation

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<sup>26</sup> *Id.* at 171.

<sup>27</sup> LIPSTADT, *supra* note 3, at 25.

of the judgment they will then render, as in "this account of us is pretty good, but this other is way off the mark." Michael Shermer and Alex Grobman imagine a similar scenario when they define the work of the historian as "the combined product of past events and the discovery and description of past events."<sup>28</sup> According to this language, events exert a pressure on their own discovery and co-operate, in a way that remains unspecified, with the task of describing themselves. But when lively disputes break out they are typically (and most interestingly) disputes about what the facts and the past events *are* and not about what they mean (although that is certainly another order of historical debate). Indeed if the facts and past events spoke for themselves, even in the minimal sense of specifying the general outlines of their interpretation, there would be very little, if anything, for historians to do, and it would be hard to account for the extraordinary passion of disputes about fact, unless one party simply declared that the other was crazy, mendacious, and evil, which is of course what happens all the time.

On the day (August 7,2000) that I write this, the *New York Post* carries a two page story detailing the failure of the United States to intervene on behalf of Polish and Italian Jews when it would have been possible to do so. Just yesterday (August 6), the *New York Times Sunday Book Review* devoted a full page to a new book arguing that The United States did what it could do and should have done, and is in no way to be faulted.<sup>29</sup> This is a matter of disputed *fact*--what did the U.S. do and when did they do it if they did it and could they have done more?--not of interpretation, although the interpretations will certainly follow once the main facts are settled (if they are settled) to the satisfaction of all the debating parties (a satisfaction that could always be upset by later revelations, but so what?). The moral is clear. Those fighting against Holocaust deniers are in the same business as their enemy, not in some cleaner, less interpretive, less interested business; what separates them are not their epistemologies, but their beliefs and conclusions. The answer to the question in Shermer's and Grobman's subtitle--why do Holocaust deniers say it?--is that they believe it, which is also the reason Holocaust affirmers say what they say; they believe it. But, comes the objection, Holocaust affirmers say what they say because they have evidence for it, to which I give the reply I have already given: everyone has evidence; the problem is that one man's evidence is another man's

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<sup>28</sup> MICHAEL SHERMER & ALEX GROBMAN, *DENYING HISTORY: WHO SAYS THE HOLOCAUST NEVER HAPPENED AND WHY DO THEY SAY IT?* 21 (2000).

<sup>29</sup> Omer Bartov, *A Tale of Two Holocausts*, N.Y. TIMES, Aug. 6, 2000 § 7 (Book Review Desk), at 8. (reviewing NORMAN G. FINKELSTEIN, *THE HOLOCAUST INDUSTRY* (2000)).

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rationalization or fabrication, and in the absence of a category of evidence labeled “undisputed by no one” or “unavailable to challenge”, the marshaling of evidence will not settle disputes, but fuel them.

Shermer and Grobman pose the right question when they ask “We all write our own ideological scripts, so what is the difference between our scripts and the scripts of extremists,” although the answer they seek is unavailable.<sup>30</sup> What they are looking for is a difference more generally and abstract than the difference between those scripts that persuade us and those that don’t, but there is no such difference. If I am persuaded that Deborah Lipstadt is right and David Irving is wrong, it is not because she has a better theoretical account of evidence and fact than he does (as I have already said, her account of these matters is to my mind naive and incoherent), but because the archives she consults, the authorities she cites, the lines of reasoning she pursues, the corroboration she can claim from others in the field, all ring more true to me than the parallel authorities, archives, lines of reasoning and citations to colleagues proffered by Irving. This is the way historians achieve credibility – by telling a story that fits with the stories we already know to be true and telling it in ways that correspond to our by now intuitive and internalized sense of how one connects the dots between observations on the way to a conclusion. Historians do not gain credibility (or anything else) by becoming meta-historians, that is by giving big answers to large questions like, What is the nature of fact?, How does one determine what counts as evidence?, Can the past be reconstructed?, Can the distinction between the past and the present be maintained? Whatever answers you give to such questions will be entirely unhelpful and beside the point when you return from their airy heights to the questions historians appropriately ask. If I say it is a documented fact that such and such a number of persons died in gas chambers, and you say, but facts are disputable, the evidence is not all in, the past is always a construction of present desires, or some such, then I should respond, all that may be true, but so what? You don’t dispute anything by declaring that it could be disputed; and the fact that the evidence is not all in merely means that time has not yet run its course, and that meanwhile we live (as John Donne said) in Time’s parentheses where we much do our work and reach our conclusions. The fact that others, perhaps equally credentialed, reach opposite conclusions and cling to them even in the fact of our evidence is unfortunate (from our point of view), but no remedy will be found in some general

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<sup>30</sup> SHERMER AND GROBMAN, *supra* note 28, at 91.

epistemological account in the light of which one set of conclusions will be validated and the other not. I may believe that I am absolutely right about the reality of the Holocaust and about Milton's authorship of the *Christian Doctrine*, but my conviction that my arguments and conclusions are superior to those of my opponent will never be shored up by the judgment of some independent epistemological machine. In so far as such a machine has been constructed, it will either be so general that there is no way to get from its operations to the questions we want to answer, or if you can get from the machine to an answer it is because the answer—partisan and stipulated in advance—has been built in. What this means is that evidentiary procedures rather than standing above or to the side of polemical arguments are part and parcel of those arguments, which means that, epistemologically speaking (an ugly phrase), our scripts and the scripts of extremists are the same; or rather, with a nod to Baudelaire, we are all brother extremists, just for different faiths.

Does this mean that Holocaust affirmers are without recourse in their efforts to discredit, and by discrediting silence, Holocaust deniers? Not at all. It just means that no help will be found in metacritical accounts of history or theories of fact and evidence, for as I have already said twice now, everybody has those. Where then is the difference that can be seized and provide the basis for victory? The answer lies in a fact everywhere noted, but whose strategic and practical implications have been too little grasped: the vast majority of mainstream researchers support Holocaust affirmers and reject Holocaust deniers. In an important sense, the battle has already been won, but the victors fail to see it because they want victory on terms—philosophical/epistemological terms—that will never yield it. They dissipate their huge advantage when they insist on buttressing it with uncashable theoretical claims. My advice is simple and easy to follow: forget the theory, forget the epistemology, forget the meta-history—they are the preferred games of the opponent—and just go with the privileged position you already enjoy by belonging to a pre-eminent and powerful guild.

That's the good part of the Duke History Department statement, the declaration that "There is no debate among historians about the actuality of the Holocaust." The declaration is circular, but in its circularity lies its strength. It is circular because the category "historians" is understood implicitly as excluding, among other things, people who deny the Holocaust. That is, in the eyes of the members of the Duke History Department, you can't be a historian if you don't accept the historical reality of the Holocaust, and since no one who

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doesn't hold the right view will ever be asked to join the Duke History Department, you can be sure that this statement can and will be made ad infinitum. Nor is this true of that department only. In 1991, the American Historical Association declared firmly, "No serious historian questions that the Holocaust took place". Here it is obvious that "serious historian" means one who doesn't question the Holocaust, and it follows (again in a circular fashion) that there will never be a serious historian who questions the Holocaust because no such person will be let into the historians' guild or invited into its debates. (But what if a recognized serious historian already in the guild suddenly became converted to this heresy? He or she probably wouldn't be excommunicated and certainly not fired, but would instead be shunned, stigmatized, politely harassed and encouraged in every way legal to exit the profession as soon as possible.) At this point a scholarly Holocaust denier—a denier with degrees and other academic qualifications—might complain, "but you're not even giving me a chance; you're just deciding in advance that views like mine will not be represented in your association and its departments; you're just using the professional prestige of your institutions to shut me out." And the response, if there is one, should be "that's right; you're being shut out and you will never be let in as long as we have anything to say about it, and it's a good thing too". But isn't that a naked exercise of power? The answer is "no." Shutting Holocaust deniers out would be a naked exercise of power if it were arbitrary, if there were nothing behind it except the desire wholly to own the franchise and prevent anyone else from claiming a part of it. But standing behind the exclusion of deniers is the massive record of rigorous research undertaken by superbly credentialed men and women whose conclusions have met every reasonable test put to them. Those who have contributed to this record need not be apologetic about protecting it from the assaults of persons who would use the vocabulary and machinery of intellectual inquiry to further ends that are rarely if ever openly acknowledged, but known to everyone. When your opponent is only pretending to play your game so that he can subvert it and pervert it, you have every right—it is an *earned* right—to walk away and refuse him the advantage of engagement.

By urging reliance on guild authority, I would seem to be vulnerable to an objection that looks both backward and forward: if the guild were corrupt, if at some future time mainstream historians had been persuaded to Holocaust denial, would I make the same argument, or, alternatively, had I been a lawyer in Vichy France when the guild of lawyers was in complicity with the Nazi occupation, would I have put my faith in legal practice as it was constituted then? This

question/objection--posed pretty much in these terms by Richard Weisberg at the Emory conference on Holocaust denial in November, 2000--harbors two assumptions I would challenge. First that I am idealizing guild practice as such and identifying it as a trumping authority, and, second, that the question of what I would have done in the 1940's or would do in, say, 2025, is coherent and intelligible. But my recommendation that Holocaust affirmers rest their case on what mainstream researchers have produced in the way of evidence and conclusions is strategic not normative. It is not a philosophical argument for professional inerrancy, but a pragmatic argument that follows from my contention that normative arguments provide Holocaust deniers with opportunities to play their fancy theoretical games. All I'm saying is, don't look there, in the world of normative abstractions, for support; instead, look here, in the ready made world of professional practices and judgments. But of course I say that within the conviction (not argued for but just in place) that the guild of mainstream historians is *not* corrupt and goes about its business with dedication and integrity (although to be sure that there are probably some members of whom that could not be said). My confidence in that guild in no way commits me to having confidence in all other guilds nor does it commit me to retaining my confidence in this guild should it fall into shoddy or venal practices. Were that to happen I could easily see myself giving advice contrary to the advice I have been giving so far and urging well-intentioned historians to reject the practices of a guild I had judged unworthy.

But in order to make such a judgement, on the historians' guild or any other, wouldn't I necessarily be invoking some perspective more general and higher than the perspective of any particular guild or context of practice, some normative or transcendent perspective? The answer is no. I would be making the judgment from the perspective of some other practice (political, moral, economic, domestic, whatever) in which I was affirmatively engaged. The fact that no authority higher than the authority provided by practices is available does not mean that a practice can not be critiqued or rejected. It just means that it can not be critiqued or rejected by some standard or measure that is itself not part of some practice. But the unavailability of such a measure (the point to which I keep returning) does not leave me (or you) without a basis for judgment since there will always be practices that for contingent and revisable reasons have my (or your) confidence and therefore it will always be possible, and reasonable, for me (or you) to look out from within such practices and render judgment on other practices.



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Having said that, I now turn to the question of what I would have done in the past when conditions were different or might do in the future when, again, conditions were different. Would I still make the same arguments? This question is not and could not be a serious one. The reason is that there is no sense in which the "I" to whom the question is now put would be identical to the "I" imagined as living either in the past or the future. That is, the question requires me to project myself back or forward into circumstances other than the ones I am in now, circumstances that would find "me" formed by experiences (of education, upbringing, success, failure, career paths, etc.) other than the experiences that have, in fact, been mine; and then, when everything, including the categories of perception available to me, has been altered, I am asked, what would "I" do? The obvious question to this question is, who is this "I" you would have me answer for, and how am the "I" I am now to know him? The arguments from either hindsight or foresight are flawed in the same way; one asks what you have done then if you knew what you know now, knew the outcomes your actions would produce and were in possession of perspectives denied to the earlier "you"; the other asks you, what would you do if present outcomes were undone and everything were different. The answer in both cases is that if everything were different, "you" would be different too, and therefore it makes no sense to ask what a you that is not you would do. Challenges like this seem to have force because of the (unannounced) assumption that the "I" to whom they are put will always be the same, constituted by the same unchanging priorities, in possession of the same reservoirs of information, unaffected by its passage through history. But the fact of historical change—"what if things were different?"—is what impels the challenge, which comes unaccompanied by any explanation of why the only thing that would not change is the first person subject. If everything changes, persons change too, and the question of what "I" would have done in a past "I" didn't experience or a future "I" cannot know is a metaphysical conceit without any relevance to anything the real "I" might do or urge now. So I assert again that right now I urge those who would repel Holocaust deniers to trust in the conclusion reached by innumerable historical researchers, and I assert too that I am under no obligation to respond to hypotheticals that have a proper home, if they have any home, in philosophy seminars.

II.

But what about academic freedom? The question will always be asked, and it should be answered by distinguishing between two conceptions of academic freedom, one tied to the "discursive neutrality"

that constitutes, I believe, a trap for those who would beat back the deniers, the other tied to a Thompson-like faith in long standing disciplinary procedures and an implicit (although not absolute) trust in the conclusions they have generated. The first conception of academic freedom is the one most commonly invoked today. It is essentially ahistorical, less focused on the political and institutional struggles in the course of which academic freedom emerged as a rallying cry than on the timeless ideals and values—the values in fact of Enlightenment liberalism—of which academic freedom is said to be an instantiation. Those values include the disinterested search for truth, the separation of knowledge and power, the superiority of knowledge to belief, the submission of all views to the scrutiny of critical deliberation, the stigmatizing of no view in advance of its receiving a serious hearing, and the exempting of no view from the requirement that it put itself to the test of all challenges, including those that issue from sources its proponents distrust. The idea is that the truth will out, or as Milton said in his *Aeropagitica*, be victorious in a free and open encounter, and that healthy and unfettered debate is its best safeguard.<sup>31</sup> Indeed, so strongly did J.S. Mill believe in this vision that in *On Liberty* he advised that in the absence of a challenge to a received opinion, one or more should be invented so that the process of refining the truth be continued.<sup>32</sup> The obstacle to achieving an accurate view of the truth, according to those who follow in Mill's tradition, is the unfortunate affection we all have for the ideas, authorities, and moral imperatives that have been transmitted to us by culture, education, parental precept, religious affiliation, ethnic identification and political persuasion. Such lenses are unavoidable for partial beings, but their distorting effects can be neutralized, we are told, by a strict adherence to neutral process. As Neil Hamilton explains in his book *Zealotry and Academic Freedom*<sup>33</sup>:

This system [of the critical examination of everything] is inherently anti-authoritarian. By imposing the obligation to check opinions and to cultivate rather than curtail criticism, it deprives intellectual, social, religious, political, or ethnic authoritarians of all moral force. In this system, the impulse to stamp out the offending or

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<sup>31</sup> See generally, JOHN MILTON, *AREOPAGITICA: A SPEECH OF MR. JOHN MILTON FOR THE LIBERTY OF UNLICENSED PRINTING, TO THE PARLIAMENT OF ENGLAND, LONDON, PRINTED IN THE YEAR 1644* (A. S. Ash ed., 1998).

<sup>32</sup> See generally J.S. MILL, *ON LIBERTY* (1978).

<sup>33</sup> See generally NEIL HAMILTON, *ZEALOTRY AND ACADEMIC FREEDOM* (1998).

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insensitive opinion is an impulse to destroy knowledge itself.<sup>34</sup>)

Underlying what Hamilton calls the “system” is a realist epistemology that has been well described by John Searle who lists its basic tenets:

- “Reality exists independently of human representations”.
- “Truth is a matter of the accuracy of representation.”
- “A statement is true if and only if the statement corresponds to the facts.”
- “Knowledge is objective [and] does not depend on nor derive from the subjective attitudes and feelings of particular investigators... the objective truth or falsity of the claims made is totally independent of the motives, the morality, or even the gender, the race, or the ethnicity of the maker.”
- “Intellectual standards are not up for grabs. There are both objectively and intersubjectively valid criteria of intellectual achievement and excellence.”<sup>35</sup>

Together with the value of sustained critical inquiry as celebrated by Hamilton and derived from Mill, these tenets add up to a powerful case for the obligation to take seriously every proposed viewpoint or thesis no matter how outlandish or repugnant to received opinion. In the words of historian Thomas Haskell, in a university that thinks of itself as an extension of the Enlightenment project, “*The price of participation in the community of the competent is perpetual exposure to criticism,*”<sup>36</sup> and it would seem that allowing Holocaust deniers into the critical conversation is part of that price.

The challenge is clear: to come up with an argument that would allow those who dismiss deniers without a hearing to claim that they are upholding academic freedom, not violating it. In general there are two strategies that might further this aim. The first is to contest both the value of perpetual critical inquiry and the epistemology of which it is an

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<sup>34</sup> *Id.* at 161 (citations omitted).

<sup>35</sup> John Searle, *Rationality and Realism, What is at Stake?*, in *ACADEMIC FREEDOM AND TENURE: ETHICAL ISSUES 201, 203-04, 206-07* (R.T. George ed., 1997).

<sup>36</sup> Thomas L. Haskell, *Justifying the Rights of Academic Freedom in the Era of “Power/Knowledge,”* in *THE FUTURE OF ACADEMIC FREEDOM 43, 47* (Louis Menand ed., 1996).

extension. You might do this in several ways. You could argue that when critical inquiry is elevated to the highest value it subordinates the truth it supposedly serves in favor of its own processes. You could argue that there is no such thing as a disinterested search for truth and that if one began a search without interests already in place there would be no reason to go in one direction rather than another or to go in any direction at all. You could argue that knowledge is a function of belief and that in the absence of belief--of some contestable notion of what the world is and/or should be like--nothing would emerge for you as a fact or a piece of knowledge. You could argue that the obligation to submit all of ones views to the scrutiny of critique is incoherent, for that would leave one without a center or focus from the vantage point of which a scrutiny might be conducted. You could argue that while it is certainly true that reality exists independently of human representations, human representations are all we have and that while such representations are indeed corrigible and revisable, they cannot be revised by juxtaposing them to the reality of which they are the representations (if they could be so revised you wouldn't need them; see the third book of *Gulliver's Travels*<sup>37</sup>). You could argue that while truth is surely a matter of the accuracy of representation, measures of representation are themselves cultural and socially constructed and you always have to ask, "accuracy as determined by what contextual and debatable models?" You could argue that of course a statement is true if and only if the statement corresponds to the facts, but that since the facts don't stand up and tell you what they are, the correspondence is of representation to representation and not of representation to (unrepresented) fact. You could argue that while knowledge is objective, objectivity is itself a standard relative to the in place norms and evidentiary rules of a continually evolving discipline or practice. (As Richard Rorty once said, "objectivity is the kind of thing we do around here"). You could argue that while intellectual standards are not up for grabs in the sense that you can't just declare new ones when the old ones thwart your purposes, intellectual standards are nevertheless debatable, and debating them is a large part of what goes on and is itself an activity presided over by intellectual standards which are themselves in turn available to challenge, a challenge that would itself be conducted according to intellectual standards, which would themselves be challengeable, and on and on and on.

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<sup>37</sup> See generally JONATHON SWIFT, *GULLIVER'S TRAVELS* (1999).

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Now, I have myself made some of these arguments and would be willing to do so again, if I thought it would be a good way to go. But it is not, first of all because such arguments are hard to make in the current intellectual climate (still configured by Enlightenment liberalism), and therefore those who make them are always on the defensive, which is exactly where deniers want them to be; but second, and more important, there is a better argument available in the alternate conception of academic freedom as a historical practice produced not by the demand for philosophical coherence but by the urgently felt needs of those engaged in a certain form of professional behavior. This kind of academic freedom does not bother itself much with theories of truth, the disinterested observer, the nature of representation and other epistemological puzzles, but with a fairly simple question. What are the conditions necessary for us to do our work as we conceive it and what arrangements are most likely to secure those conditions?

It is in response to *that* kind of question that academic freedom emerged as a central institutional value, most notably in the famous 1915 report on academic freedom and tenure issued by the American Association of University Professors. In that document there is some deference paid to the concept of unfettered critical inquiry, especially when the authors declare that the university "should be an intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may become part of the accepted intellectual food of the nation or of the world."<sup>38</sup> Read in isolation, this statement (itself somewhat ripe) would seem to argue for allowing "new ideas" to flourish willy nilly until time and the marketplace separated the wheat from the chaff. The sentence, however, is preceded and followed by many others in which it becomes clear that the freedom being recommended is institutionally defined and limited, is not absolute freedom but "academic" freedom, in the sense both that it is a freedom peculiar to the academic enterprise and a freedom whose boundaries are to be determined and patrolled by academics. This last is especially important because the report is produced in response to a perceived threat to professional autonomy from outside forces, once identified with various ecclesiastical establishments, now in 1915 identified with overweening boards of trustees. The enemy is described

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<sup>38</sup> American Association of University Professors, *General Report of the Committee on Academic Freedom and Academic Tenure* (1915), LAW AND CONTEMP. PROBS. 393, 400 (1990).

by way of a quotation from an address delivered by Charles William Eliot, President of Harvard:

These barbarous boards exercise an arbitrary power of dismissal. They exclude from the teachings of the university unpopular or dangerous subjects. In some states they even treat professors' positions as common political spoils; and all too frequently, both in state and endowed institutions, they fail to treat the members of the teaching staff with that high consideration to which their functions entitle them.<sup>39</sup>

What such boards do not understand is that "the responsibility of the university teacher is primarily to the public itself, and to the judgment of his own profession."<sup>40</sup> To be sure, boards of trustees in the course of their duties are called upon to approve the appointment of teachers, but once that authority has been exercised further supervision or surveillance would be regarded as an unwarranted imposition: "the relationship of professor to trustees may be compared to that between judges of the Federal courts and the Executive who appoints them" and "[U]niversity teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the trustees, than are judges subject to the control of the President, with respect to their decisions. . . ."<sup>41</sup> This does not mean that university teachers are free to say or profess anything they like without fear of reprisal or discipline. It is absolutely necessary that the "incompetent" and the "unworthy" be purged from the professorial ranks and prevented from using the freedom from external control "as a shelter for inefficiency, for superficiality, or for uncritical and intemperate partisanship";<sup>42</sup> it is just that these acts of institutional vigilance and good house-keeping should not be performed by "boards of laymen,"<sup>43</sup> but by fellow professionals: "It is ... inadmissible that the power of determining when departures from the requirements of the scientific spirit and method have occurred, should be vested in bodies not composed of members of the academic profession."<sup>44</sup>

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<sup>39</sup> *Id.* at 395.

<sup>40</sup> *Id.* at 397.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 402.

<sup>43</sup> *Id.* at 401.

<sup>44</sup> American Association of University Professors, *supra* note 38, at 402.

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Three things seem clear: (1) for the authors of the 1915 statement, academic freedom is limited and does not extend to those found unworthy, incompetent, inefficient, superficial, and intemperate; (2) the responsibility of determining who does or does not fall under these negative rubrics belongs to fellow professionals who in exercising that responsibility do not violate academic freedom but safeguard its integrity; (3) failure to assume that responsibility will lead to the erosion of academic freedom, for if members of the profession decline the task of making hard judgements, "it is certain that the task will be performed by others—by others who lack certain essential qualifications for performing it. . . ."45 From these three follow a fourth, which is exactly to our point: there is plenty of room in the concept of academic freedom as defined by the 1915 report to determine that Holocaust denial is, in and of itself, a "departure from the requirements of the scientific spirit and method" and an instance of "intemperate partisanship." I am not saying that such a determination is inevitable or automatic, but that if it is made as a result of due consideration by responsible bodies like the Duke University History Department or the American Historical Association there is no reason—and certainly no reason labeled "academic freedom"—to leave the matter open and to allow further presentations by representatives of a discredited enterprise. One of those representative—David Irving, for example—might then complain that his academic freedom is being infringed, but he would be making the mistake of thinking that the freedom in question was a property of the individual who must therefore be given opportunities to exercise it. No, say the authors of the report, "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 asserted by this declaration of principles."46

Now it should be acknowledged that subsequent to 1915 other conceptions of academic freedom have been put forward, conceptions less guild oriented, less tied to the specific purposes of a certain kind of work, more informed by the large philosophical questions—what is freedom?, what is truth?, what is neutrality?, what is objectivity?—from which I have been trying to wean you. And it is because these other conceptions—some would call them more capacious; I would say that they are too big for the task—have proven so persuasive both inside and outside the academy that academic freedom becomes a problem for

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<sup>45</sup> *Id.* at 402.

<sup>46</sup> *Id.* at 404-405.

those would combat Holocaust denial. My purpose here is to recall the historical provenance of the term and to make it useful once again for those who work in the academy as opposed to those who theorize about it. I want to say to historians, *be* historians, not epistemologists. (You're no good at it anyway.) And I am not alone. I have already made reference to the powerful piece by Judith Jarvis Thompson, and to her argument I would add those of Louis Menand and Richard Rorty. Menand begins by asking "What makes universities different from other places in which people work?" and answers in a way that echoes the formulations of the 1915 report:

The answer is that so far as the content of the work that goes on in them is concerned, universities are self-regulating. The university professor is a professional. He or she works in a business whose standards are, to every extent possible, established and enforced by its own practitioners. Professions aspire to be self-regulating for the same reason that the Hollywood film industry has its own rating system: because if a profession doesn't undertake to regulate itself, it exposes itself to the possibility of regulation by the state or some other external agency.<sup>47</sup>

Menand goes on to detail how comprehensive is the internal authority wielded by those in possession of the right credentials. Tenured academics "decide who is to be permitted to enter the profession" and they "certify the legitimacy of scholarly work by requiring that it be submitted to peer review and they create permanent members of the profession by requiring junior professors to submit their work to senior professors before awarding them tenure. . . ."<sup>48</sup> The result is an institution—the research university—that is "a virtual paradigm of professionalism", one in which the "wide freedom of inquiry" typically celebrated exists "only for the specialist."<sup>49</sup> Always the goal is to protect insiders from outside interference, and this extends to the interference of one discipline with the business of another: "Academic freedom not only protects sociology professors from the interference of trustees and public officials...it protects them from physics professors as well" and mandates "that decisions about what counts as good work in sociology

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<sup>47</sup> Louis Menand, *The Limits of Academic Freedom*, in *THE FUTURE OF ACADEMIC FREEDOM* 7 (Louis Menand ed., 1996).

<sup>48</sup> *Id.* at 8.

<sup>49</sup> *Id.*



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shall be made by sociologists.”<sup>50</sup> Thus characterized, academic freedom is not an abstract philosophical value with a pedigree in the writings of Mill and other Enlightenment rationalists, but a form of guild protectionism; which is exactly how Menand describes it in his summary statement: “Academic freedom is, at a basic level, an expression of self interest: it is a freedom for academics.”<sup>51</sup>

The detaching of academic freedom as a practice from the philosophical or theoretical questions that might be put to it is the main business of Richard’s Rorty’s essay, *Does Academic Freedom Have Philosophical Presuppositions?*<sup>52</sup> Rorty’s answer, not surprisingly is “no”, which is also the answer he gives to the more “general question of whether *any* social practice has *philosophical*, a well as empirical, presuppositions.”<sup>53</sup> Empirical questions, Rorty explains, are questions we can answer because with respect to any particular answer “we are clear about what would falsify it”<sup>54</sup>; we can test for example whether a particular illness has been caused by a bacteria or a virus. “But when it comes to a philosophical belief like “[t]he truth of a sentence consists in its correspondence to reality,’ or ‘[e]thical judgments are claims to knowledge, rather than mere expressions of feeling,’ nobody... is sure what counts for or against such propositions.”<sup>55</sup> An even more important difference between empirical and philosophical propositions, says Rorty, is that a change in the status of the first kind will bring about material changes in the practice it is a proposition about, while a change in the status of the second kind will bring about changes only in the world of theoretical debate. If medical science establishes (by the usual tests and procedures) that a disease once thought to be caused by a virus is in fact caused by something else, many things will be altered, including conventional courses of treatment and the “disbursing of funds for medical research.”<sup>56</sup> But if the majority of philosophers comes to believe that the truth of a sentence is a matter of coherence rather than correspondence the only thing that will alter will be the way philosophers talk at certain moments in their professional conversations. Everyone, including philosophers, will still employ and hear sentences as they did before, using them to assert what are taken at the moment to

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<sup>50</sup> *Id.* at 17.

<sup>51</sup> *Id.* at 9.

<sup>52</sup> Richard Rorty, *Does Academic Freedom Have Philosophical Presuppositions?*, in *THE FUTURE OF ACADEMIC FREEDOM* 21, 22 (Louis Menand ed., 1996).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

be true facts or to ask questions or to make promises or to provoke irritation or to express joy or give commands or hand down verdicts, or to perform the myriad of other actions catalogued in Speech Act Theory. The lesson is generalizable: A difference in the philosophical account of a practice (unless that practice is philosophy itself) does not dictate a difference in the practice of the practice, although it might dictate a change in the way you talked about the practice when you weren't practicing it but talking about practicing it.

Rorty illustrates with the example of oath taking which at one time, he points out, was thought by almost everyone to depend for its force on a belief in a nonhuman authority to whom one would have ultimately to answer for false swearing.<sup>57</sup> No doubt some still believe this about oath taking, but many more do not, yet the practice is engaged in and engaged in seriously by believers and atheists alike. The reason is that oath taking and swearing to tell the truth are components in a social practice (of Anglo-American law) that has its own traditions, purposes, consequences, and public functions; within that practice the meaning of oath taking and of the penalties one risks by swearing falsely is perfectly clear, and it is that (social/institutional) meaning to which oath takers are responsive independently of what they might say (if they would say anything) if asked "what do you think ultimately underwrites oaths?"<sup>58</sup>

It is, or should be, the same, says Rorty, with the relationship between the practices that are the empirical content of academic freedom—self-governance, tolerance (within limits) of divergent views, insulation from state dictates—and theories of academic freedom which typically offer propositions about truth, representation, objectivity, and the like:

[P]hilosophical debates about the nature of truth should become as irrelevant to academic practices as debates about the existence and forms of postmortem punishment are to present-day judicial practices. Just as we have much more confidence in our judicial system than we do in any account of the afterlife, or the workings of divine Providence, so we have, or at least should have, much more confidence in our colleges and

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<sup>57</sup> *Id.* at 23.

<sup>58</sup> Rorty, *supra* note 52, at 23.

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universities than we do in any philosophical view about the nature of truth, or objectivity, or rationality.<sup>59</sup>

That confidence is, or should be, based on a track record of performance that includes tried and true procedures, carefully administered requirements for accreditation, widely accepted standards, and publicly recognized achievements. A scholar who follows those procedures, hews to those standards, and produces results validated by her peers need not become defensive in response to a request for the kind of philosophical justification it is neither her business nor her obligation to provide:

When we say that good historians accurately represent what they find in archives, we mean that they look hard for relevant documents, do not discard documents tending to discredit the historical thesis they are propounding, do not misleadingly quote passages out of context...and so on. To assume that a historian accurately represents the facts as she knows them is to assume that she behaves in the way in which good, honest historians behave. It is not to assume anything about the reality of past events, or the truth-conditions of statements about such events... or about any other philosophical topic.<sup>60</sup>

If we put these statements together with those offered by Thompson and Menand, and remember that mature practices carry with them their own long established norms and protocols and need not submit themselves to the interrogation of other, alien, practices, the challenge of Holocaust denial will lose its force and be revealed not as an effort to correct history but as an effort to hijack the historical enterprise under the guise of a noble-sounding, but irrelevant, vocabulary. The proper response to Holocaust deniers is to say that they have not met our criteria for being considered seriously and that we are sending them away, without apology and without any further justifications. And if they persist in their work and seek to discredit the labors of honest men and women, one must denounce them, ridicule them, harass them, and do in your own way what Deborah Lipstadt has done to David Irving—make the bastards pay.

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<sup>59</sup> *Id.* at 24.

<sup>60</sup> *Id.* at 30-31 (citation omitted).