

ACADEMIC FREEDOM OF THE FACULTY MEMBER AS CITIZEN

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INTRODUCTION

The faculty member in an institution of higher learning functions in two capacities. He is, first of all, a scholar. In this capacity he conducts his teaching in the classroom, pursues his research into the problems of his field, and publishes his conclusions in scholarly form. But the faculty member is, at the same time, a citizen. He is a participating member of the university community and of the broader community that lies beyond the university walls. Here he engages in manifold activities in addition to his scholarly pursuits. Yet he remains a scholar, attached to an academic institution. The question to which we address ourselves is, what are the principles of academic freedom which are applicable to such a faculty member when acting in this capacity as citizen?

The question has come to be one of special importance today, particularly as it involves the conduct of the faculty member in the outside community. There seems to be little doubt that members of our university and college faculties are engaged far more extensively than at any past time in the political and other affairs of nation, state, and locality. This engagement in part takes the form of furnishing expert consulting service to government or private groups. But it extends much beyond this. It involves in large measure activities designed to influence public opinion on a wide range of issues as well as actual participation in many forms of decision-making or other action. The reasons why the faculty member has been drawn into these areas derive from basic factors in our society. Thus, the broader based public opinion in a modern democracy requires that new information and ideas be conveyed to a wider audience. And the complexity of the issues to be resolved demands more expert knowledge and advice. It is not necessary, however, to explore these considerations here. Whatever the reasons for the development, the widespread participation by the faculty member in affairs outside the classroom, particularly when he takes the role of dissenter, has strikingly posed the need for clarification of the principles which govern his rights and responsibilities when acting in this capacity.

The development of these principles has been slow to emerge. In the nineteenth century issues of academic freedom centered primarily around the right of the faculty member in teaching, research, and scholarly writing. Many of the principles applicable to these areas have by now become reasonably well defined and are widely accepted, in theory if not always in practice. More recently, especially since

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World War II, the major focus has shifted to academic freedom of the faculty member as citizen. This is the area where the chief controversy now rages. Yet, despite the growing volume of cases, there has been little theoretical discussion of the issues and even less agreement upon principle.

The range of problems is wide and their manifestations complex. The issues turn, first of all, upon the nature of the faculty member's conduct, whether it takes the form of communication or of overt action, or a combination of both. The question also involves the source and the nature of the contemplated restriction, whether originating in university or government regulation. Procedures employed in administration of the rules play a significant part. And the extent to which the law—constitutional, statutory, or judicially made—supports the system of academic freedom is a matter of major concern. It is not possible to treat all these issues within the confines of this article. We can only attempt a brief statement of some of the major principles and their application.

We start with a survey of the chief statements of principle which have been advanced as constituting the rules of academic freedom as they apply to the faculty member as citizen (I). We then attempt to summarize the development of the case law on the subject, as these principles have been applied in concrete situations (II). Thereafter we undertake to restate briefly the basic considerations which must enter into an acceptable framework of principle in this area (III). Our final, and major, task is to formulate the principles which in our judgment ought to control, and to deal with the main objections that can be made to them (IV).

We do not attempt to treat the problem as it arises in the field of secondary and elementary education, or of specialized or "proprietary" institutions. Different considerations pertain here, and somewhat different principles apply. But these issues are beyond the province of this article. Nor do we deal directly with matters of hiring, promotion, or acquisition of tenure; we are primarily concerned with questions of discharge, termination of contract, and other forms of university discipline. Finally, we omit consideration of procedure, assuming throughout that the procedures utilized will include the fundamental principle of a hearing before one's peers.

I

EXISTING STATEMENTS OF PRINCIPLE

The main statements of principle concerning academic freedom of the faculty member as citizen are those put forward by the American Association of University Professors (AAUP), the Association of American Universities (AAU), and the American Civil Liberties Union (ACLU). None of these formulations is comprehensive in coverage, but all deal with important elements of the problem. They will be examined briefly.

A. American Association of University Professors

The principles advanced by the American Association of University Professors are embodied in the 1940 Statement of Principles on Academic Freedom and Tenure. This Statement was adopted at a series of joint conferences between representatives of the AAUP and the Association of American Colleges (AAC). It was subsequently endorsed by a number of other professional organizations concerned with higher education and remains the basic charter of the academic community on academic freedom. Paragraph (c) of the 1940 Statement declares:

(c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all time be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.¹

An Interpretation of this provision, also approved by the AAUP and the AAC in 1940, provides:

3. If the administration of a college or university feels that a teacher has not observed the admonitions of Paragraph (c) of the section on *Academic Freedom* and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning his fitness for his position, it may proceed to file charges under Paragraph (a)(4) of the section on *Academic Tenure*. In pressing such charges the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility and the American Association of University Professors and the Association of American Colleges are free to make an investigation.²

It will be noted that the above formulation of principle deals only with conduct of the faculty member which takes the form of communication; it refers to the right to "speak" and "write," and to "utterances." It does not undertake to lay down principles relating to overt action, or to any category of mixed communication and action. Moreover, it is concerned only with restrictions imposed by the university, not with those emanating from government.

The Statement commences with the broad proposition that when the faculty

¹The 1940 Statement of Principles was first printed in 27 A.A.U.P. BULL. 40 (1941). For an account of its adoption, see *Annual Report of Committee A*, 28 *id.* 68, 72-82 (1942). The 1940 Statement has frequently been reprinted. See, e.g., 49 *id.* 192 (1963). Prior statements of the AAUP are the 1915 Declaration of Principles, adopted in the first year of the Association's existence, and the 1925 Conference Statement on Academic Freedom and Tenure. These statements have also been frequently reprinted in the *Bulletin*. For the 1915 Declaration, see 40 *id.* 90 (1954). For the 1925 Statement, see 45 *id.* 110 (1959). An earlier version of the 1940 Statement, prior to its approval by the AAC, is known as the 1938 Statement of Principles. It is printed in 26 *id.* 49 (1940).

²The Interpretations of the 1940 Statement were not printed when the Statement was originally published in 1941, *supra* note 1, or again when it was reprinted in 1942, 28 A.A.U.P. BULL. 84 (1942). They first appear in 29 *id.* 78, 80 (1943).

member "speaks or writes as a citizen" he "should be free from institutional censorship or discipline." But it then qualifies this by stating that "his special position in the community imposes special obligations." These obligations are defined as demanding that the faculty member should be "accurate," should exercise "appropriate restraint," should "show respect for the opinions of others," and should avoid identification as an institutional spokesman. The obligations thus set forth have subsequently been referred to as embodying a requirement of "academic responsibility."

The 1940 Statement does not make entirely clear whether the standard of "academic responsibility" is one to be enforced through official university sanctions, or is merely intended as embodying "admonitions" to which the faculty member "should" adhere, the only sanction being the unofficial guild pressures of the academic community. The wording and legislative history of the Interpretation give support to the former construction. And in the recent University of Illinois case, a majority of Committee A of the AAUP so interpreted the provision. It is even less clear that the Statement intended that a violation of the standard of "academic responsibility" should in itself be grounds for dismissal or other university discipline, rather than simply evidence relevant to a broader inquiry into the fitness of the faculty member for his position. The Interpretation would appear to support the latter view, but this was not accepted by the majority of Committee A in the University of Illinois case. Taking these interpretations, therefore, the essence of the 1940 Statement is that the faculty member as a citizen is free to engage in communication, so long as he conforms to the requirement of "academic responsibility."³

A second basic statement of principle emanating from the AAUP appears in the Report of a Special Committee of that organization, entitled *Academic Freedom and Tenure in the Quest for National Security*, approved by the Association at its annual meeting in 1956. The 1956 Report was prompted by the adverse effect upon academic freedom of various security measures adopted in the post-war period in the "national effort to achieve military security and to combat Soviet Communism." It deals principally with political conduct of the faculty member—both communication and overt action—and discusses the range of issues related to disclaimer oaths, investigations of "subversive activities," use of the privilege against self-incrimination, membership in the Communist Party, and similar matters. It is concerned primarily with restrictions imposed by the university and concentrates mainly upon dismissal

³The 1938 Statement of Principles contained an additional sentence in para. (c) which read: "The judgment of what constitutes fulfillment of these obligations should rest with the individual." This sentence was eliminated in negotiations with the AAC which resulted in the 1940 Statement. See RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 487 (1955). On the other hand, the Note attached to the 1940 Statement as published by the AAUP in 1941 and 1942 stated that the "only real difference" between the 1938 and 1940 Statements was the length of the probationary period. See 27 A.A.U.P. BULL. 40 (1941); 28 *id.* 84 (1942). As noted above, the Interpretations were not printed until 1943. For a further discussion, see the University of Illinois case, involving Professor Leo F. Koch, 49 *id.* 25, 35-38, 40-43 (1963).

or similar forms of discipline. The 1956 Report, building upon the 1940 Statement, states its guiding principles in the following terms:

Implicit in that Statement is the proposition (rendered explicit in later reports of committees of the American Association of University Professors and resolutions of its Annual Meetings) that a faculty member's professional fitness to continue in his position, considered in the light of other relevant factors, is the question to be determined when his status as a teacher is challenged. No rule demanding removal for a specific reason not clearly determinative of professional fitness can validly be implemented by an institution, unless the rule is imposed by law or made necessary by the institution's particular religious coloration. Any rule which bases dismissal upon the mere fact of exercise of constitutional rights violates the principles of both academic freedom and academic tenure. By eliminating a decision by a faculty member's peers, it may also deny due process. This principle governs the question of dismissal for avowed past or present membership in the Communist Party taken by itself. Removal can be justified only on the ground, established by evidence, of unfitness to teach because of incompetence, lack of scholarly objectivity or integrity, serious misuse of the classroom or of academic prestige, gross personal misconduct, or conscious participation in conspiracy against the government. The same principle applies, *a fortiori*, to alleged involvement in Communist-inspired activities or views, and to refusal to take a trustee-imposed disclaimer oath.⁴

The 1956 Report goes on to declare specifically that

the invocation of the fifth amendment by a faculty member under official investigation cannot be in itself a sufficient ground for removing him. . . . The exercise of one's constitutional privilege against self-incrimination does not necessarily or commonly justify an inference of criminal guilt; and even if it were to be ruled otherwise, it would not follow that the loss of an academic position should automatically result from a legal offense, whether proved in court or established by inference, without consideration of the relation of the offense to professional fitness.

Nevertheless, invocation of the fifth amendment does give the university grounds for inquiry:

If a faculty member invokes the fifth amendment when questioned about communism, or if there are other indications of past or present communist associations or activities, his institution cannot ignore the possible significance for itself of these matters. There is then a possibility of his involvement in activities subversive of education itself, or otherwise indicative, to an important degree, of his unfitness to teach.

In such an inquiry, "it is the duty of a faculty member to disclose facts concerning himself that are of legitimate concern to the institution, namely, those that relate to his fitness as a teacher, as enumerated above. . . ." But, again, refusal to disclose information "is relevant to the question of fitness to teach, but not decisive"; the reasons for the refusal "should be weighed with other factors. . . ."⁵

⁴ 42 A.A.U.P. BULL. 49, 57-58, 343 (1956).

⁵ 42 *id.* 58, 60 (1956). In a statement, Supplementary to the 1956 Report, issued in 1958, Committee A elaborated the principles of the 1956 Statement concerning "the relative weight that may properly, in the context of all other pertinent considerations, be given, in reaching a final decision, to the reasons for the faculty member's continued refusal to make disclosures to his own institution." 44 *id.* 5, 8-9 (1958). See also Hook & Fuchs, *A Joint Statement*, 42 *id.* 692 (1956).

The Report does not make clear whether the principles stated are applicable to all conduct of the faculty member as citizen, or only to that form of conduct with which it is specially concerned, namely conduct related to national security. Apart from this ambiguity, the Report seems to assert that the faculty member's conduct as citizen is not to be considered as sufficient ground for dismissal in itself but only as evidence bearing upon an inquiry into professional fitness, an inquiry which must take into account other relevant factors. The conduct which is made relevant to professional fitness, however, is not narrowly defined but includes a broad area of communication and overt action.⁶

B. Association of American Universities

In 1953, at the height of the McCarthy period, the AAU adopted a statement on "The Rights and Responsibilities of Universities and Their Faculties." The Association is an organization of universities primarily concerned with maintaining the quality of graduate study and research in institutions which grant advanced degrees. The 1953 Statement, signed by the chief administrative officers of the thirty-seven universities comprising its membership, dealt with issues outside the usual area of the Association's activities. It was undoubtedly prompted by the grave concern of the academic community over the impact of current security measures and attitudes upon academic freedom. In any event, the Statement received wide publicity and remained a significant influence.⁷

The AAU Statement, after setting forth in liberal terms the nature and function of the university, laid down the following principles relating to the obligations and responsibilities of university faculties:

(1) After declaring that "[in] the eyes of the law, the university scholar has no more and no less freedom than his fellow citizens outside a university," the Statement observes: "When the speech, writing, or other actions of a member of a faculty exceed lawful limits, he is subject to the same penalties as other persons. In addition, he may lose his university status."

(2) Noting that membership on a university faculty "implies endorsement not of its members' views but of their capability and integrity," the Statement continues:

Every scholar has an obligation to maintain this reputation. By ill-advised, though not illegal, public acts or utterances he may do serious harm to his profession, his university, to education, and to the general welfare. He bears a heavy responsibility to weigh the validity of his opinions and the manner in which they are expressed.

⁶ In addition to the standards of unfitness in the passages quoted above, the 1956 Statement also indicates that conduct relevant to fitness would include "illegal or unprofessional conduct or . . . an intent to engage in such conduct." 42 *id.* at 57.

⁷ The AAU Statement is printed in *N.Y. Times*, March 31, 1953, p. 12, cols. 4-5; THOMAS I. EMERSON & DAVID HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1070-77* (2d ed. 1958). A statement of the Academic Freedom Committee of the American Civil Liberties Union (ACLU), issued in 1958, criticizes the AAU Statement as implying "an authorization it did not in fact possess," pointing out that the signatories to the AAU Statement were acting as individuals and did not actually represent the considered views of the trustees or the faculties of their institutions. STATEMENT OF THE ACADEMIC FREEDOM COMMITTEE OF THE ACLU ON THE 1953 STATEMENT OF THE AAU (March 1958).

(3) With respect to the obligation of the faculty member arising out of his association with the university, the Statement declares:

Above all, he owes his colleagues in the university complete candor and perfect integrity, precluding any kind of clandestine or conspiratorial activities. He owes equal candor to the public. If he is called upon to answer for his convictions it is his duty as a citizen to speak out. It is even more definitely his duty as a professor. Refusal to do so, on whatever legal grounds, cannot fail to reflect upon a profession that claims for itself the fullest freedom to speak and the maximum protection of that freedom available in our society. In this respect, invocation of the fifth amendment places upon a professor a heavy burden of proof of his fitness to hold a teaching position and lays upon his university an obligation to re-examine his qualifications for membership in its society.

(4) Pointing to the benefits and privileges granted to the university by government, the Statement concludes:

Legislative bodies from time to time may scrutinize these benefits and privileges. It is clearly the duty of universities and their members to cooperate in official inquiries directed to those ends. When the powers of legislative inquiry are abused, the remedy does not lie in non-cooperation or defiance; it is to be sought through the normal channels of informed public opinion.

(5) Dealing specifically with the issue of "subversive activities," the principle is stated:

Appointment to a university position and retention after appointment require not only professional competence but involve the affirmative obligation of being diligent and loyal in citizenship. Above all, a scholar must have integrity and independence. This renders impossible adherence to such a regime as that of Russia and its satellites. No person who accepts or advocates such principles and methods has any place in a university. Since present membership in the Communist Party requires the acceptance of these principles and methods, such membership extinguishes the right to a university position. Moreover, if an instructor follows communistic practice by becoming a propagandist for one opinion, adopting a "party line," silencing criticism or impairing freedom of thought and expression in his classroom, he forfeits not only all university support but his right to membership in the university.

The AAU Statement does not expressly put forth the above principles as standards for the application of official university discipline, but that intention is clearly implied. Thus, while declaring that "discipline on the basis of irresponsible accusations or suspicion can never be condoned," the Statement adds: "The university is competent to establish a tribunal to determine the facts and fairly judge the nature and degree of any trespass upon academic integrity, as well as to determine the penalty such trespass merits." The Statement, likewise, does not make explicit whether violations of "academic integrity" are grounds for dismissal in themselves or only relevant evidence on the broader issue of academic fitness based upon full consideration of all factors. The former interpretation, except in the case of the use of the fifth amendment, seems indicated. No distinction is made between conduct in the form of communication and conduct in the form of overt action. Nor is any clear

differentiation made between the obligation of the faculty member in his capacity as teacher and in his capacity as citizen.

The principles enunciated by the AAU Statement are obviously far more restrictive of academic freedom than the principles laid down by the AAUP. Yet, it is not to be assumed that the impact of the AAU Statement was repressive. On the contrary, it was hailed at the time as a liberal presentation of the issues, and undoubtedly did much to curb the excesses of the McCarthy era.

C. American Civil Liberties Union

The ACLU Statement, entitled Academic Freedom and Academic Responsibility, draws a distinction between "(1) the conduct of a teacher apart from specifically professional responsibilities and (2) his conduct in teaching and other activities directly related to professional responsibilities."⁸ With respect to the former area, which embraces the rights and responsibilities of the faculty member as citizen, the basic rule is:

Outside the academic scene the teacher has no less freedom than other citizens. He is not required because of his profession to maintain a timorous silence as a price of professional status. On the contrary, his greater knowledge imposes upon him the twofold duty of advancing new and useful ideas and of helping to bury ideas which are outworn. However, since the public may judge his profession and his institution by his utterances, he should make every effort to maintain high professional excellence and at the same time to indicate that he does not speak for the institution which employs him. When he speaks or writes as an individual he should be free from both institutional and public censorship or discipline.⁹

The Statement then goes on to deal with various specific rights. With regard to freedom of association: "In his private capacity the teacher should be as free as any other citizen to participate in political, religious, and social movements and organizations and in any other lawful activity, and to hold and to express publicly his political, religious, economic, and other views." On freedom of expression:

The teacher should be as free as any other citizen to write on any subject which interests him. In the field of his professional competence he should speak and write mindful of the special responsibilities that professional standards impose. When acting as a private citizen, he should make it clear that he speaks, writes and acts for himself and not for his institution.

The Statement further specifies that the faculty member "should be free to organize with others to protect group interests," and "should not be required to take any special oath of loyalty to the government."¹⁰

Two other propositions relevant to the conduct of the faculty member as citizen

⁸ The ACLU Statement is printed in 42 A.A.U.P. BULL. 517 (1956); EMERSON & HABER, *op. cit. supra* note 7, at 1003. References here will be to the AAUP printing. The passage quoted above appears at 42 A.A.U.P. BULL. 523 (1956). See also ACLU Statement Concerning the University and Contract Research, printed in 46 *id.* 52 (1960).

⁹ 42 A.A.U.P. BULL. at 518.

¹⁰ *Id.* at 524.

are set forth. Referring to appropriate grounds for discharge, the Statement includes not only "professional incompetence" and "perversion of the academic process" but also "immoral conduct." And dealing with the relations between the community and the educational institution the Statement provides:

The community may properly expect of its teachers a standard of personal conduct comparable to that required of other responsible professional members of the community and a standard of public conduct harmonious with the teacher's position. The teacher must not be deemed to have sacrificed any of his rights as a private citizen. He should be as free as any other person to participate in his private capacity in political and social movements and in any other lawful activity and to hold and to express publicly his political, economic, religious, and other views.¹¹

Summarizing the ACLU position, it would seem to be that the faculty member has the same rights as any other citizen subject to the qualifications that he make clear that he does not speak or act for his institution, that he make every effort to maintain professional standards (at least in the field of his professional competence), and that he does not engage in "immoral conduct" or conduct not "harmonious with the teacher's position." Apart from the requirement to refrain from "immoral conduct," for which discharge or discipline is permissible, the Statement does not make clear whether the faculty member's obligations set forth are enforceable by university discipline or merely by unofficial academic or community pressures.

D. Other Formulations

Other professional organizations have largely confined themselves to adoption of the AAUP 1940 Statement of Principles.¹² Individual commentators have from time to time considered the rights and obligations of the faculty member in his capacity as citizen, but none of these discussions has undertaken to state the general principles in detailed or systematic form.¹³ University regulations and state laws on the subject are even more sketchy; they are usually confined to stating the grounds for dismissal or discipline in terms of "adequate cause," "good cause," "moral turpi-

¹¹ *Id.* at 528.

¹² For a list of these organizations, see 49 *id.* 192 (1963). The Association of American Law Schools (AALS), however, in addition to adopting the AAUP 1940 Statement, has dealt with the national security aspects of academic freedom, along the lines of the AAUP 1956 Statement. See *Report of the Committee on Academic Freedom and Tenure*, 1951 PROCEEDINGS 102-36; *Statement of the AALS Regarding Loyalty Oaths and Related Matters*, 1951 PROCEEDINGS 98-101, approved by the Association, *id.* at 8-13, 61-62; *Report of the Committee on Academic Freedom and Tenure*, 1953 PROCEEDINGS 97-125, referred back to the Committee for further study, *id.* at 29-32, 38-45; *Report of the Committee on Academic Freedom and Tenure*, 1954 PROCEEDINGS 115-20, approved by the Association, *id.* at 20-22.

¹³ See Colc, *Academic Freedom as a Civil Right*, 2 WEST. POL. Q. 402 (1949); ROBERT M. MACIVER, *ACADEMIC FREEDOM IN OUR TIME* (1955); Machlup, *On Some Misconceptions Concerning Academic Freedom*, 41 A.A.U.P. BULL. 753 (1955); ZECHARIAH CHAFEE, JR., *THE BLESSINGS OF LIBERTY* 229-34 (1956); CLARK BYSE & LOUIS JOUGHIN, *TENURE IN AMERICAN HIGHER EDUCATION* (1959); Jones, *The American Concept of Academic Freedom*, 46 A.A.U.P. BULL. 66 (1960). For other materials see THOMAS I. EMERSON & DAVID HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* ch. 5 (2d ed. 1958).

tude," "gross misconduct" or similar broad phrases, or singling out in random fashion some specific infraction such as "drunkenness."¹⁴

In our view the formulations of principle thus far presented, including those of the three organizations described above, must be regarded as incomplete and inadequate. They leave unstated in various degrees the full range of conduct that should be free from restriction and the specific conduct that may be disciplined. The distinction between "expression" and "action," terms which will be hereafter defined, seems inadequately appreciated. Or, where this distinction is appreciated, as in the AAUP 1940 Statement, nothing is said about action at all. Furthermore, the statements deal largely with university control and not with the role of government. Except in limited instances they fail to clarify the role of the university where the conduct is subject to government sanctions. Nothing is said about the university's posture toward an individual under indictment. The difference, if any, between on and off campus activities is not always delineated. The use of certain conduct, not punishable in itself, as evidence of other punishable misconduct is not spelled out with sufficient clarity.

Thus the task of enunciating a more comprehensive and satisfactory set of guiding principles in this important area remains to be done. Before approaching this problem, however, we turn to a survey of the application of existing principles in concrete cases.

II

THE CASE LAW

The principles of academic freedom governing the conduct of the faculty member as citizen have, to some extent, been clarified and refined through the process of decision in individual cases. The main body of this case law emanates from the AAUP. Decisions of the courts have been of secondary importance. Within the limits of this article only a rough summary of these developments is possible.¹⁵

A. American Association of University Professors

From the time of its formation in 1915, the AAUP has maintained the practice of investigating and reporting upon alleged infractions of academic freedom as set forth in its statements of principles. The AAUP normally acts only upon request of a faculty member who claims his rights have been infringed. Upon receipt of such

¹⁴ See BYSE & JOUGHIN, *op. cit. supra* note 13, at 44-51; ASS'N OF AMERICAN LAW SCHOOLS, ANATOMY OF MODERN LEGAL EDUCATION 218-32 (1961); FELLMAN, *Academic Freedom in American Law*, 1961 WIS. L. REV. 3, 25, 27. Occasionally, university regulations are more detailed. See HAVERFORD COLLEGE, INFORMATION FOR MEMBERS OF THE FACULTY (1960, rev. 1961).

¹⁵ In addition to the AAUP, other professional organizations have at times taken action on violations of academic freedom in individual cases. See, e.g., the proceedings of the AALS in censuring Rutgers University for its dismissal of Professor Abraham Glasser, reported in AALS, 1954 PROCEEDINGS 121-31; 1955 *id.* at 17-19, 129-50; 1956 *id.* at 59-60, 112-18, 132-33; 1957 *id.* at 31-56, 133-47. Such organizations normally proceed under AAUP principles. The work of the ACLU and its Academic Freedom Committee does not take decisional form. For accounts of matters on which the ACLU has taken a position, see the ACLU annual reports.

a complaint or request for assistance, the General Secretary makes a preliminary inquiry and if he believes a violation of academic freedom may have occurred, attempts to effect a settlement with the educational institution through negotiation. In the event of failure, and if the issue appears deserving of further action, the General Secretary usually appoints an *ad hoc* investigating committee, consisting of two or more members of the Association. The *ad hoc* committee makes a full investigation of the case, normally including a visit to the campus of the institution involved. Upon completion of its investigation the *ad hoc* committee prepares a report, which is submitted to the Association's Committee A. After revision by Committee A and the General Secretary, submission to the parties for comment, and possible further revision, the report is published in the AAUP *Bulletin*. This report, which is ordinarily a detailed account of the facts and an application of AAUP principles to the issues raised, is the principal document embodying the AAUP's position in the case. Committee A then prepares a brief recommendation. The formal action of the Association, which may involve censure of the offending institution, is taken by resolution adopted at the annual meeting. At times the basic report is prepared by the General Secretary or his staff without the aid of an *ad hoc* investigating committee.¹⁶

The AAUP reports, together with the action taken by the Association, constitute a valuable collection of decisional material. Indeed, they represent the only significant effort to develop the principles of academic freedom through the case-by-case method. Nevertheless, the impact of the material has unfortunately been limited by several factors. Most important is the fact that the various reports do not constitute a coordinated and systematic body of principle comparable to that produced by a judicial tribunal. Each report is principally the work of a different *ad hoc* committee. Committee A, which is itself somewhat shifting in membership, does not prepare its own analysis or decision. There is no practice of citing prior cases as precedent or reliance upon *stare decisis*. Hence each report tends to be an elaborate presentation of factual material, and no single tribunal undertakes to develop a systematic statement of principle in the manner of an appellate court. Furthermore, the sifting process of the General Secretary somewhat obscures the AAUP position. Formal action is taken only in those cases found to involve a *prima facie* denial of academic freedom. Hence, without a study of the cases not officially investigated, or of informal action taken by the General Secretary, the complete AAUP view cannot be determined. Finally, no compilation of the reports or of Association action in individual cases has thus far been published.¹⁷

¹⁶ For a recent description of AAUP procedures, see *Report of Committee A, 1961-62*, 48 A.A.U.P. BULL. 155-59 (1962). See also Metzger, *The First Investigation*, 47 *id.* 206 (1961).

¹⁷ A different view of the value of bringing more legal form to AAUP decisions was expressed in the *Report of Committee A for 1943*, 30 *id.* 13, 22 (1944): "Experience has convinced the active members of Committee A that hearings are better approached as scholarly investigations than as legal proceedings. The age-old ritual of the law has developed an array of distinctions and rules, some highly technical,

Despite these difficulties in the use of the material, it is possible to give a brief outline of the major trends in AAUP decisions, based on a survey of the published decisions since 1940. The cases fall principally into three categories: (1) Those dealing with political conduct of the faculty member; (2) those concerned with other forms of extra-mural conduct; and (3) those involving intra-mural opposition to the university administration.

I. *Political Conduct*

In several cases the AAUP has found a violation of academic freedom in dismissal of a faculty member for engaging in routine political conduct off the campus. Thus, in the case of Rocky Mountain College a faculty member who had been given leave of absence to serve in the state legislature was refused reappointment because of his liberal record in that position. Similarly, the Sam Houston State Teacher's College dismissed a faculty member whose political activities consisted of giving an address before the Southern Conference Educational Fund, setting up booths for assisting persons to pay their poll tax, campaigning for election of a judge, questioning a congressman at a public meeting, engaging in "a political hassle" with a student in an extension class (denied), and criticizing the film "Operation Abolition." In both cases the AAUP held that the institution had failed to conform to accepted principles of academic freedom.¹⁸

Other cases have involved political conduct alleged to be "subversive" or affecting national security, but falling short of membership in the Communist Party or close association with it. At Western Washington College of Education the president was dismissed after attack by a right-wing group for having allowed radical speakers on the campus, failing to hold patriotic meetings, allowing an "anti-American" Social Science Club to function, and tolerating a "subversive" campus newspaper. In the Evansville College case a professor was dismissed for participating in the Henry Wallace campaign for the presidency in 1948. And at Kansas State Teacher's College at Emporia a faculty member who had signed a petition for "amnesty" for persons convicted under the Smith Act was discharged. Again, the AAUP found violation of academic freedom by each institution.¹⁹

The principle incorporated in the AAUP 1956 Statement, that present or past membership in the Communist Party is not in itself ground for discharge but should be considered in connection with an overall appraisal of fitness to teach, was applied

conducive to a just adjudication; but, since a proper utilization requires experts, their introduction into academic affairs leads to bewilderment and irritation."

However, in its report for 1959-60, Committee A promised publication of a codification of its statements and decisions, described as "a formidable undertaking." 46 *id.* 222-23 (1960).

¹⁸ Rocky Mountain College, 42 *id.* 292 (1956) (no record of action on censure); Sam Houston State Teacher's College, 49 *id.* 44 (1963), censured, 49 *id.* 188 (1963).

¹⁹ Western Washington College of Education, 27 *id.* 48 (1941), censured 28 *id.* 11 (1942); Evansville College, 35 *id.* 74 (1949), censured 36 *id.* 16-17 (1950); Kansas State Teacher's College at Emporia, 42 *id.* 70 (1956). See also The Jefferson Medical College, 42 *id.* 75 (1956); Oregon State College, 42 *id.* 66 (1956).

in the University of Washington case. Here the gist of the Special Committee's recommendation, accepted by the Association's annual meeting in 1956, was:

The dismissal by the Administration of the University of Washington of the two faculty members whose sole offense, as defined at a critical point in the proceedings, was membership in the Communist Party, merited censure by the American Association of University Professors at the time the action was taken and should stand condemned by the academic community. The competence of the faculty members as teachers was assumed throughout, and there was no evidence that they had abused their positions in the classroom in any way. The action of the Administration deprived these faculty members of the right to be judged by their qualities as teachers, and took no account of much evidence as to fitness which came before the faculty Committee.²⁰

The same result was reached in the case of the University of Michigan, where the *ad hoc* committee found that Professor Mark Nickerson, a former Communist Party member, had been discharged principally on the ground that his "continued membership in the Medical School would be harmful to the school and may injure the reputation of the university as a whole."²¹

For the reason indicated below, the bare issue of dismissal for membership in the Communist Party rarely arose in cases considered by the AAUP. Hence there was little occasion for the Association to deal with the question implicit in the general principle as to what sort of evidence would establish the connection between membership in the Communist Party and lack of fitness to teach, so as to justify dismissal. In the case of Professor Edwin Berry Burgum of New York University, however, the *ad hoc* committee in dealing with an issue of the specificity of charges addressed itself to this matter. Its view very likely represents that of the Association:

There are, of course, many ways in which a teacher's communist connections might in some degree compromise his fitness and integrity. Some of these may be noted here: 1. His adherence to the Communist "line" may reveal a closed mind inconsistent with the scholar's honest and impartial use of facts. 2. There may be actual evidence of an attempt to use the classroom for Communist indoctrination of students. 3. There may be improper use by a teacher, in his outside activities, of his university connection to gain prestige for Communist causes. 4. There may be activity that is defined by law as criminal, such as conspiracy to teach or advocate the overthrow of the government by force or violence. 5. Finally, the teacher, if he remains silent about his Communist connections, may do so in ways that involve him in dishonesty or deceit.²²

In those cases where a state law required the discharge of a faculty member who was a member of the Communist Party or a "subversive organization," regardless of

²⁰ Report of a Special Committee of the AAUP, *Academic Freedom and Tenure in the Quest for National Security*, 42 *id.* 49, 62-63 (1956), report accepted, *id.* at 339-43.

²¹ The University of Michigan, 44 *id.* 53, 71 (1958), censured *id.* at 503. See also University of Oklahoma, 42 *id.* 69 (1956), censured *id.* at 341; C. W. Post College of Long Island University, 48 *id.* 5 (1962) (involving a former Nazi).

For a detailed account of the action of the universities in cases involving political conduct of faculty members alleged to affect national security, see RALPH S. BROWN, *LOYALTY AND SECURITY* 120-31 (1958).

²² New York University, 44 A.A.U.P. BULL. 22, 44 (1958).

the issue of fitness, the AAUP has not imposed censure on the university. It has, however, objected to the law and called for its repeal.²³

The reason why dismissal for alleged Communist Party membership has arisen only infrequently in its pure form is that issues of this kind soon come to be framed in terms of the faculty member's obligation to answer questions. The problem has occurred in two types of situations: first, where the ground for discharge has been that the faculty member invoked the fifth amendment before a legislative committee or otherwise refused to answer its questions; and, second, where the faculty member has refused to answer questions addressed to him by university authorities.

With respect to the first type of case the AAUP has consistently applied its rule, set forth in the 1956 Statement, that reliance upon the fifth amendment is not in itself ground for discharge. Thus in the case of Rutgers University, the Special Committee recommended censure on this ground:

The adoption by that Administration of the view that invocation of the fifth amendment is in itself a ground of dismissal, violated the right of a faculty member to a meaningful hearing in which his fitness to remain in his position would be the issue, and attempted to turn the exercise of a constitutional privilege into an academic offense, without reference to other relevant considerations.²⁴

The fact that in a later case Rutgers University modified its position to allow inquiry into whether any unusual circumstances existed "on account of which the fixed policy of the Board of Trustees should not be applied" did not in the AAUP view "materially diminish the evil involved." Similarly, when Ohio State University ostensibly granted a hearing to the faculty member on the issue of fitness, but ultimately based dismissal on the harm claimed to result to the University, censure was recommended and voted.²⁵

Although there seems to be no clear-cut case, the same rule appears applicable to refusal to answer based on the first amendment.²⁶ Even where a conviction for contempt of the House Committee on Un-American Activities resulted from a refusal to produce documents, the AAUP has held, in the case of Professor Lyman Bradley of New York University, that the university must consider all the circumstances and base its decision on the issue of fitness to teach.²⁷

²³ New York City Municipal Colleges, 42 *id.* 71 (1956) (Feinberg Law). See also The Jefferson Medical College, 42 *id.* 75 (1956), censured *id.* at 342.

²⁴ Rutgers University, 42 *id.* 77, 78 (1956), censured *id.* at 342.

²⁵ Rutgers University, 42 *id.* 77, 78 (1956); the Ohio State University, *id.* at 81, censured *id.* at 341-42. Other cases are Temple University, *id.* at 79, censured *id.* at 342; the University of Southern California, 44 *id.* 151 (1958), not censured, *id.* at 664-65; 45 *id.* 274, 399 (1959). In the case of Wayne University, where dismissal resulted from operation of the state Trucks Act, no censure was recommended, but the report of the Special Committee, accepted by the Association, said: "We believe opposition to the policy of such a statute has become a professional duty." 42 *id.* 87, 89, 339-43 (1956).

²⁶ See Fisk University, 45 *id.* 27 (1959), censured *id.* at 274, 393; and Ohio State University and University of South California, cited *supra* note 25.

²⁷ New York University, 42 *id.* 75 (1956), 44 *id.* 22 (1958), *id.* at 503, 663, censured 45 *id.* 274, 393-94 (1959). *But cf.* New York City Municipal Colleges, 42 *id.* 71 (1956) (issue of false testimony not passed upon).

In a number of decisions the AAUP has dealt with the faculty member's obligation to answer questions posed by the university authorities. All these cases arose out of situations where the faculty member had been summoned before a legislative investigating committee and had declined to respond, on first amendment or fifth amendment grounds, or both, to inquiries concerning past or present Communist Party membership or communist associations. In a subsequent investigation by the university the extent to which the faculty member continued to maintain silence varied in the different cases. In some the faculty member declined to answer any questions.²⁸ In others, he volunteered information or responded to questions relating to advocacy of overthrow of the government, espionage, other illegal or unethical practices, objectivity in the classroom, and similar matters, but refused to answer questions concerning political opinions or affiliations.²⁹ In the New York University case, Professor Edwin Berry Burgum refused to say whether or not he had ever used his University post as a means of recruiting members into the Communist Party.³⁰ In one case the faculty member limited his silence to questions relating to communist connections before joining the faculty.³¹

The AAUP in these cases applied the principles, set forth in its 1956 Statement, that the university has the right to inquire into the fitness of the faculty member to teach, that the faculty member has the obligation to respond to questions concerning political activities and associations, but that the faculty member's reasons for refusing to answer must be given consideration, and that a refusal to answer cannot by itself constitute ground for discharge. In none of the cases did the AAUP find that the university had considered the issue of silence in the full context of the reasons advanced for it and the faculty member's entire record on fitness. It therefore found a violation of academic freedom in all the cases, although in some it did not, for other reasons, vote censure. In two cases, where a state law required dismissal for refusal to answer questions, the AAUP, while disapproving the law, did not find the university in violation.³²

The AAUP has dealt with university imposed loyalty oaths in two formal decisions. The University of California required that faculty members take an oath that: "I am not a member of the Communist Party, or under any oath, or a party to any agreement, or under any commitment that is in conflict with my obligations." The Ohio State University requirement compelled the faculty member to swear that he did not advocate, nor was a member of any political party or organization that advocated, overthrow of the government by force or violence, and that during his service with the university he would not so advocate or become a member of such

²⁸ University of Kansas City, 42 *id.* 85 (1956), 43 *id.* 177 (1957).

²⁹ New York University (Professor Edwin Berry Burgum), 42 *id.* 75, 44 *id.* 22, 503, 663-64 (1958), censured 45 *id.* 274, 393-94 (1959); University of Michigan (Professor H. Chandler Davis), 42 *id.* 89, 44 *id.* 53 (1958), censured 44 *id.* 503 (1958); Dickinson College, 44 *id.* 137 (1958), censured 44 *id.* 503 (1958); The George Washington University, 48 *id.* 240 (1962).

³⁰ New York University, *supra* note 29.

³¹ University of Vermont, 42 *id.* 83 (1956), 44 *id.* 11 (1958), not censured 44 *id.* 665 (1958).

³² New York City Municipal College, 42 *id.* 71; San Diego State College, *id.* at 74.

an organization. The AAUP found the imposition of both of these oaths in violation of the principles of academic freedom.³³

2. Other Conduct

Conduct of a faculty member in the field of race relations was the subject of an AAUP decision in the Alabama Polytechnic Institute case. Here the faculty member had written a letter to the student newspaper criticizing an editorial in that publication dealing with integration of public schools in New York City. The strongest statement appearing in the letter was: "What is difficult to understand is the reasoning of those persons who profess decency, a feeling for their fellow man and who boast of their moral standards, yet who nevertheless hesitate to join the crusade to drive ignorance, poverty, and social injustice from our midst." The Board of Trustees refused to renew the faculty member's contract on the ground that, in view of the racial tension in Alabama, particularly the recent Autherine Lucy case at the University of Alabama, the letter violated the canons of appropriate restraint, respect for the opinions of others, and the duty to dissociate one's view from that of the university. The AAUP committee, accepting the principle of academic responsibility as a ground for university discipline, ruled that the letter had not contravened this principle.³⁴

The principal case raising the question of academic responsibility is that involving Professor Leo F. Koch and the University of Illinois. This also involved a letter written to the campus newspaper, here commenting on a prior article dealing with sex mores on the campus. In his letter Professor Koch criticized the previous article as omitting "any reference to the social meleu (sic) which compels healthy, sexually mature human animals into such addictions (of which masturbation is likely the least objectionable) to unhealthy and degenerative practices"; protested "the widespread crusades against obscenity which are so popular among prudes and puritanical old-maids"; asserted that events described in the prior article "are merely symptoms of a serious social malaise which is caused primarily by the hypocritical and downright inhumane moral standards engendered by a Christian code of ethics which was already decrepit in the days of Queen Victoria"; declared that "college students, when faced with this outrageously ignorant code of morality, would seem to me to be acting with remarkable decorum, and surprising meekness, if they do no more than neck at their social functions"; and concluded,

With modern contraceptives and medical advice readily available at the nearest drugstore, or at least a family physician, there is no valid reason why sexual intercourse should not

³³ University of California, 42 *id.* 64, censured *id.* at 341; the Ohio State University, *id.* at 81, censured, *id.* at 341-42.

³⁴ Alabama Polytechnic Institute, 44 *id.* 158 (1958), censured *id.* at 503. Two other cases in which faculty members were dismissed for activities in race relations, but in which the AAUP decision was put on grounds of violating academic due process, are Allen University and Benedict College, 46 *id.* 87 (1960), censured 47 *id.* 100, 144 (1961); Alabama State College, 47 *id.* 303 (1961), censured 48 *id.* 173 (1962). See also the material on Governor Talmadge's interference with the university system in Georgia, 27 *id.* 466 (1941), 28 *id.* 11 (1942).

be condoned among those sufficiently mature to engage in it without social consequences and without violating their own codes of morality and ethics.³⁵

Professor Koch was immediately suspended from his position and shortly thereafter his contract was terminated before its regular expiration date. The decision of the Board of Trustees rested on the ground that, while Professor Koch had a right to express "views contrary to commonly accepted beliefs and standards," the "tone, language, and content" of the letter were such that his publishing it "constituted a grave breach of his academic and professional responsibility and duty to the University of Illinois, the students attending the University, and the citizens of the state of Illinois."³⁶ The AAUP *ad hoc* committee took the position that the standard of academic responsibility was one enforceable only by unofficial professional pressures, rather than by official university discipline, and that in any event the letter did not violate that principle. Committee A rested its decision exclusively upon procedural grounds, but published a supplemental statement, with three members dissenting, taking the position that the standard of academic responsibility was enforceable by university action.³⁷

3. *Opposition to University Authorities*

A large proportion of the AAUP cases concern the problem of the extent to which a faculty member or group of faculty members may criticize or otherwise oppose the policies or actions of the president or other university officials. Some of these cases involve one or two faculty members, acting more or less as individuals. Charges against them, for which discipline has been imposed, include such conduct as by-passing the president in making direct contact with the trustees;³⁸ voting against establishment of an ROTC program;³⁹ criticizing the president to students (outside the classroom);⁴⁰ making derogatory remarks about university officials, when under the impression that a tape recording had been made of an interview without notice;⁴¹ and general "friction" or "failure" to "cooperate."⁴² In all these cases

³⁵ The full text of the letter is set out in 49 *id.* 26 (1963).

³⁶ 49 *id.* at 31.

³⁷ The University of Illinois, 49 *id.* 25 (1963), censured *id.* at 188. The arguments for the various positions are fully stated in the published material and will not be set forth here. It should be noted, however, that one of the authors of this article was chairman of the *ad hoc* committee.

Two other cases involving non-political conduct deserve brief mention. In the case of Montana State University, 26 *id.* 602 (1940), five faculty members were asked for their resignations, in part for participating in the activities of organized labor. In the case of Professor Lyman Bradley at New York University, 44 *id.* 22 (1958), one of the charges involved Professor Bradley's participation in a student demonstration following his discharge. In both cases, the AAUP found the conduct not to be grounds for discharge. See also Fisk University, *supra* note 26, and the material on the discharge of President Rainey at the University of Texas, 30 *id.* 627 (1944), 31 *id.* 462 (1945).

³⁸ Winthrop College, 28 *id.* 173 (1942), censured 29 *id.* 446 (1943).

³⁹ State Teacher's College, Murfreesboro, 28 *id.* 662, censured 29 *id.* 446 (1943).

⁴⁰ Memphis State College, 29 *id.* 550 (1943), censured 30 *id.* 293 (1956).

⁴¹ University of Oklahoma, 42 *id.* 69 (1956), censured *id.* at 378.

⁴² Montana State University, 26 *id.* 602 (1940); University of Kansas City, 27 *id.* 478 (1941), censured 28 *id.* 11 (1942); Memphis State College, *supra* note 40; San Angelo College, 33 *id.* 153 (1947). See also Adelphi College, 27 *id.* 494 (1941), censured 28 *id.* 11 (1942).

the AAUP found that the faculty member's conduct did not constitute appropriate ground for discipline. In the New York University case, Professor Bradley was charged with misrepresentation of facts relating to his discharge, but the AAUP Committee found that the alleged misrepresentations might have been "mere honest mistakes" and in any event "were so few and so inconsequential as to be trivial when considered separately from the other charges."⁴³

In other cases the controversy has occurred on a larger scale, involving major conflicts between university authorities and a group of the faculty or between several groups in the faculty. The trend of AAUP decisions is illustrated by three recent cases. In the University of Nevada case, the president accused five faculty members of being members of a "small, dissatisfied minority group," and charged them with attempting "to develop friction" between departments on the campus and between the university and the public schools; with "the spreading of false information" concerning academic standards at the university and other matters; and with "the alarming of faculty, townspeople, and legislators without first presenting the matter to the administration directly." Subsequently three of the faculty members signed a statement agreeing to "cooperate" and the charges were dropped as to all except one, Professor Frank Richardson. The AAUP report revealed a major controversy at the university between the president and a group of faculty members over educational policies. Upon reduction to detailed specification, the objectionable conduct on Professor Richardson's part came down to the allegations that he had stated at a local AAUP meeting that the president had made "an unjustified and unfair attack" upon the AAUP, and that he had distributed to some of the faculty copies of an article in the *Scientific Monthly* which took a different position from the president on an issue of educational policy then in controversy. The AAUP report, agreeing with a court decision that these matters did not constitute cause for removal, found violation of academic freedom in the president's position that Professor Richardson should not have opposed the administration's position on admission policies, and should have limited his interests and utterances to his own area of biology.⁴⁴

The case of Catawba College also involved a major conflict between a group of faculty members and the president. In the course of the controversy some of the faculty members had requested an accrediting agency to investigate the college, had charged that a financial scandal in the college's affairs had been covered up by the administration, and had expressed to other faculty members strong opposition to the administration. Three faculty members were charged with having been "disloyal to the administration," with having made "slandrous statements," and with having made "consistent efforts among students and faculty members to incite unrest, suspicion, and lack of confidence in the institution." The AAUP com-

⁴³ 44 *id.* 35 (1958).

⁴⁴ University of Nevada, 42 *id.* 530 (1956), censured 43 *id.* 359-60 (1957). The court decision in this case is *State ex rel. Richardson v. Board of Regents*, 70 Nev. 144, 261 P.2d 515 (1953), 70 Nev. 347, 269 P.2d 265 (1954).

mittee, reviewing the controversy in detail, concluded that the charge of disloyalty "should never have been made," and that the other charges were not supported by the evidence.⁴⁵

A somewhat different issue was involved in the South Dakota State College case. Here Professor W. W. Worzella was discharged as head of the Department of Agronomy and also as faculty member on charges of non-cooperation and insubordination. The issues involved a long-standing controversy over agricultural policies in the state, between groups in and out of the college, with political and personal overtones. The AAUP report found a violation of academic due process and did not consider the merits of the removal of Professor Worzella from his administrative post. But it did hold that there was a violation of academic freedom in his discharge as a faculty member because of alleged non-cooperation with the administration.⁴⁶

The AAUP decisions in this area are largely *ad hoc* in character, dealing with each case on its own specific facts. Apart from an underlying attitude of tolerance for the conduct of a faculty member in opposing the administration, no principles for marking the boundary between justified and unjustified methods of opposition have been delineated.

B. Court Decisions

No attempt will be made here to analyze the judicial decisions dealing with the academic freedom of the faculty member as citizen. The state of the law on all phases of academic freedom has been surveyed elsewhere.⁴⁷ It suffices to say that the development of legal support for the principles of academic freedom has been sporadic and unsatisfactory. Many courts have refused to recognize any legal basis for judicial testing of the faculty member's rights. Apart from claims to constitutional protection, therefore, there are relatively few decisions which deal with the problem. Even where a court grants judicial review of university action the scope of that review may be seriously limited. In the constitutional cases, most of which have dealt with alleged "subversive" conduct, the court decisions have on the whole been restrictive. It is clear that the development of satisfactory legal support for academic freedom depends in the first instance upon elucidation of the basic principles and the creation of a body of case law by the universities and the professional organizations of faculty members. What is essential for progress is

⁴⁵ Catawba College, 43 *id.* 196 (1957), censured *id.* 359-60. See also Eastern Washington College of Education, *id.* at 225.

⁴⁶ South Dakota State College, 47 *id.* 247 (1961), censured 48 *id.* 173 (1962).

⁴⁷ For the decisions and discussion up to the middle of 1958, see THOMAS I. EMERSON & DAVID HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 1026-1113 (2d ed. 1958). Subsequent material includes COWAN, *Interference with Academic Freedom: The Pre-Natal History of a Tort*, 4 WAYNE L. REV. 205 (1958); CLARK BYSE & LOUIS JOUGHIN, *TENURE IN AMERICAN HIGHER EDUCATION* ch. 3 (1959); CARR, *Academic Freedom, the American Association of University Professors, and the United States Supreme Court*, 45 A.A.U.P. BULL. 5 (1959); FELLMAN, *Academic Freedom in American Law*, 1961 WIS. L. REV. 3; DAVIS, *Enforcing Academic Tenure: Reflections and Suggestions*, *id.* at 200; and articles appearing in this symposium. See also *Racial Integration and Academic Freedom, A Study by the Arthur Garfield Hays Memorial Fund*, 34 N.Y.U.L. REV. 725, 899 (1959).

a more systematic effort along the lines undertaken by the AAUP. Until that task is accomplished the legal basis of academic freedom is likely to remain a secondary factor.

We therefore turn to an attempt to state the basic considerations which underlie a system of academic freedom and thereafter to outline in more detail the concrete principles which should control.

III

BASIC CONSIDERATIONS

Any attempt to formulate acceptable principles of academic freedom for the faculty member as citizen must commence with an inquiry into the basic considerations which underlie and shape the problem. One may indeed ask, why give the faculty member any freedom at all? Why is he not subject to full direction and control of the university president or board of trustees? Why should he be given the status of a *citizen*, with rights vis-à-vis the university administration, rather than being treated as mere employee? There is a serious question as to how far an ordinary employer should control the outside activities of his employees—a question of increasing moment in our society. Whatever the control under ordinary circumstances, however, here the function performed by the university indicates a special relationship. In order to formulate the principles governing that relationship it is first necessary to state briefly our proposed general theory of individual freedom in a democratic society. We then must consider the nature of the university and the extent to which its special function involves modification or extension of this general theory of freedom or otherwise affects its application.

A. Freedom in a Democratic Society

Under the general theory of freedom here proposed, the conduct of the individual will be divided into two categories: that of "expression" and that of "action." This division between "expression" and "action" underlies our constitutional guarantees of freedom, though it has not been consistently adhered to by the Supreme Court. The basic proposition for which we contend is that "expression" should be virtually immunized from governmental or other direct social control, but that "action" may be controlled for the achievement of legitimate social objectives so long as such control is not arbitrary, discriminatory, or otherwise unreasonable.

In many instances conduct can readily be classified as "expression" or "action" on the basis of whether it takes the form of "communication" or the form of "overt action," respectively. But there are times when the form of the conduct alone may not be conclusive. Thus expression may take place in the context of action, as in the familiar example of the cry of "fire" in a crowded theater. Or, expression may be closely linked to action, as in the gangleader's command to his triggerman. Or, expression may have the same immediate impact as action, as in instances of private defamation or publicly uttered obscenities which may shock unforwarned listeners:

or viewers. These examples point to a need for a functional rather than a mere formal basis for the classification.⁴⁸

Such a functional differentiation can be derived from the reasons for which a democratic society gives a preferred treatment to "expression." As summarized by one of the authors in a previous article: "Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in society."⁴⁹ All these functions are somewhat related and the fourth in a sense is the culmination of the other three. This explains, along with certain administrative considerations, why the preferred status is given to freedom of expression:

1. Expression is the means through which social change is brought about with a minimum of violent disruption and unnecessary harm. Alternatives can be rehearsed on paper, so to speak, and undesirable and harmful consequences avoided. And this rehearsal process never ends even after particular action has been taken, so that the desirable and undesirable can continually be re-identified by the public. No harm flows from expression itself, only from possible action which may result. Therefore action should not be controlled through the control of expression. It is time to control any harmful action when it has reached at least the conspiracy or attempt level.

2. It is not easy to promulgate sensible and fair rules for the restriction of expression. Since these rules usually are attempts to control future action at an early stage, they involve a degree of prediction about human behavior still impossible at the current level of development of behavioral science. Moreover, the content and manner of expression are so multifarious as to make it difficult to frame rules containing proper standards.

3. This last fact points up the further difficulties of regulating the dynamics of speech control in such a way as to avoid the suppression of much larger areas of discussion than were originally intended. To prevent easy circumvention, a rule prohibiting certain expression must usually be broad and vague, allowing great discretion to the enforcing and judging arms of the society. Under pressure of overzealous minorities or influential censorship minded groups, this discretion soon tends to be exercised in such a way as to extend the reach of the rule beyond its original objective. Faced with an ever broadening taboo the public tends to become intimidated and to rationalize its own fear by joining in the spirit of censorship against the few who may still object. Thus, the process of censorship, once begun, tends to get out of hand.

⁴⁸ For a more elaborate statement of the general position, see Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963). On the problem of defamation, see *id.* at 922-24; on obscenity, see *id.* at 937-39.

⁴⁹ *Id.* at 878-79.

The foregoing suggests the functional considerations which aid in classifying conduct as "expression" or "action." Conduct, though it may take the form of communication, may be classified as "action" if the harm attributable to the conduct is immediate and if it is irremediable, justifying threat of punishment as a deterrent. In addition the conduct must be such that it can be regulated by clear and definite rules under which an individual can be reasonably certain of the extent of his rights, and officials and judging bodies are apprised of the limits of their power, so as to prevent the extension of the regulation into areas properly classified as "expression." All other conduct primarily communicative in form is classified as "expression." Since the design of these criteria is to classify as "expression" conduct which must be left unregulated to assure the proper functioning of a democratic society, it follows that the application of the suggested system of classification makes it possible to adopt principles which immunize all "expression" from formal social control.

Under the suggested criteria the conduct of crying fire in a crowded theater or of the gangleader's command to his triggerman, though "communication" in form, is readily classifiable as "action." Even the area of private defamation seems to fall in this category since the harm to reputation is frequently immediate and not consequential, and since the private nature of the controversy, as well as the defenses of truth and fair comment, make it unlikely that this form of regulation will be overextended. On the other hand, the example of the public utterances of obscenities presents a more mixed picture. Here there may be an immediate shock effect on the unforewarned. Without attempting to treat the problem in detail, the following analysis may be suggested: Where the communication has actually resulted in such traumatic shock it can be classified as "action." In this situation we have met the requirements of both immediate and irremediable harm and a definite standard for imposing punishment. However, the borderline elements of the problem should not be overlooked. It is still difficult for the speaker to anticipate what communications are likely to cause the necessary effect. The evidence of shock will not always be reliable. And the influence of pressure groups on the trial process and in instilling a general fear of prosecution still exists. Therefore, it is imperative that the restriction be limited to clear instances where the communication is imposed on the listener or viewer and in effect constitutes an assault.

This, then, is a brief statement of the general theory here proposed and a brief description of the key terms the theory employs. Two other matters need be pointed out before we leave this general topic. The terms "expression" and "action" cover only conduct which by its very nature cannot be subdivided for the purposes of legal control into the separate categories. Neither term is meant to cover situations where such subdivision is possible, but where a law has been so framed as to lump "action" and "expression" together. An example would be a law making it illegal to cooperate with criminals, which is applied to a person who supports a candidate for office who is also supported by criminals, regardless of the nature or

the reasons for such person's conduct. In this instance, the theory of freedom here advocated does not call for classifying the conduct covered by the statute as all either "expression" or "action," but rather requires a more specific drafting of the law so that it is aimed solely at the type of "cooperation" with criminals which constitutes "action."

It needs also to be pointed out that the terms "expression" and "action" are functional terms of a theory of freedom on the basis of which general principles and legal rules are to be constructed. Since it is desirable that the principles and rules themselves be as clear and definite as possible it is best that these do not require *ad hoc* functional judgments in each instance. Therefore it is desirable so far as possible not to use the terms "expression" and "action" in the statement of the principles and rules we hereafter propose. These will refer to "communication" and "overt action" as the recognizable formal categories and will then indicate under what circumstances the conduct thus described may be regulated. The principle or rule as formulated will be justified on the basis that a particular form of conduct under particular circumstances may be classified functionally in a theoretical category permitting or forbidding regulation.

B. The Nature of the University

We are now ready to consider the application of the general theory of freedom here advocated to the special situation of the university community.

1. *The Function of the University*

The university is generally conceived as performing two main functions in a democratic society. One is the transmission of existing knowledge and values to the oncoming generation. The other is the critical re-examination of such knowledge and values, with a view to facilitating orderly change in the society. These two functions carry somewhat different implications with regard to the freedom of the faculty member as citizen.

Performance of the first function—that which may be termed indoctrination⁵⁰—does press somewhat in the direction of constraint upon the faculty member. The transmission, no matter by what specific pedagogic techniques, of accepted community standards, as well as the training in intellectual discipline and the imparting of an existing body of knowledge, make some demands upon the faculty member to serve as an exemplary teacher and citizen. Yet these factors impose restrictions more upon his conduct in the classroom than upon his conduct outside. Moreover, even in performing the indoctrination function, the faculty member in a democratic society must be allowed a substantial degree of freedom. For the university operates within a pluralist society. Its function is not simply to indoctrinate the student in the values

⁵⁰ We do not use the term "indoctrination" in a technical sense, as employed in educational theory, but simply as a shorthand method of referring to the function of transmitting existing knowledge and values.

of a narrow or local majority, but rather in the broader values that prevail in the wider and diverse community of civilized men.

The other function entrusted to the university—the facilitation of orderly change—clearly implies a high degree of freedom for the faculty member. Effective performance of this function demands free inquiry and experimentation; encouragement of questioning, skepticism, and probing; and the development of a critical attitude not only toward current knowledge and values, but toward authority generally, including the authority of the teacher. These considerations have been accepted as requiring full freedom of the faculty member within the classroom. They are equally applicable to his conduct outside the classroom.

Indeed, additional factors justify freedom of the faculty member in his capacity as citizen. In order to carry out his function he needs direct contact with the changing society itself. His sources of information and experience can no longer be confined to the halls of academe. They lie elsewhere also, and he should not be cut off from them. Moreover, the contact should be reciprocal; the academic must be exposed to the outside and he must be able to expose what he is doing to the outside, to subject it to the testing of reality. Again, the scope of what goes on in the university should reflect the current and future needs of society. This is facilitated when the faculty member is encouraged, as an ordinary citizen, to interest himself in new areas beyond the previous scope of his specialty.

Similar considerations apply when the matter is examined from the viewpoint of the student. Much of the educational value of the university takes place outside the classroom. Freedom in this area of university life is as essential to intellectual and ethical development as freedom in the classroom. Indeed, an atmosphere of excitement and ferment in the academic community at large may be more meaningful to the student than freedom of discussion within the confines of the class. Moreover, to the extent that students are affected by example, it is instructive for the academic to appear to them as a person who enjoys participation in the adventure of change and as a man of the world whose ideas can be taken seriously by those who are preparing to live in it.

Finally, it should be added that freedom outside the classroom is indispensable for the exercise of freedom within the classroom. The two areas are indissolubly linked.

These two functions of the university—indoctrination and facilitation of change—are in partial conflict. Society must strike some balance between them. As modern society has emerged it has become increasingly evident that the major forces at work press toward conformity and rigidity. The same tends to be true within the narrower confines of the university. Indeed special factors tend toward greater emphasis in this direction within the academic community. The great majority of faculty members, by nature, training or environment, are not likely to be individuals who court danger and adventure; and, given a general atmosphere of conformity, they tend to seek greater safety by emphasizing the more restrictive aspects of the indoctrination function in performance of their tasks. Consequently a system of academic freedom based

upon the greatest measure of freedom for the faculty member as citizen is necessary to maintain the balance between the two prime purposes of the university.

The university also performs a third function which is relevant to the rights and responsibilities of the faculty member as citizen. The essential principle of the democratic process is that every citizen has full access to all facts, opinions, and argument in an open market place of ideas. In the purest operation of this forum each individual must sift out the material for himself, judge the various opinions and arguments, and weigh the motives and competence of the speaker. The university system, to some degree, operates to shortcut this trial and error process by holding out the members of the faculty as competent to speak in their fields of expertise. In a sense the university certifies to the community that the faculty member is entitled to special attention in the market place of ideas.

The certifying function of the university is an important one. This is particularly true in modern society where the issues to be discussed and resolved are highly complex and technical. The assistance which the university can thus render in facilitating the operation of the democratic process is substantial. But performance of the function implies some responsibility on the faculty member to maintain the standards of competence when speaking as a citizen in his own field, and some obligation on the university in granting or revoking the certificate to protect those who rely upon it.

2. *The University as Administrative Organization*

The university is more than a disconnected group of individual faculty members. It is an operating organism. As such, it must have rules for the conduct of its affairs. Thus it must devise and enforce an orderly method for holding classes, prescribing the work necessary for obtaining a degree, enunciating rules of conduct for students, and the like. The faculty member is a part of this organization. Implicit in his membership is the obligation to assist in the establishment, administration, and enforcement of the university regulations. In this respect he differs from an ordinary citizen not attached to the university bureaucracy.

This is not to say, of course, that the faculty member is merely the employee of the university. The academic organization does not function like a business corporation. It is and must be, for reasons already outlined, a community of scholars. From its earliest beginnings this community was not a hierarchical or authoritarian group. In fact its unique form as a gathering of scholars interested in a common endeavor predated the modern constitutional democracy. Nor does the organizational aspect of the faculty member's position mean that he is not free to criticize the university administration or its rules, or that there are no limits on what rules may be imposed. But the dual role of the faculty member—as teacher, scholar, and citizen on the one hand, and as a member of an organization sharing responsibility for its operation on the other—must be taken into account.

3. *The Dynamics of Restriction*

The principles governing academic freedom of the faculty member as citizen must also take into consideration the dynamics of restriction. Official restraint upon freedom of expression or action has powerful and pervasive effects. Its impact extends beyond any one individual or any one incident. The ramifications are widespread in any form of bureaucracy, where lines of communication are indistinct, and where rumor, hearsay, and false impressions readily distort events. The atmosphere of freedom is easily poisoned.

These effects of suppression are particularly acute in an academic community. The position of the faculty member who has been discharged or disciplined by the university is a precarious one. The possibility of advancement at home appears jeopardized and the likelihood of transfer to another academic institution remote. Thus the entire career of the faculty member in his chosen field is undermined. The same is true to an even greater degree of graduate students or others in the position of applicant. Repressive policies by the academic community quickly throttle the type of bold thinking, initiative, and willingness to experiment that are essential to the performance of the university's function.

Moreover, pressures outside the university are easily aroused. These are often fed by the anti-intellectual forces which are characteristic of the ambivalence of our society to education and educational institutions. Even where the opposition is not merely irrational or Philistine, it frequently lacks understanding of the meaning and significance of academic freedom. The theory of academic freedom is a complex and sophisticated one, not automatically grasped by the average member of the outside community. Thus the faculty member acting in his capacity as citizen is likely to find himself in an emotionally charged and highly vulnerable situation.

The implications of these factors are apparent. They point strongly toward the need of a presumption in favor of freedom and against restriction, of principles and rules that are clear-cut and easily applied, and of procedures that allow a fair hearing by persons who understand the theory of academic freedom and are committed to the values it seeks to achieve.

4. *Community Within a Community*

One further point needs to be made explicit. The university is a community within a community. This raises special problems of jurisdiction. To what extent may a university punish its members where the society has already prescribed a punishment for them as members of the society at large? To what extent should members of the university be immunized from restrictions imposed on society at large? In the light of what objectives and functions of the university as a university or as a community may the university impose restrictions on its members that may not be imposed on them as members of the society at large?

C. Freedom and the University Community

This brief sketch of the function of the university in the society and its functioning as a community indicates that the need for freedom here is similar to that of the society at large. As will be seen throughout this article any modification or extension of the rights of faculty members in the light of their participation in university life does not require a change of the general theory of freedom previously proposed but can be accommodated within the theory's own terms. Before this is undertaken in greater detail, it may be helpful to suggest the general line of approach which will to some extent remain implicit in the more detailed discussion.

Thus, it was previously suggested that a society may regulate "action" so long as the regulation is reasonable for the achievement of legitimate social objectives and where it is not discriminatory. In the university context this still holds, but when the sanctions are specifically directed at teachers the objectives are the special objectives of the university. A special punishment imposed on faculty members for the achievement of general social objectives where the society at large has not seen fit to impose punishment on its members or where the society at large through other agencies is already punishing the faculty members as members of society may therefore at times be discriminatory.

As another instance, conduct which might ordinarily be classified as "expression" for purposes of the workings of the general society may be classified as "action" in the context of university life. Thus, in the society at large there is an assumption of the equivalence of speech. Therefore, no immediate or irremediable harm is done even in the case of deliberate distortion, misinformation, or falsehood.⁵¹ In the long process of debate the truth will emerge. But the university, as has been indicated, in so far as it performs an indoctrination and certifying function, is designed to short-cut the process of debate in certain areas by a full and fair presentation through its experts of all the available relevant information. In certain contexts where a faculty member fails to do this the harm to the educational process may be immediate and at times irremediable. Moreover, the professional standards of the proper minimum requirements of manner and content of proper academic presentation may be sufficiently definite to avoid the danger of overextension of the regulation. In such instances the control of content and manner of a faculty member's presentation may be classified as control of "action" rather than "expression." On the other hand, when the faculty member is working in areas of new discovery or continued controversy the content or manner of his communication generally will tend to be classified as "expression," though the procedures of research to the extent that they are well established may fall into the category of "action."

Another area of difference between the freedom of faculty members and that of members of the society at large, which again can be explained in terms of the proposed general theory of freedom, may stem from the dynamics of suppression

⁵¹ The law of private defamation is an exception to this proposition.

in the university context. As has been indicated, a particular university and in a larger sense the whole university community tends to be more close-knit than the society at large. The translation of an incident of suppression into general fear or apathy is therefore more likely. This is especially so where the punishment is imposed not by the government but by the university under procedures which do not contain all the niceties or safeguards of judicial proceedings. This fact would tend to make it desirable to put communicative conduct in the university context more often into the "expression" category, immunized from control.

IV

A PROPOSED STATEMENT OF PRINCIPLES

We are now in a position to offer a suggested statement of principles applicable to the conduct of the faculty member as citizen. We deal first with conduct that takes the form of communication, and second with conduct that takes the form of overt action. Within each of these sections we treat first regulation imposed by the university, and second regulation imposed by the government.⁵²

University regulations may be administered in two contexts. First, the university may attempt to control the faculty member's conduct directly by punishment such as dismissal, termination of contract, reprimand, or other discipline, based wholly or substantially upon the conduct itself. Second, it may consider the conduct as relevant evidence in making a broader judgment of unfitness to teach, incompetence, neglect of duty, illegal action, or similar grounds for the imposition of sanctions. In addition the issue may be framed in terms of the obligation of the faculty member to answer inquiries.

We consider these matters in the order just set forth. At the close of our discussion we attempt to formulate our conclusions as a set of formal principles. It need hardly be said that our statement of principles must be regarded as exploratory and tentative, which we offer as a basis for further consideration.

A. Communication

1. *University Regulation: Direct Punishment*

We start with the basic principle that a faculty member outside his classroom performance and his professional research and writing, both on and off the campus, should not be subjected by the university to punishment for the content or manner of his communications, or for organizing or associating for the purposes of communicating. The justification for this main principle derives from the general theory of freedom already stated.

Broadly speaking, communication should be and is immune from governmental restriction as constituting "expression." In the absence of special university objectives

⁵² We use the term "university" as referring to the total governing body of the university, including the board of trustees, the executive and legislature of the state where these have direct control over state universities, and the judiciary in so far as it interprets rules promulgated by the foregoing.

the faculty member is plainly entitled to no less freedom than the ordinary citizen. Such freedom, as has been shown above, is important in carrying out the indoctrination function of the university and is essential to achievement of its function in facilitating orderly change. The difficulties of keeping limitations on expression within bounds are especially acute in the university context. Nothing in the role of the university as a community within a community justifies any general restriction of communication permitted by the outside community. It goes without saying that the university restriction of such communication would be discriminatory against teachers. Indeed, even where the principles of free expression are violated by the outside community because of the passions of the moment, the university as transmitter of our highest ideals should not aid in the erosion of our freedom.⁵³

We come, then, to the question, are there any special objectives or functions of the university which require qualification of the general rule? The answer is yes, but only when the context permits the communication, or conduct closely related to it, to be classified as "action" for purposes of control.

Qualifications Related to Special University Functions. (a) As was shown above, the indoctrination and certification functions of the university require a certain measure of communication control. So far as the indoctrination function is concerned it is sufficient to apply the standards of competence, objectivity, and the like to the faculty member's performance in the classroom and in his professional writings and research. On the other hand, the certification function, whereby a faculty member is certified by the university to speak as an expert on the campus to students and colleagues and off the campus to the outside world, involves a measure of control over his communications beyond his direct university work. Unless he makes a specific disclaimer of acting as an expert, or the context clearly indicates that he is not so acting—as, for example, where he performs as a paid advocate—the content of a faculty member's presentation of matters within his field should meet certain professional standards. Obviously not every communication can contain the full measure of proof and other indicia of academic competence required of research reports or scholarly books. Nor can one expect that a faculty member address every type of audience in a scholarly manner. Nevertheless, the content of communications within a faculty member's professional field should be supportable by a full professional presentation if the faculty member is called upon to do so.

This requirement is justified because the short-cutting of debate implicit in the certification function means that to this extent the market place of ideas is not expected to operate fully. The process of short-cutting is immediately and sometimes irremediably harmed by irresponsible presentation. Moreover, the standard of supportability by a full scholarly presentation is relatively easy to apply and the chance of overextension of this type of control is remote. Hence it is permissible for the

⁵³ We consider below the situation where the government punishes communication which, under the theory of freedom as we would apply it, should be classified as "expression."

university to regulate communication not meeting these requirements as a legitimate part of maintaining its certification function.

(b) Closely related is the possibility that a faculty member whether he speaks within his field or not may be mistaken by the community to be the spokesman for the collective expertise of the entire university. To make sure that this does not happen it is proper for the university to require that, unless otherwise authorized, the faculty member disclaim that he represents the views of the university. Again the possible harm to the community in being misled, and to the university, may be immediate and the standard of conduct is clear and definite. The harm to freedom of expression is minimal. Since the failure to disclaim may often in fact not mislead many people and since it may at times be inadvertent the severe sanction of dismissal should here be employed only for repeated violations after warning.

(c) Another qualification on the faculty member's right of communication outside his direct professional work is suggested by the university's nature as an administrative organization of which the faculty member is a part. One of the functions of such an organization is at least a limited custodianship over the students, which implies that the university and its faculty must see to it that no immediate harm comes to them, at least while they are on the campus. This implies in turn that a faculty member should refrain from speaking to students, when they are not forewarned, in a manner which is likely to shock their sensibilities in an immediate and traumatic way. Such a restriction, however, should not apply where the content or manner of the communication is necessary to the presentation of information, hypotheses, or conclusions which can be corroborated by a full scholarly presentation.

Of course, all controversial discussion has a tendency to shock the sensibilities of some listeners to a certain extent. This is the burden all citizens in a democratic community are expected to bear. But there are two reasons why the subject deserves special attention in the context of the university community. First, the citizens involved are youthful citizens who may not yet have sufficiently matured to be subjected to all manner of shock and therefore are entitled to special protection while they are under the stewardship of an educational institution. Second, the areas where such protection may be justified are the limited ones where there is some reason to believe that the shock may be traumatic. While other such areas could perhaps be included, we confine ourselves to two, on which there is likely to be general agreement. One of these is the area of sex and the other the area of race and religion. Here it is arguable that where the communication is likely to, and does, produce an immediate traumatic shock on average student listeners or viewers the possible immediacy and irreparability of the harm, despite the danger of over-extension of the restriction, allow the treatment of this type of communication as "action."

In this situation, also, the penalty should be one short of dismissal, except after

warning and repetition. For the standard cannot be formulated with precision and an isolated slip is therefore likely to occur. It will be noted, likewise, that the qualification here discussed does not prevent the faculty member, even in his non-professional communications, from stating what is recognized as necessary by scholars for adequate presentation of the communicated material. This is based on the judgment that, even though the conduct here is classified as "action," its prohibition would be unreasonable in the light of the basic university objective of discovering and advancing the truth.

The rule is further limited in its application to the immediate environs of the campus because it is felt that the special effect on a possible student reader or listener of more general communications by faculty members is too sporadic to warrant a special exception. Moreover, for reasons which will be pointed out below, in the case of obscenity, and in some states in the case of so-called group libel, obscene and libelous communications off the campus are not of a type where the university should impose sanctions in addition to those imposed by the general law.

Under the rule, as advocated, the limitation applies only to the captive audience situation, where the listener or viewer has not been forewarned. It can be argued that a more extensive restriction is justifiable and that the rule should apply regardless of whether the student has been forewarned.⁵⁴

(d) A further restraint suggested by the university's function as an administrative organization stems from the faculty member's role as an administrator and enforcement officer of the university community. The university as an institution is entitled to protect its own cohesiveness by requiring a certain adherence to its rules and a certain decorum on the part of its officials towards each other and toward the administration. As the AAUP cases demonstrate, the most troublesome seems to be criticism of the university administration and of fellow faculty members. From what has been said previously it is obvious that all criticism of this type should not be stopped. The faculty member's role as educator requires that he critically examine all areas where his interest leads him, including the area of education. His role as a citizen of the university community and of the general community, which too may exercise a certain measure of control over the university, requires him to play a policy-making role. He must be left free to influence others participating in this governing process. On matters affecting the university his experience and relatively greater expertise than that of the general citizen make it specially desirable that he should be heard. These are factors that must be considered against the possible harm which may come from the disruption of cohesiveness when he as a member and an official is permitted to criticize the institution.

⁵⁴ The issue may be raised as to why university regulations are necessary or permissible in those states where the criminal law imposes sanctions for the same conduct. Without elaborating here, it can be suggested that the considerations are those discussed in subsection B, *infra*, dealing with overt action. Moreover, outside the limited university context, regulation of this conduct would in many instances violate our view of the first amendment, which, were such view some day to prevail, would render the problem moot.

In general, it seems clear that this type of communication should be classified as "expression" and hence not subject to control. Mere criticism is not likely to cause immediate or irremediable harm. And from the perspective of the needs of the university as an administrative organization even libels, when not deliberate or grossly negligent, do not seem so drastic as to require university punishment. In so far as they injure private reputations, they can after all be handled through private lawsuits. But the problem is different where faculty members make false statements, deliberately or through gross negligence, about each other or the administration. Such communications can be systematically employed to disrupt the minimum cohesiveness of the university as a system of administration. The same holds true where the faculty member advocates direct violation of the university rules. Here the effect may be immediate and sufficiently irremediable. University reputation may be seriously injured and the morale and discipline of the school may be so impaired as to require a long period of time and undue effort to make it whole. Moreover, the standards are relatively definite and clear, which diminishes the chances of their overextension.

Qualifications Related to the University's Role as a Community Within a Community. (a) A further set of restraints on the conduct of a faculty member in the form of communication is justified because the university as a community, like any other subgroup within the society, may set certain moral standards for its own members and also act as an enforcement agent for the moral standards of the general community. Unlike the restraints just discussed these do not involve special university functions, but rather matters which the university has in common with other smaller groups, organizations, and institutions within the general community. In this capacity the university is entitled to punish communication by a faculty member which violates criminal statutes, or other governmental regulation, relating to espionage, solicitation to crime, exhibitionism, security regulations imposed on personnel doing research on the campus, or similar matters.

It needs no elaboration that the first three types of communication produce irremediable harm and are identified by reasonably clear-cut standards. They thus fall in the category of controllable "action." So do violations of security regulations, provided they are kept within constitutional bounds. The question then arises whether the university should impose a penalty in addition to that demanded by the outside society. For reasons that are set forth at a subsequent point, the applicable principle should be that "action" which is punishable by law may be penalized in addition by the university where the crime is such that it violates relatively stable moral standards of the national university community or of the national general community.

For the same reasons the university might be justified in punishing communication classified as "action" which is not punishable by law but which violates such

moral standards. It seems unlikely, however, that there is any conduct that would fall within this category.

(b) Other permissible restrictions on the faculty member's communication relate to the authority of the university to assure minimum conditions of order and safety within the university community. Three aspects of this problem may be mentioned:

(1) The first concerns the authority of the university to impose "traffic regulations," dealing with the time and place of communication. Thus it is open to the university to regulate communication to the extent necessary to make facilities available on the campus to everyone on a non-discriminatory basis. Under these regulations the content or manner of the communication must not be the basis for denial of the facilities. Subject to this requirement, such restrictions cannot be deemed an interference with freedom of expression.⁵⁵

It may also be argued that, where facilities are limited, as in the case of radio time, preference may be given to types of communication closer to the educational pattern of the university. Because of their necessary vagueness, such restrictions, if permissible at all, should be adopted only in the case of real necessity. Denial of facilities on the ground that the communication might fall within the ambit of other restrictions, allowable under principles stated elsewhere, is not permissible, as such restrictions would constitute an undesirable prior restraint.

(2) A second problem relates to the means of communication, such as the use of amplifiers. Thus, excessive noise would constitute a direct assault on other members of the university community and hence would be classified as "action." The principle is that where the mode of communication operates to produce an effect equivalent to "action" it can be regulated to the extent necessary for the life of an orderly and civilized community.

(3) A third issue involves circumstances under which communication is related to a situation endangering the safety of the university community. Where during the course of a meeting or assembly a situation arises in which there is immediate likelihood of the eruption of violence not controllable by the university through its own internal machinery of discipline, an authorized administrative official of the university could order the meeting closed, and violation of such an order could be punished. The thrust of the restriction is directed at the violence, which is "action"; the communication can be stopped only because the violent environment has made further communication impossible.⁵⁶

Answer to Objections. The qualifications just outlined meet many of the objections which might be raised to a broad principle of freedom of expression for faculty

⁵⁵ For a further discussion of the "traffic regulation" problem, see Emerson, *supra* note 48, at 946-47.

⁵⁶ Unlike the general community, which would be required to use all the police forces at its disposal to allow the communication to take place, the university community should have the power to stop the meeting under the circumstances described above even though, were it to call on outside aid, the meeting could proceed. The reason for this is that the university's special objectives would be seriously disrupted were large outside police forces to be called onto the campus.

members outside their official duties. Two further frequently voiced contentions against the position here taken need to be considered at this point.

One objection is that, because of the faculty member's influential position, students are likely to unthinkingly follow his "unscholarly" views expressed outside his professional work, especially when he is addressing student groups, and that therefore the freedom of thought of students is obstructed and the educational function of the university is jeopardized. In terms of the theory of freedom proposed above this thesis would state: The interference with freedom of thought through communication exercised by one in a specially dominant relationship with some listeners has a sufficiently immediate and frequently irremediable effect on these listeners to be categorized as "action"; the harm done as a result is markedly greater than the benefit from the free communication; this justifies considerable restraint.⁶⁷

This hypothesis with respect to the student-teacher relationship seems quite unreal in the modern American university. University students are not children who regard their "fathers'" statements as gospel truth. This is especially so if the university in its direct educational work encourages a healthy probing skepticism. If anything, students tend to be rebellious against notions dogmatically imposed by authority figures, at least, outside their own peer-group. Occasionally an individual student, having discovered the point of view of a particular faculty member, may cater to him, or at least try not to offend him by open criticism. To the extent that this may occur it does interfere with the full development of a student's intellectual curiosity, but on the other hand it constitutes part of the realities of life from which students must not be entirely immunized. As a whole, therefore, the harm stemming from untrammelled faculty communication flowing from the special student-faculty relationship seems minimal compared to the many benefits previously discussed. It is, thus, the type of communication which should be treated as "expression."

There may be one situation where it is arguable that the faculty member's influence can be coercive. That is where he predominates as an organizer or advisor of a student club advocating a particular controversial point of view. Here it may be contended that students in this faculty member's classes may more strongly fear unequal treatment if they fail to join the club or at least to espouse its views. But even here the hypothesis is probably exaggerated unless actual favoritism exists, and this should be shown by more direct evidence and punishable under other rules of conduct than those dealing with communication.

A second objection to the general position here taken, which is perhaps the most commonly advanced, is that the faculty member's outside communication may arouse the hostility of the community, thus costing the university general support as well as money and students. It is argued that the university has therefore a right to limit

⁶⁷ An analogy would be to the employer's free speech situation, in which communication by an employer on matters of labor organization, by reason of the employer's dominant economic position, amounts to coercion and is thus classifiable as "action." See *National Labor Relations Board v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941).

a faculty member's freedom to antagonize the community. This seems to be one of the many reasons underlying the vague standard of "academic responsibility." This standard, which can be given a varied content, in its extreme form suggests that, outside the rarefied context of the classroom and the professional journal, a faculty member should avoid controversial issues, and, in a somewhat milder vein, insists that his communications be conducted in a scholarly and dignified manner. But as has been shown, the university's function of promoting orderly change requires complete freedom for a faculty member's communication outside his direct professional activities. The university's prestige and support depend in the long run on its ability to carry out this important function. A university which fails in this respect is not a university and endorsement by the community bought at this price frustrates the very purpose for which the university was created. A proper university resists these community pressures and attempts among other things to educate the community to the values of controversy and change. Just as the society as a whole, the university must use all means alternative to restraint of expression to assure its survival. To the extent that there may be any serious misunderstanding because of confusion in the public mind of the views of a faculty member with the official position, if any, of the university, the requirement of non-identification makes adequate provision.

A further objection to the position we have stated is that a faculty member's partisan and controversial communications outside his direct professional activities may interfere with his objectivity to such an extent as to make it impossible for him to properly perform his duties as a scholar and a teacher. This issue is closely related to the problem we consider in the next section and is dealt with there.

2. University Regulation: Use of Communication as Evidence Relevant to Unfitness, Incompetence, Neglect of Duty, and the Like

As noted previously, the university's restriction upon communication by a faculty member may take the form, not only of direct punishment for the conduct as such, but use of the communication as evidence in making a more inclusive judgment concerning unfitness to teach, incompetence, neglect of duty, or similar matters. The principle we urge here is that the content and manner of a faculty member's communication outside the classroom and his professional research and writing, and a faculty member's associations or organizational activity to facilitate such communication, except for such conduct as is included in the qualifications set out in the previous section, should not be used as evidence of other conduct or states of affairs which can be punished or otherwise regulated by the university.

A possible qualification to this principle is that the communication in question can be used as evidence where a prima facie case has first been established on the basis of other evidence. This is an arguable position. But for reasons stated subsequently we believe that the preferable principle is the one as originally stated, without the qualification.

In justification of the principle it should first be observed that the relation between outside communications and proper performance of professional duties is largely speculative. If such communication were allowed to stand alone as proof of other misconduct the effect would be exactly the same as making such communication punishable in itself. The protection afforded by the rules stated in the previous section would then be rendered meaningless on the basis of a not too probable conjecture.

The more basic justification is that the punishable conduct for which the outside communication is sought as evidence can be shown without it, and the outside communication is thus either irrelevant or at best very slightly relevant. Examination of this proposition takes us into an area otherwise beyond the scope of this article, namely the criteria for discharge or other punishment of a faculty member for misconduct in his professional work.

The usual scope of the university's legitimate power to dismiss or otherwise punish a faculty member with tenure, or during the term of his contract, includes: (1) neglect of duty in failing to teach adequately or to carry out research adequately; (2) neglect of duty in not meeting classes or carrying out other tasks assigned to a faculty member; and (3) mental or physical incapacity. Though the content or manner of a faculty member's outside communication may undoubtedly be relevant to the issue of his mental incapacity, surely more direct evidence is usually available and little is lost by following the proposed rule. The manner and content of outside communication have no bearing on the issues under category (2) above. As to category (1), the outside communications of a faculty member not dealing with his field should have no bearing on the question of merit of his professional teaching or research activities. Where the outside communication is made by him as an expert it is covered by the qualification stated in the previous section that, unless a disclaimer is made or is apparent, the communication must be supportable by a full scholarly presentation.

It may still be objected, however, that one cannot so circumscribe the evidence on the basis of which the universities, including faculty members, are permitted to judge the abilities of a faculty member. Ought one to exclude from consideration all intangibles such as character, personality, temperament, degree of general dedication to scholarly work, and so on, considerations which usually are meant to be taken into account under rules permitting dismissal for "good cause" or "incompetence" or "unfitness"? And are not the manner and content of a faculty member's outside communications at times very good evidence of these intangibles? In the first place, it should be clear that the criterion of "good cause" is totally meaningless and should therefore be eliminated from all regulations dealing with the rights of faculty members. Criteria such as "incompetence" and "unfitness to teach" should probably be made more specific. But for purposes of this discussion it is unnecessary to make an extensive analysis. It is sufficient to point out that while these criteria undoubtedly

include certain intangibles, they should only be used as a basis for hiring, promotion, appointment to tenure, or renewal of a contract of a faculty member. Incompetence and unfitness are not properly used as the basis for discharging or otherwise punishing a faculty member while he is under contract or after he has acquired tenure, which is the area with which we are here concerned. Otherwise tenure or a term appointment would be largely meaningless since the general basis of competence and fitness on which the tenure or contract was awarded would constantly be subject to re-examination and review, rendering them virtually revocable. Tenure and contract protection would then operate only to prevent dismissal based on pure whim. Punishment during tenure or contract term should be based solely on specific misconduct such as would be covered by some version of standards such as "neglect of duty" and "insubordination" found in many university regulations. There is, therefore, no reason for using any evidence excluded by the principle under discussion in connection with cases involving incompetence or unfitness.

Two further considerations should be mentioned in connection with our preference for excluding evidence regarding outside communications, where not otherwise punishable, even where there is an independently established prima facie case. In the first place, the very possibility that outside communication may be used as corroborating evidence in a borderline case is likely to have an inhibiting effect. And second, the informal nature of the procedure under which faculty members are usually tried and the fact that the process is often conducted by laymen makes it unlikely that the line drawn between a prima facie case independently established to which outside communications are merely corroborative proof, and one where outside communications constitute the decisive part of the evidence, will provide sufficient protection against possible abuse of such evidence.

3. *University Regulation: Power of Inquiry*

As the AAUP case material disclosed, the issue of restriction upon the faculty member's right of outside expression, particularly in the political arena, is frequently framed in terms of the university's power to inquire and the faculty member's obligation to answer. The principle applicable here may be stated as follows: The university may not conduct inquiries concerning a faculty member's outside communication, or association or organizational activity to facilitate such communication, except with respect to communication included in the qualifications already stated.

Here, also, it is arguable that a further qualification should be made which would permit such inquiries with respect to communication, or associational or organizational activity, where evidence is sought to corroborate an independently established prima facie case of other conduct or state of affairs which can be punished or otherwise regulated by the university. Our preference, as before, is for the principle without qualification.

The principle is no more than an elaboration or corollary of the principles already set forth. If outside communication and association and organizational

activities for purposes of such communication may not be used as evidence of other misconduct, except to the extent covered by the qualifications made, it follows that an inquiry by the university into such conduct generally can have no other purpose but to control the communication by subtle pressure.

The argument may be made that the inquiry may reveal a violation of the "duty of candor." But no such duty regarding opinions or associations should be imposed on a faculty member outside the area of his professional work. Freedom of expression and belief must include the right to silence at a time when one's views may be unpopular. To the extent that lack of candor is not considered a failure of duty but a character trait that may be used as a criterion for hiring or promotion it is, as has been shown above, irrelevant to the area covered by this principle. As to candor with regard to matters within the faculty member's professional field, this is covered to a large extent by the restriction imposed upon the faculty member when communicating in his capacity as an expert. To the extent this matter is not embraced within that rule, the same reasons apply for not permitting the inquiry as were urged for not permitting such outside communications and organizational activities to be introduced as evidence of other misconduct or analogous state of affairs.

Similarly any attempt by the university to aid the government in its inquiries into this type of communication or organizational activities, either by punishing the faculty member for failing to cooperate with the government or for failing to cooperate with a university inquiry into such failure to cooperate, has all the earmarks of the type of unjustifiable discriminatory punishment ruled out by the principles previously stated.

As to areas of permissible inquiry by the university, such as investigations into overt action or into communications subject to the qualifications noted, such inquiry must not be so administered as to negate the protections established by the rules we have proposed. This means that there can be no broad inquiry into a general area of both permissible and prohibited conduct in the hope that, thus, the prohibited conduct may be discovered. The investigation must have a narrow focus on the area of conduct which the university can legitimately control.

4. University Regulation: Some Specific Applications

The presentation is now sufficiently complete to indicate how the principles might be applied to certain currently disputed questions of academic freedom, such as loyalty oaths, the plea of self-incrimination or the first amendment in connection with government inquiries into communication, Communist Party membership, and the failure to answer questions concerning political beliefs, associations, and activities put by the university administration.

To the extent that the last mentioned issue raises any special problems, these have already been sufficiently discussed above. As to loyalty oaths, unless they are so narrowly drawn as to cover only conduct which is properly classified as "action," they are devices for controlling large areas of "expression," or for making inquiry

into large areas of "expression," and therefore cannot be imposed by the university. Nor can the plea of self-incrimination or of the first amendment, whether honored by the courts or not, when used in connection with government inquiries into conduct which is to be treated as "expression" or which includes large areas of "expression," be the basis for university punishment. Membership in the Communist Party or similar organizations, whether on the right or left of the political spectrum, may also not be used as a basis for dismissal or other sanctions; nor may any inquiry into such membership be made. This is, of course, a prime example of where a broad label applied to an association is meant to cover conduct ranging from theoretical discussion of revolutionary action to overt sabotage, espionage and conspiracy to overthrow the government. To avoid serious interference with "expression" and the injustice inherent in guilt by association there should be no punishment on the basis of mere association or failing to answer government questions about association with organizations, some of whose members may engage in punishable "action" at certain times while others engage in no more than "expression," perhaps without any knowledge of the activities of their fellow members. The inquiry should be directed at, and the punishment imposed for, if at all, specific controllable overt action engaged in by the particular faculty member. For the same reason violation of the McCarran Act should not be a ground for dismissal, and obviously violation of the Smith Act, which even in its avowed aim covers only "expression," may not be used as a basis for university punishment.

5. *Government Regulation*

Turning now to the subject of governmental regulation of communication by the faculty member as citizen, the following principles apply:

(a) The government should have no greater power to regulate communications or related activities of the faculty member than the university has.

(b) In addition, the government should not attempt to control the types of communication included in the qualifications to the general principles relating to communication by the faculty member in his field of special competence, non-identification with the university, advocacy of violation of university rules, or university regulations of "traffic" or means of communication.

(c) Where the government is allowed to exceed these limitations under an *ad hoc* balancing test or similar interpretation of the first amendment, it should give greater weight to the value of outside communication by a faculty member than it does to communication by citizens generally. Even under such tests the government should not be allowed to regulate the communication of faculty members to a greater extent than that of citizens generally. And, except in the case of prohibitions against disclosure for reasons of national security, such as espionage laws or security regulations, no laws should be enacted which prevent the presentation of information, hypotheses, or conclusions which can be corroborated by a full scholarly presentation.

In view of the prior discussion these principles require little elaboration. Since our principles dealing with university regulations are based upon our view of the first amendment, it follows that the government cannot interfere with the freedom of a faculty member to communicate to any greater extent than the university can. The second principle goes further by prohibiting the general government from establishing sanctions for communications in certain areas open to university regulation. This rule is based upon the proposition that these qualifications are justified in terms of university community objectives, over which the general government ought not to take jurisdiction, and deal with the type of conduct where university punishment need not be supplemented by further punishment imposed by the government.

The third principle assumes a situation such as exists today where the first amendment is not enforced by the courts to the extent here advocated. Prohibitions of communication are usually upheld under *ad hoc* balancing or similar tests requiring the weighing in each instance of the likely harm that might be caused by allowing the communication against the seriousness of the infringement upon freedom. The significance of the university's function in assisting the process of orderly change, and the importance to that function of the freedom of faculty members to communicate outside their professional work, require that the value of this freedom should be given special weight in the balancing process.

The second part of the third principle is based on the theory that even under the most restrictive view of the first amendment there is never any sound reason for singling out faculty members for special restrictions imposed by the general government. Such restrictions therefore violate the principle of equal protection. They can ordinarily be justified only on the basis of the indoctrination function of the university, particularly in such matters as instilling a feeling of loyalty and patriotism. But this would be accomplished at too great an expense to the function of promoting orderly change and to the faculty member's right to be as free as any other member of the community. It is, at any rate, very doubtful that true loyalty and patriotism are ever the result of blind one-sided indoctrination. It has been forcefully argued and is the thesis here advocated that exposure to diverse views, including radical criticism of the government, is more effective. The very concept of orderly change contemplates a process whereby the society accommodates itself to changing views without losing its fundamental cohesiveness.

The final provision in the third principle makes it clear that under no restrictive view of freedom of expression must a faculty member, except under laws preventing disclosure for reasons of security, be restricted from communicating findings, legitimate hypotheses, or information which can be corroborated in a scholarly way, outside the classroom or his professional writings, whether within or outside his professional field. That the immeasurable loss to the community through this type

of restriction is not likely ever to be justifiable by any weighing against other legitimate community objectives seems self-evident.

B. Overt Action

Under the general theory of freedom here proposed conduct which may be classified as "action" is subject to social control provided the regulation is not arbitrary, discriminatory, or otherwise unreasonable. In the university context the question arises as to what forms of control over the faculty member's overt action are permissible to the university in addition to those imposed by government. Issues are also posed as to what sanctions should be allowed to the university, in addition to those applied by government, where the faculty member's action violates a governmental restriction, either one not customarily enforced or one generally enforced. The nature of the university sanction and the power of university inquiry must also be considered. Finally, there remains the question whether governmental regulation of actions of the faculty member can be predicated upon any different basis from regulation of citizens generally.

1. *University Regulation: In Areas Where Government Does Not Impose Official Sanction or Governmental Sanctions Are Not Enforced*

We commence with the general principle that, for reasons already made clear, regulation by the university of action of the faculty member not regulated by government imposes unfair discrimination against the faculty member, except to the extent that regulation by the university is necessary to achieve legitimate university objectives. The area where this control is most clearly permissible is that of regulating the overt actions of faculty members in carrying out their professional (including administrative) duties. This area is outside the scope of this discussion, however, and therefore is not covered by our statement of principles. Non-professional overt action may take place both on and in the vicinity of the campus and in the general community. With respect to this area of action two principles are controlling.

(a) The first is that the university, like any other community, may make police power rules to provide for the health, welfare, and safety of those within its premises to the extent that such provision is not adequately made by the content and enforcement of the general law. The need for this is obvious.

(b) The second principle is: where the overt action does not violate laws or violates laws that are not generally enforced by the government the university may punish such conduct whether it occurs on or off the campus only if it violates moral principles of intra-university behavior or moral principles of social conduct generally, and only so long as such moral tenets are relatively stable and do not extend beyond those generally accepted by the national university community or the national general community, respectively. This proposition is more controversial and requires explanation. The control of intra-university behavior relates to the

university's role as a community within a community. As such the university is expected like a club or a family to impose sanctions of its own to achieve its own inner socially cohesive life. For example, the general law against fornication may not be consistently enforced, but the university owes it to parents to provide a community where students are not likely to engage in such activities with their teachers. Since the conduct involved is "action" the theory here proposed does not require the degree of freedom provided for "expression." The concern here is not with the "expression" aspect of the overt action, such as the possible effect on students spurred on by bad example, but rather with the direct impact of the "action" itself.

Again, the university as a community within a community owes the general community a certain amount of control over those overt actions of its members which disrupt the social cohesiveness of the relationship between the two communities. The overt actions of faculty members may therefore also be regulated according to the moral standards of the general community. For example, consistent public drunkenness by a faculty member to the annoyance of the general community, even where the law does not strictly enforce prohibitions against such conduct, should perhaps be punishable by the university. This might also be true with regard to a consistent pattern of indiscreet sexual promiscuity.

It should be noted, however, that the standards of morality here suggested both for intra-university overt action and for overt action outside the university community, are those which are relatively stable and generally accepted by the national university community and the national general community. We refer to standards, generally held, which are not at present undergoing substantial change. There are a number of reasons for this prescription:

(1) At least in times such as ours, when moral codes are moving in a direction of less restriction, the standards proposed are likely to be the minimum standards most universally accepted and there is therefore less chance that they will be inadvertently violated where the university has established no definite code; or that, in the event the university has established a code, the issue of whether that code violates freedom of "action" will have to be resolved on the basis of criteria on which there is no consensus.

(2) As has been suggested above, a good deal of overt action has at least some communicative aspect. The university's function of promoting orderly change requires that the faculty member by the example of his own action be in a position to communicate to both students and colleagues the possibility of experimental "action" at the periphery of an ever-changing moral code.

(3) As the previous statement suggests, orderly change is not brought about through "expression" alone. Somewhere, at sometime, some experimental ideas are gradually translated into experimental action, thus gradually establishing the direction of change in moral standards. It is inconsistent to expect a faculty member to be in the forefront of experimental thinking and at the same time to live accord-

ing to narrow and sometimes anachronistic moral codes when it comes to experimental action. Where "expression" has sufficiently prepared enlightened national communities to tolerate certain experimental action a faculty member should be free to act according to such a code, thus helping to provide the local link in the chain leading toward at least one of a number of likely directions of orderly change.

(4) Under a standard which permits the university to discipline for the infraction of every narrow moral tenet and every technical violation of law, such as laws against U-turns or littering, the standard is not likely to be uniformly applied and often serves as a subterfuge for discharging or disciplining a faculty member who has otherwise incurred the displeasure of the administration or of his colleagues or of the local community.

(5) Though the violation of narrow local principles of morality may cost the university some support, considerations similar to those stated in connection with freedom of "expression" require that this risk be assumed for the sake of achieving minimum guarantees of freedom of "action." In other words, a faculty member need not be a paragon of virtue. A woman teacher should be allowed to wear lipstick on the campus and shorts in town on a hot summer day. A faculty member should have a right to divorce and marry someone recently divorced, and so on. Nor should adultery with a non-student, which may violate a criminal statute rarely enforced, ordinarily be sufficient ground for discipline.

2. *University Regulation: In Areas Where Government Sanctions Are Enforced*

Where the faculty member engages in overt action that violates a law which is generally enforced, a somewhat different question is presented. Here the concern is not with possible discriminatory punishment resulting from imposition of university discipline where none is imposed by the law, but rather with possible discrimination resulting from additional university punishment where the law has imposed or is likely to impose its own sanctions. This additional punishment is not discriminatory in areas where other institutions in the society, such as employers, customarily impose informal sanctions in addition to the legal ones. These informal sanctions are part of society's method of regulating conduct, from which as a general rule the faculty member should not be immunized. The scope of double punishment should, however, be limited to those sanctions where the moral standards which are relatively stable and which are generally held by the national university community call for supplementation of the legal punishment with non-legal sanctions in order to best carry on university functions, or where such moral standards of the national community call for additional informal sanctions. In other words, just as not every violation of moral tenets or unenforced law justifies university discipline, so not every conviction of a crime needs or should be supplemented by further "informal" sanctions.

Some of the considerations which support this position may be summarized:

(1) Such informal sanctions frequently interfere with the law's objective of rehabilita-

tion. (2) Laws are frequently violated as the only means of testing their constitutionality, as exemplified by deliberate violations of segregation laws. This process should in many instances not be discouraged by increasing the risk the individual undertakes. (3) Segregation laws also illustrate that the enlightened sector of the national university community and the national general community frequently consider certain laws unjust and unnecessary. A university should not contribute to an unjust or unnecessary restraint on freedom of "action" by the imposition of additional sanctions on faculty members. (4) Many laws do not represent a relatively permanent consensus but exist as a result of carrying out the desires of a temporary majority, as in the case of much business, tax, and labor legislation. Here the expectation generally is that while the majority is entitled to impose its criminal sanctions, the general community will not impose further informal sanctions because of the controversial nature of the laws. (5) Other laws are so complex and so vaguely drawn as to make it possible for individuals to violate them inadvertently. The crime here is really one of lack of sufficient care, again normally not calling for the imposition of further informal sanctions. (6) Some statutes and ordinances, like those involving parking, are generally regarded as a necessary nuisance. The law itself is promulgated with the understanding that it will frequently be violated. The necessary modicum of order here is achieved by the fact that a sufficient number of individuals are likely to choose to obey rather than pay. But the individual who chooses to pay does so on the basis that it is worth it because he will not be subjected to further formal or informal sanctions. (7) Laws are often discriminatorily enforced against individuals who have become unpopular with the community or its officials. The university should not participate in this act of vengeance undertaken under the subterfuge of law enforcement.

A further aspect of this problem requires attention. At times a sufficiently large, prominent, and fair-minded sector of the enlightened national community considers the outcome of particular trials unjust, as in the Sacco-Vanzetti and the Hiss cases, or there are sufficient facts known to the university even in cases which have no national notoriety to give rise to a suspicion that the outcome of the trial was improper. Here the university should not contribute to the possible injustice by adding its own sanctions against the accused without, at least, conducting an independent investigation and presenting its own view of the facts for consideration at a fair hearing before the faculty member's peers. Where this is not immediately possible because the convicted person is in custody such a hearing will have to await his release, but the university should take steps to preserve as much of the evidence as possible.

Finally, it is necessary to consider the question of a faculty member under indictment. Here the attempt should be made to keep intact the principle of presumption of innocence. Suspension without loss of pay is permissible, but only in those instances where there is reasonable ground to believe that the presence on the campus of the person in question will immediately endanger the safety of the university community.

3. *University Regulation: The Nature of the Sanction and the Power of Inquiry*

In the case of overt action subject to university sanction, the university should be entitled to impose direct punishment for the conduct itself or consider the conduct as relevant evidence in making judgments as to neglect of duty, illegal action, and the like. These principles are less restrictive than the analogous rules dealing with communication.

The university should be free to make inquiries with respect to such conduct, subject to restrictions which pertain in criminal proceedings. Our position here is that in the modern society the institution of the university is sufficiently comparable to the institution of government to require adoption of the same constitutional safeguards. As we have seen, these may be differently applied in the light of special university objectives. But in connection with the regulation of overt action there appears to be no special objective which would justify relaxation of the general protections accorded an accused in a criminal proceeding.

4. *Government Regulation*

Governmental regulation of overt action of the faculty member is limited only by constitutional protections available to all citizens generally. The faculty member should not be the object of discriminatory legislation. But neither is he entitled to any special immunity.

Under this view the right to teach in a university cannot be taken away by the government as part of the punishment for the commission of a crime. Nor should the government be permitted to make the commission of a crime the basis for withholding a license to teach in a university. Whatever justification there may be for such controls in the case of teachers of the lower grades, we feel that no legitimate governmental objective would be served by this type of control over "action." To the extent that a legitimate university objective is sought to be achieved the university is given the appropriate powers under our proposals.

C. Recapitulation

The principles we have proposed may be restated in summary form as follows:

I. A faculty member outside his classroom performance and his professional research and writing, whether on or off the campus, shall not be subjected by the university to discipline for the content or manner of his communications or for organizing or associating for purposes of communicating, provided that:

A. When a faculty member communicates in the field of his special competence, the facts, hypotheses, and conclusions stated are such that they can be corroborated by a full scholarly presentation, unless the faculty member has clearly indicated that he is not communicating as an expert or unless the circumstances are clearly such as not to allow for the reasonable inference that he is communicating as an expert.

B. Whenever a faculty member is not officially authorized to do so, he indicate

that he is not speaking as a representative of the university. However, no faculty member shall be dismissed for violating this proviso unless he has done so repeatedly after warning.

C. No faculty member communicate to the students on the campus, when they have not been forewarned, any content or in any manner which is likely to and does produce an immediate traumatic shock effect on an average student listener or viewer, provided the communication is in the following general areas: (1) obscene material; (2) derogatory statements about race or religion; (3) (here other areas may be added provided they meet the above criteria. It is desirable that these areas be codified to give a modicum of warning to communicators as to subjects where they are expected to exercise some care). However, no communication shall be deemed to violate this proviso where the content and manner is necessary to the presentation of information, hypotheses, and conclusions which can be corroborated by a full scholarly presentation. Furthermore, no faculty member shall be dismissed for violating this proviso unless he has done so repeatedly after warning.

D. A faculty member may be disciplined where he either deliberately or as a result of gross negligence slanders or libels fellow faculty members or university administrators or makes false derogatory statements concerning the university.

E. No faculty member may advocate the violation of legitimate university rules and regulations.

F. A faculty member may be punished for communications, associations, or organizational activities which violate the criminal statutes, or are covered by other statutes or executive orders, against espionage, solicitation to crime, or exhibitionism, or which violate regulations imposed on personnel doing government research on the campus, or . . . (here may be added other similar specific provisions involving violations of government regulations of conduct communicative in form but functionally constituting "action" of the type prohibited under Rule V, C, *infra*).

G. The university may regulate communication to the extent necessary to assure minimum conditions of order and safety within the university community in the following respects:

(1) The university may regulate communication of faculty members to the extent necessary to make facilities for such communication available on the campus on a nondiscriminatory basis. In this connection the content or manner of the communication must not be the basis for the denial of facilities. [However, where facilities are scarce, preference may be given to areas of communication closer to the educational purposes of the university, and the total pattern may be so arranged as to present a proper balance of non-classroom communication in the light of such educational purpose. On controversial issues equal time should be given for each point of view.]

(2) The university may make specific regulations concerning the means of communication such as the use of amplifiers to the extent necessary to prevent

immediate deprivational effects beyond those expected to be reasonably endured by members of an orderly civilized community.

(3) Where during the course of a meeting or assembly a situation arises in which there is immediate likelihood of the eruption of violence not controllable by the university through its own internal machinery of discipline, an authorized administrator of the university may order the meeting closed and violations of such order may be disciplined.

II. The content and manner of a faculty member's communication outside the classroom and his professional research and writing, and a faculty member's associations or organizational activities to facilitate such communication, except for such communication as is included in the provisos to Rule I, shall not be used as evidence of other conduct or states of affairs which can be disciplined or otherwise regulated by the university, [unless a prima facie case is first established on the basis of other evidence].

III. The university may not conduct inquiries concerning a faculty member's outside communication, or associations or organizational activities facilitating such communication, except in so far as such communication is specifically covered by the provisos in Rule I [or, except in so far as such communication or associations and organizational activities are sought as evidence to corroborate an independently established prima facie case as provided by Rule II].

IV. The government shall have no greater power to regulate the communications and related activities covered by Rules I, II, and III than the university has. The government shall furthermore not control the type of communications covered by provisos A, B, and E, and paragraphs (1) and (2) of proviso G, of Rule I. [Where the government exceeds these limitations under an *ad hoc* balancing test or similar interpretation of the first amendment it shall give greater weight to the value of the outside communication of faculty members than it does to citizens generally. Except in the case of prohibitions against disclosure for reasons of national security, such as espionage laws covered by proviso F of Rule I, no laws shall be enacted which prevent the presentation of information, hypotheses, and conclusions which can be corroborated by a full scholarly presentation.]

V. A faculty member's overt action outside that involving the performance of his professional and administrative duties shall not be regulated by the university, provided that:

A. The university may make rules governing overt action of faculty members on the campus and its immediate vicinity necessary for the protection of the health, welfare, and safety of the university population, to the extent that the general law is insufficient to meet this objective.

B. Overt action, both on and off the campus, not prohibited by the government, or such overt action covered by general laws which are not enforced, may be prohibited by the university where such overt action violates relatively stable and

generally accepted moral standards of intra-university behavior held by the national university community, or such moral standards of general conduct held by the national community.

C. Overt action, both on and off the campus, prohibited by laws which are generally enforced may also be prohibited by the university where such overt action violates the type of relatively stable and generally accepted moral standards of intra-university behavior which call for additional non-legal sanctions, or which according to such moral standards of general conduct held by the national community call for such additional informal sanctions.

D. In the event of a conviction under the general law for conduct covered by proviso C, where there is called to the attention of the university evidence that the conviction may be unjust, the university shall take no disciplinary action unless this evidence has first been presented at a fair hearing before the faculty member's peers at which the convicted faculty member is present, and the trial is found to have been fair and just. Where the accused is in custody this hearing and disciplinary action must await his release; but the university shall do all it can to preserve the evidence.

E. In case of an indictment of a faculty member and in case of a possible unjust conviction of a faculty member the faculty member may be suspended without loss of pay pending a final determination where his presence on the campus is likely, on the basis of the facts known at the time, to endanger the safety of the university community. Where a faculty member cannot be present on the campus because he is in custody of the authorities his pay may be withheld for such period of custody.

VI. Except as qualified by Rules II and III, there shall be no restriction on the university's power to use evidence or to make inquiries in connection with conduct covered by Rule V, other than those analogous to restrictions which obtain in criminal proceedings.

VII. The government's power to regulate overt action of the faculty member is limited only by constitutional protections available to all citizens generally. Faculty members may not be discriminated against; nor are they entitled to special immunity.