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Ralph F. Fuchs

Indiana University School of Law

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ACADEMIC FREEDOM—ITS BASIC PHILOSOPHY, FUNCTION, AND HISTORY

RALPH F. FUCHS*

I

THE SCOPE OF ACADEMIC FREEDOM

Academic freedom is that freedom of members of the academic community, assembled in colleges and universities, which underlies the effective performance of their functions of teaching, learning, practice of the arts, and research. The right to academic freedom is recognized in order to enable faculty members and students to carry on their roles. It is not sought as a personal privilege, although scholars enjoy the activities it permits,¹ and the tenure rights of faculty members, which are conferred after a period of probation, bestow economic security as well as forestall restrictions on freedom that might stem from the power to dismiss. In relation to tenure the position of the faculty member resembles that of the judge who holds office during good behavior to safeguard his fearlessness and objectivity in the performance of his duties.²

The conception of academic freedom which is dominant in colleges and universities in the United States today rests mainly on three foundations:

- (1) the philosophy of intellectual freedom, which originated in Greece, arose again in Europe, especially under the impact of the Renaissance, and came to maturity in the Age of Reason;
- (2) the idea of autonomy for communities of scholars, which arose in the universities of Europe; and
- (3) the freedoms guaranteed by the Bill of Rights of the federal constitution as elaborated by the courts.

Academic tenure is protected by procedural safeguards in proceedings to dismiss faculty members for cause, which are academically maintained and modelled to a significant extent on procedural due process of law.³ Academic freedom, in addi-

* A.B., LL.B. 1922, Washington University; Ph.D. 1925, Robert Brookings Graduate School; J.S.D. 1935, Yale University. Professor of Law, Indiana University. President, American Association of University Professors, 1960-62.

The definition in the first sentence of Part I and the first paragraph of Part II of this article are largely quoted, with the kind permission of the publishers of the *Encyclopaedia Britannica*, from the author's article on Academic Freedom in the current edition of the *Encyclopaedia*, I ENCYC. BRIT. 57 (1963). The bibliography attached to that article contains additional references on the subject.

¹ *Academic Freedom and Tenure in the Quest for National Security, Report of a Special Committee*, 42 BULLETIN OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS [hereinafter cited as A.A.U.P. BULL.] 51, 54-55 (1956).

² Machlup, *On Some Misconceptions Concerning Academic Freedom*, 41 A.A.U.P. BULL. 753 (1955).

³ Rudimentary procedural safeguards are required by the 1940 Statement of Principles on Academic Freedom and Tenure, drafted and supported by educational organizations and published at intervals by the American Association of University Professors (AAUP). See 46 A.A.U.P. BULL. 410 (1960) for the text and a list of supporting organizations, to which several large scholarly associations have since been

tion, has its correlative in academic responsibility in the use of freedom, which there may or may not be recognized means of enforcing against faculty members.⁴

Student freedom is a traditional accompaniment to faculty freedom as an element of academic freedom in the larger sense; but in the United States it has on the whole received secondary consideration until recently.⁵ Now students are organized to some extent to assert their right to it,⁶ and recent court decisions have enforced procedural protections, based on due process of law, against dismissals by state institutions on account of student exercise of off-campus rights of free speech and assembly.⁷

Exclusion from the academic community because of race has, also, been stated of late to be a violation of academic freedom;⁸ and exclusion of students or teachers from public institutions on this ground or discrimination against them for this reason, is, of course, a violation of federal constitutional right.⁹ Choice of those who shall participate in higher education (which must be an institutional choice) is, along with determination of curricula and of areas of research, among the elements of that academic autonomy which is one of the bases of academic freedom and may be looked upon as its essence.¹⁰ It is, however, itself subject to constitutional require-

added. Institutional regulations provide specific procedural rules to a varying extent. See CLARK BYSE & LOUIS JOUGHIN, *TENURE IN AMERICAN HIGHER EDUCATION* (1959), for the results of a three-state survey of such regulations. A model set of regulations is provided in *Recommended Institutional Regulations on Academic Freedom and Tenure*, approved by the Committee on Academic Freedom and Tenure of the AAUP on August 4, 1957, and published in mimeographed form by the Association. In discussions of academic procedural problems, legal due process of law is often referred to.

⁴ See *Academic Freedom and Tenure: The University of Illinois*, 49 A.A.U.P. BULL. 25 (1963), for a discussion of the question whether a faculty member's alleged breach of responsibility in public utterance can be a basis of disciplinary proceedings against him.

⁵ Teacher freedom and student freedom, *Lehrfreiheit* and *Lernfreiheit*, are companion concepts. In Europe the freedom of students to visit other institutions and to govern their own personal conduct is much wider on the whole than in this country. Here the idea has contributed to the policy of elective courses; but no generally recognized code of student freedom has arisen. See RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 383-98 (1955).

⁶ The United States National Student Association, composed of the student bodies of nearly 400 colleges and universities, the student governments of which have adhered to the organization, devotes a considerable portion of its attention to academic freedom and in particular to student freedom. See its *CODIFICATION OF POLICY* esp. 28-29, 38-41, 97-112 (1962-63). See also Am. Civil Liberties Union, *Academic Freedom and Civil Liberties of Students in Colleges and Universities* (1961), reprinted in 48 A.A.U.P. BULL. 110 (1962).

⁷ *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), cert. denied, 368 U.S. 930 (1961); *Knight v. State Board of Education*, 200 F. Supp. 174 (M.D. Tenn. 1961). Like some earlier cases, the opinions support rights to due procedure in connection with dismissals for any kind of misconduct. See Byse, *Procedure in Student Dismissal Proceedings: Law and Policy*, 4 J. COLLEGE STUDENT PERSONNEL 130 (1963).

⁸ Resolution of the Forty-third Annual Meeting, 43 A.A.U.P. BULL. 362 (1957): "The right to teach and the right to learn are vital and inseparable aspects of academic freedom. Consequently, free access to every kind of educational opportunity, measured only by the aptitude and achievement of the individual teacher or student, must be safeguarded to all Americans, of whatever race. Any interference with such access imperils the right of the teacher to teach, as well as of the student to learn."

⁹ *Brown v. Board of Education*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Alston v. School Board of Norfolk*, 112 F.2d 992 (4th Cir. 1940); *Davis v. Cook*, 80 F. Supp. 443 (N.D. Ga. 1948). Cf. *United Public Workers v. Mitchell*, 330 U.S. 75, at 100 (1947).

¹⁰ Lennard, *The Threat to Academic Freedom*, *Hibbert Journal*, Oct. 1948, p. 21. Robert M. MacIver

ments, which may on occasion protect the individual student or faculty member from action by his institution as well as by outsiders.¹¹

Inroads upon autonomy in respect to research are a leading cause of concern in American colleges and universities at present, because grants from government and industry for designated projects may influence the directions of inquiry. Here institutional integrity and individual self-direction both stand in need of protection—not from hostile action but from temptation.¹²

Notwithstanding the increasingly broad reach of academic freedom and the current emphasis on the essentiality of autonomy for academic institutions, the freedom of individual faculty members against control of thought or utterance from either within or without the employing institutions remains the core of the matter. If this freedom exists and reasonably adequate academic administration and methods of faculty selection prevail, intellectual interchange and pursuit of knowledge are secured. A substantial degree of institutional autonomy is both a usual prerequisite and a normal consequence of such a state of affairs. Student freedom will follow—unless, indeed, individual faculty members or departmental groups are permitted to tyrannize over particular students, as occasionally happens. Hence the main concern over developing and maintaining academic freedom in this country has focused upon encouragement and protection of the freedom of the faculty member. Institutional autonomy, constitutional freedoms, and the basic ideology of intellectual freedom have been invoked mainly to this end.

II

DEVELOPMENT OF ACADEMIC FREEDOM

European universities began during the Middle Ages as self-constituted communities of scholars, whether teachers or learners. The institutions they founded

in his book, *ACADEMIC FREEDOM IN OUR TIME* (1955), stresses the autonomy of the faculty within an institution in matters lying within its competence as basic to academic freedom. See especially pp. 94-95. RUSSELL KIRK, *ACADEMIC FREEDOM* (1955), stresses the inherent right of the academic community to maintain its own standards in that search for truth which is its reason for being.

¹¹ The AAUP Annual Meeting resolution, *supra* note 8, asserts that individual rights to teach and to learn are superior to restriction by any authority on ground of race; and of course judicial judgments which strike down segregation in education are typically directed against educational authorities. If the policy which excludes a student or faculty member is based on such allowable grounds as competence or prior training, or perhaps age or sex, the right to maintain it might be claimed as an incident to institutional academic freedom. In *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934), the Regents' policy of excluding male students who would not submit to compulsory military training was sustained; but in *Board of Education v. Barnette*, 319 U.S. 624 (1943), the policy of requiring a salute to the flag (in an elementary school) had to yield to the right of pupils who refused to take part and whose parents would be punished for their non-attendance at school if they were expelled for refusing.

¹² See AMERICAN COUNCIL ON EDUCATION, COMMITTEE ON RESEARCH POLICY, *REPORT ON SPONSORED RESEARCH POLICY OF COLLEGES AND UNIVERSITIES* (1954); AM. CIVIL LIBERTIES UNION, *STATEMENT CONCERNING THE UNIVERSITY AND CONTRACT RESEARCH* (1959), reprinted in 46 A.A.U.P. BULL. 52 (1960); HARVARD AND THE FEDERAL GOVERNMENT: *A REPORT TO THE FACULTIES AND GOVERNING BOARDS OF HARVARD UNIVERSITY* (1961); *Twenty-six Campuses and the Federal Government*, 46 EDUCATIONAL RECORD 95, 108-13 (1963); Gosheen, *Federal Financing and Princeton University*, *id.* at 168.

came under the sponsorship of the medieval church and to some degree under its authority; and the faculties, of course, were composed largely of clerics. Before the eighteenth century the Roman church and in some areas its protestant successors exerted sporadic controls against which the universities or members of their faculties found it necessary at times to contend. Scholars outside of the universities, including early scientists, engaged in the same struggles, however, and the total story is one of the effort of the human intellect to escape from bondage, rather than simply of university faculties and students to be free of external control. Within the universities a considerable censorship by dominant groups, giving rise to internal controversies, prevailed for a long time. The boundaries to learning maintained by this censorship receded on the whole, even though vestiges remained for long.¹³ At Oxford and Cambridge religious tests and restrictions for students were not removed until the latter half of the nineteenth century.¹⁴

In the eighteenth and nineteenth centuries the political state became the sponsoring authority for most universities throughout the world—although some under religious auspices remained and in the United States particularly independent private colleges and universities have continued to exist alongside the public ones. Instances of actual or attempted political interference with public institutions have continued to arise in various countries down to the present time.¹⁵ In the United States political control by state governments remains a danger which assumes reality under demagogic governors from time to time,¹⁶ despite the generally good record of the states in relation to the colleges and universities they maintain. In Europe dictatorships of several varieties have supplied object-lessons of the extent to which political control can regiment and distort intellectual endeavor even while stimulating the development of learning along selected lines.¹⁷ In some other countries, political influence

¹³ HOFSTADTER & MEITZGER, *op. cit. supra* note 5, ch. I.

¹⁴ *Id.* at 393.

¹⁵ For examples of successful resistance to attempts of this kind in the face of strong traditions of academic freedom, see instances reported in RICHARD H. SHYROCK, *THE STATUS OF UNIVERSITY TEACHERS* 77 (France) and 159 (Egypt) (published by Int'l Ass'n of Univ. Professors and Lecturers, 1961). In India the interaction of administrations, faculty groups, students, and state officials, each invoking political forces in varying degree, gives rise to government intervention from time to time, as it did in the universities of Uttar Pradesh in 1960-61.

¹⁶ The latest of the interventions of this variety was that of the Governor of Mississippi in the crisis over admission of a Negro to the University there in September-October 1962, followed by a similar attempt in Alabama. For the response in educational circles, see Resolution adopted by the American Council on Education, Oct. 5, 1962, 44 *EDUCATIONAL RECORD* 85 (1963), also printed in 48 *A.A.U.P. BULL.* 318 (1962). An earlier Mississippi episode involving gubernatorial assumption of the control of state institutions is told about in Hudson, *The Spoils System Enters College*, 64 *NEW REPUB.* 123 (1930). For the actions of educational organizations in the matter, see 17 *A.A.U.P. BULL.* 140 (1931). As to the control of Louisiana State University by Governor Huey P. Long a few years later, see Don Wharton, *Louisiana State University*, *Scribner's Magazine*, Sept. 1937, p 33. State coercion of private colleges appears in *Academic Freedom and Tenure: Allen University and Benedict College*, 46 *A.A.U.P. BULL.* 87 (1960).

¹⁷ The control of fascism over the universities is exemplified by conditions which continue in Spain. See the account by Professor Tierno Galvan in SHYROCK, *op. cit. supra* note 15, at 133. For an account of tight Communist Party control over institutions of higher education in Russia, see I. N. SHUMLIN, *SOVIET HIGHER EDUCATION* ch. VI (1962).

may play a significant although unmeasurable role in the appointment of staff members. There is a genuine interaction between academic freedom and healthy political democracy, causing each to strengthen the other. It would be too much to say, however, that the former is wholly dependent upon the latter; for given enlightenment on the part of an autocratic government, academic freedom in a genuine sense may coexist with it, as it did in nineteenth century Germany.¹⁸

It was, indeed, in nineteenth century Germany that the modern conception of academic freedom came to be formulated. The idea of the university as a place where scholars are to pursue truth, as well as to formulate and transmit it to students, who at the same time learn to pursue truth for themselves, came to be dominant there. Especially in an age of science, knowledge grows as individuals ferret it out; and the free interplay of ideas is the means of purifying it. Intellectual discipline over the members of the university community is excluded, lest it distort their search. Attracted by this conception and its results, distinguished young scholars from abroad, especially from the United States, went to the German universities in numbers.¹⁹ There they were imbued with the conception, an enlargement of which has since been dominant in this country.

Professor Friedrich Paulsen of the University of Berlin formulated systematically in 1902, in his book on *The German Universities and University Study*, the conception of academic freedom which had arisen in his country during the preceding decades. "It is no longer, as formerly," he wrote,²⁰

the function of the university teacher to hand down a body of truth established by authorities, but to search after scientific knowledge by investigation, and to teach his hearers to do the same. . . . For the academic teacher and his hearers there can be no prescribed and no proscribed thoughts. There is only one rule for instruction: to justify the truth of one's teaching by reason and the facts.

Paulsen, however, introduced a qualification. The professor of philosophy must be absolutely free; but the professor of theology "must assume a positive relation to religion and the church in general," and the professor of political and social science in a state institution must do so toward "the people and the state." The professor "who can find absolutely no reason in the state and in law, who, as a theoretical anarchist, denies the necessity of a state and legal order . . . may try to prove his theory by means of as many good arguments as he can, but he has no call to teach the political sciences at a state institution." The state, for example, is not bound to tolerate adherence to the "principles of the *social-democracy*" on the part of professors of political science. To permit such theories to be taught would indicate that "the authorities regarded the lectures of professors as harmless and insignificant. . . . So long as the state takes the universities seriously, such a form

¹⁸ HOFSTADTER & METZGER, *op. cit. supra* note 5, at 383-92.

¹⁹ Rockwell, *Academic Freedom—German Origin and American Development*, 36 A.A.U.P. BULL. 225 (1950); Metzger, *The German Contribution to the American Theory of Academic Freedom*, 41 *id.* 214 (1955).

²⁰ Translation by F. Thilly and W. W. Elwang (1906), pp. 228-31.

of political science as has been described will be impossible in its institutions of learning."²¹

Paulsen also expressed the view that political partisanship on the part of a faculty member is a disqualification, notwithstanding the fact that professors may be "men of noble discontent" who sow "the thoughts for future acts." The things which universities "are called upon to cultivate transcend the boundaries of countries and nations. . . . The German universities dwell in their own world, outside of politics, and their highest achievements are in science." Hence the professors, "the representatives of science, should not engage in politics, but should reflect upon the state and the law."²² Academic freedom, in other words, is internal to institutions of higher education, and does not apply to external activities of academic personnel.²³

The conception of academic freedom which is dominant in American colleges and universities and in other countries today has discarded the limitations that remained in nineteenth century Germany. It accepts, rather, another statement of Paulsen's that "a people," who establish and maintain a university,²⁴

cannot as such have an interest in the preservation of false conceptions. Its ability to live depends in no small measure upon its doing that which is necessary from a proper knowledge of actual conditions. And hence the people and the state . . . can have no desire to place obstacles in the way of an honest search for truth in the field of politics and social science, either by forbidding or favoring certain views.

It follows that a society will be strengthened by permitting honest condemnation as well as defense of the state in institutions of higher learning, whether publicly or privately maintained. As to participation by professors in politics, specialization and attention to duty will ordinarily keep the faculty member from an active role; but he cannot be barred from testing his views or gathering data in action, or from urging his conclusions in the world of affairs, whether relevant to his academic subject or not, by joining organizations or by other means. In addition to "full freedom" in research and publication and "freedom in the classroom in discussing his subject," the faculty member in any field of study, speaking or writing as a citizen, "should be free from institutional censorship or discipline."²⁵

According to the position taken by some Americans within the academic profession and outside who subscribe to broad principles of academic freedom, certain specific limitations upon that freedom may nevertheless be imposed for reasons of special urgency. During World War I some of the staunchest proponents of academic freedom sanctioned the muzzling of anti-war professors and even of those

²¹ *Id.* at 233-38, 243-54.

²² *Id.* at 254-62.

²³ The German university tradition involved a sharp separation between the academic community and the general one, with the former devoted to science and philosophy and hence "utterly indifferent to the turmoils and ambitions of the outer-world." See excerpts from JAMES MORGAN HART, *GERMAN UNIVERSITIES: A NARRATIVE OF PERSONAL EXPERIENCE* (1874), as printed in 2 RICHARD HOFSTADTER & WILSON SMITH, *AMERICAN HIGHER EDUCATION* 569, 576 (1961).

²⁴ Paulsen, *supra* note 20, at 244.

²⁵ 1940 Statement of Principles, *supra* note 3.

whose ancestry and utterances gave "reasonable ground for belief that they contemplate[d]" acts to aid the enemy or hamper the war effort.²⁶ Many today and during the past thirty years have urged that membership in the Communist Party disqualifies an individual for faculty membership without reference to sincerity or circumstances, because of the Party's discipline and the existence of a basic conflict between its purposes and freedom itself.²⁷ The professional charter of academic freedom which is currently followed concedes more generally that a college or university may insist upon "limitations of academic freedom because of religious or other aims of the institution," provided the limits are clearly stated in advance.²⁸ This concession recognizes the church sponsorship of many institutions in this country and the civil liberty of individuals and groups, including those who form academic institutions, to govern their own affairs. At some point in the scale of self-imposed restrictions a college or university that comes under them may, of course, cease to be an institution of higher education according to the prevailing conception;²⁹ and an institution that does not expressly limit itself assumes an obligation to adhere to the principles inherent in an academic community. As generally understood today, these principles do not sanction the proscription of any ideas or honest means of communicating or effectuating them, on the part of academic personnel, within an institution or outside.

The present American conception of academic freedom did not, of course, spring full-blown from the soil in which higher education grew in this country. It evolved, rather, along with specific protections to academic freedom, from the organizational forms and educational policies that arose in colleges and universities, and from struggles over recurring infringements of freedom or tenure, which sometimes took the form of faculty dismissals. These infringements were committed by governing boards or administrative officers, moved in the typical case by opinion outside the institutions, which the institutional authorities ordinarily shared. At first the pressures that resulted in these incidents were the product of demands for religious conformity;³⁰ later they involved objections to the economic or political views of

²⁶ A.A.U.P. Bulletin, Feb.-March 1918, pp. 29, 41.

²⁷ ASSOCIATION OF AMERICAN UNIVERSITIES, *THE RIGHTS AND RESPONSIBILITIES OF UNIVERSITIES AND THEIR FACULTIES* Pt. IV (1953); Lovejoy, *Communism Versus Academic Freedom*, 18 *AMERICAN SCHOLAR* 332 (1949); Sidney Hook, *Should Communists Teach?*, N.Y. Times Magazine, Feb. 27, 1949, p. 7; KIRK, *op. cit. supra* note 10, at 114-15. Compare Alexander Meiklejohn, *Should Communists Teach?*, N.Y. Times Magazine, Mar. 27, 1959, p. 10; and see Hook & Fuchs, *A Joint Statement on a Matter of Importance*, 42 A.A.U.P. BULL. 692 (1956). For brief accounts of events at the University of Washington and the University of California which followed the implementation by those institutions of the policy of barring Communist Party members from the faculties, see 42 A.A.U.P. BULL. 61-66, 100-107 (1956).

²⁸ 1940 Statement of Principles, *supra* note 3.

²⁹ The Declaration of Principles formulated in 1915 by the first Committee on Academic Freedom and Tenure of the AAUP distinguished in this regard between "proprietary institutions" espousing particular ideas and those which exercise a "public trust" and "have no moral right to bind the reason or the conscience of any professor." Reprinted in 40 A.A.U.P. BULL. 90, 94-97 (1954).

³⁰ HOFSTADTER & METZGER, *op. cit. supra* note 5, at 155-77, 286-303, 320-45. Views on slavery which were out of accord with those in the academic or surrounding community were also the cause of dismissals or of hostility to individual administrators or faculty members. *Id.* at 253-61.

faculty members.³¹ Most recently, nonconforming utterances in matters of sex, or literary works which have been deemed offensive, have produced faculty dismissals raising issues of freedom.³²

III

PROFESSIONAL FORMULATION AND SUPPORT OF PRINCIPLES OF ACADEMIC FREEDOM

Because of concern among professors over dismissals that had taken place, coupled with the belief that it would be desirable to have a national organization of college and university teachers similar to the associations of physicians and lawyers, the American Association of University Professors (AAUP) was formed in 1915 by a group of prominent faculty members in leading institutions. Those who joined as charter members came from sixty institutions. Although the purposes of the new Association were broadly professional, its most noteworthy early pronouncement was the 1915 Declaration of its Committee on Academic Freedom and Tenure, specifically directed to that subject.³³ The officers of the Association quickly became absorbed in efforts to cope with recurring dismissals of faculty members at institutions in various parts of the country.³⁴ The Association has continued in conjunction with the Association of American Colleges (AAC) to formulate basic principles of academic freedom and tenure.³⁵ It has also provided means of vindicating these principles by directing professional attention to academic administrations which are found to have violated them,³⁶ and has spelled out its policies in decisions on particular cases and in annual reports of the Committee on Freedom and Tenure, carrying forward the 1915 Declaration.³⁷

³¹ *Id.* ch. IX.

³² *Academic Freedom and Tenure: The University of Illinois*, *supra* note 4; *Academic Freedom and Tenure: Southwestern Louisiana Institute*, 42 A.A.U.P. BULL. 718 (1956). Instances of dismissal on account of publication of literary works have been the subject of recent complaint to the AAUP. Another recent factor contributing to violations of freedom and tenure has been, of course, a wave of dismissals from institutions in the Deep South because of views or utterances in favor of racial desegregation. For recent summaries, see 48 A.A.U.P. BULL. at 159 and 167-69 (1962). As to the intimidating effect of the climate of opinion in which southern institutions operate today, see Woodward, *The Unreported Crisis in the Southern Colleges*, Harper's, Oct. 1962, p. 82.

³³ 1915 Declaration of Principles, *supra* note 29.

³⁴ Metzger, *The First Investigation*, 47 A.A.U.P. BULL. 206 (1961).

³⁵ The two associations formulated a joint statement in 1925, now superseded by the 1940 Statement. See 1925 Conference Statement, 43 A.A.U.P. BULL. 116 (1957). A joint Statement on Procedural Standards in Dismissal Proceedings received final approval in 1957-58. 44 A.A.U.P. BULL. 270 (1958).

³⁶ These means typically consist of an on-the-scene inquiry by a special committee of professors into a challenged dismissal that has not been resolved by negotiation, the publication of its report after approval for publication by the Committee on Academic Freedom and Tenure of the Association, "censure" of the responsible administration (including governing board) where deemed warranted by the Council and an Annual Meeting of the Association, and subsequent negotiations looking to removal of the censure. The list of censured administrations, which originated in 1938 as a substitute for previous removals of institutions from an "eligible list," is regularly published in the *Bulletin*. See, e.g., 49 A.A.U.P. BULL. 4 (1963).

³⁷ These reports are published in the *Bulletin* after their presentation at Annual Meetings. See especially the report for 1950, 37 A.A.U.P. BULL. 72 (1951). The report of the Special Committee on Academic Freedom and Tenure in the Quest for National Security, *supra* note 1, reformulated the applicable general principles with special reference to the issues presented by the national effort to combat communism.

These group measures have involved only partial collaboration between the professors, represented by their association, and administrators and trustees. The AAC has shared in what might be called the legislative process; but mediation in on-campus disputes, investigation into challenged dismissals, determinations of whether violations of the principles of freedom and tenure have occurred, and the application of sanctions have fallen to the AAUP acting alone. In its investigations, reports, and use of sanctions, the Association prides itself on proceeding with scrupulous objectivity through processes judicial in character. Its conclusions as to facts have not been challenged, except very rarely by an immediate party.

In the reports it has been necessary to develop through interpretation the rather brief joint statements which underlie the conclusions. As to tenure, for example, the "acceptable academic practice" the 1940 Statement sets forth, of limiting the faculty member's probationary period to seven years, has been translated into a mandatory rule.³⁸ With respect to academic freedom during the probationary period, for which the 1940 Statement provides, it has been held that the faculty member may not be made to suffer non-renewal of his appointment or denial of tenure because of his exercise of freedom.³⁹ The freedom of the faculty member to speak as a citizen, which is secured "from institutional censorship or discipline," has been taken to include his privilege of refusing on constitutional grounds to answer questions in an official investigation.⁴⁰ The judgment of unfitness to continue in a faculty position, which may be reached in a dismissal proceeding, may not be based merely on conduct, such as simple membership or honest activity in a suspected organization, which is within the ambit of academic freedom.⁴¹ This type of development of the principles of freedom and tenure, although *ex parte*, has implicitly been accepted—in part, no doubt, because of the sheer necessity for it, and to some extent, perhaps, because of the soundness of the interpretations reached.

The extent of the actual acceptance of these interpretations by the academic community as a whole cannot be gauged with precision. The decisions by the AAUP to which they have led—and, indeed, the decisions establishing clear-cut violations of explicit principles—have not secured the reinstatement of faculty members found to have been wrongfully dismissed. The regulations of the offending institutions have, however, typically been made to conform subsequently to the stated principles, as those of many other institutions do, without dissent from the interpretations of the AAUP.⁴²

42 A.A.U.P. BULL. at 50-61 (1956). A supplementary statement of the Committee on Academic Freedom and Tenure was published in 1958. 44 A.A.U.P. BULL. 6 (1958).

³⁸ *Academic Freedom and Tenure: Princeton Theological Seminary*, 45 A.A.U.P. BULL. 47 (1959).

³⁹ Alabama Polytechnic Institute, 44 A.A.U.P. BULL. 158 (1958); see also *Academic Freedom and Tenure: Evansville College*, 35 A.A.U.P. BULL. 74 (1949).

⁴⁰ *The Effects of Refusal to Testify*, 42 A.A.U.P. BULL. 75 (1956).

⁴¹ University of Washington, *id.* at 61.

⁴² The administration is not required to assent affirmatively to an interpretation which is disputable and which does not have the approval of the Association of American Colleges, although it sometimes does assent.

Of central importance in the implementation of the principles of freedom and tenure is the assurance of participation by faculty members in decisions when the dismissal of colleagues is proposed. The 1940 Statement provides that "termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution."⁴³ Often characterized as a means of securing a judgment of the faculty member by his peers in the first instance, this provision draws its chief value from the assurance it gives that academic considerations will enter into decisions and from the likelihood it provides that professionally accepted principles will be given effect. Without such faculty participation, the prospects for thoroughgoing maintenance of academic freedom in American institutions of higher learning would be considerably less than they are.

IV

LEGAL IMPAIRMENT AND PROTECTION OF ACADEMIC FREEDOM

In addition to the contribution which constitutional law has made to the substantive and procedural aspects of academic freedom as professionally defined and maintained, the law of the land may bear directly on academic freedom in at least three ways: through the impairment of freedom by legislative restrictions on it; through judicial enforcement of constitutional barriers to such impairments; and through judicial protection of the right to freedom as against limitation by academic authorities themselves. In rendering decisions in cases arising in any of these areas the courts, especially the Supreme Court of the United States under the Bill of Rights and the fourteenth amendment, may do much to define the effective scope of academic freedom.

Legislation which attaches ideological tests to the eligibility of students or faculty to participate in higher education obviously impairs academic freedom by imposing the alternative of either outward conformity or exclusion for refusal to submit. Statutory oaths of allegiance aroused much opposition among administrators and professors in the 1930's.⁴⁴ Even though the required oaths could be taken in good faith and construed according to the subjective loyalties of the takers, they were recognized as efforts to impose conformity on education.⁴⁵ These laws remain on the books⁴⁶ and have been augmented by a loyalty oath requirement that conditions federal aid to students and scholars under the National Science Foundation and National Defense Education Acts.⁴⁷ There have also been added the more recent

⁴³ Note 3 *supra*.

⁴⁴ The index to volume 22 of the AAUP *Bulletin* (1936), under the caption "Loyalty Oaths," leads to published accounts of protests against such oaths.

⁴⁵ See Becker, *In Support of the Constitution*, 21 A.A.U.P. BULL. 327 (1935), reprinted from 140 THE NATION 13 (1935); Angel, address to Yale Alumni, 22 A.A.U.P. BULL. 260 (1936); *Statement on Freedom of Speech—Teachers' Oath Laws*, 23 A.A.U.P. BULL. (1937).

⁴⁶ WALTER GELLHORN, *THE STATES AND SUBVERSION* 410-11 (1952).

⁴⁷ 64 Stat. 156, as amended, 42 U.S.C.A. § 1874(d)(1)(A) (Supp. 1963); 72 Stat. 1962, as amended, 20 U.S.C.A. § 581(f) (Supp. 1963).

requirements of disclaimers of subversive associations and beliefs, including such a requirement in the same two federal acts prior to their amendment in 1962.⁴⁸ The principal objections to such disclaimers are that they operate somewhat *in terrorem* when their terms are not wholly clear and that the exclusion of any genuinely held ideas whatsoever from colleges and universities is inconsistent with the nature of higher education. In addition, they are invidious when academic personnel are singled out for attention, and can lead easily to inquisitions when false swearing is suspected.⁴⁹ Similar in effect are statutory requirements for disclosure of memberships, accompanied by express or implied threats of dismissal if unfavorable affiliations are brought to light.⁵⁰ Statutes requiring investigations to ferret out individuals adhering to proscribed organizations or beliefs operate with, if anything, still more drastic effect.⁵¹ Simple prohibitions, enforceable by criminal prosecutions, operate more sporadically. The one which has now replaced the disclaimer requirement in the National Science Foundation and National Defense Education Acts is quite tightly drawn.⁵²

Investigations not required by statute and having no prescribed effects under existing law may nevertheless operate *in terrorem* and may lead to loss of reputation by those who are subject to inquiry, if their beliefs and associations are gone into. Therefore, the possible effect of such investigations in limiting the freedom of students and faculty is recognized, and specific justification for each inquiry must be shown.⁵³ When justification is shown and the inquiry goes forward, the restriction that may result is a consequence of the conduct of academic institutions in society. Inquiry

⁴⁸ Notes 46 and 47, *supra*, prior to amendment. The requirement of the two acts was that the affiant swear "he does not believe in, and is not a member of and does not support any organization that believes in or teaches, the overthrow of the United States Government by force or violence or by any illegal or unconstitutional methods."

⁴⁹ Among many published protests against the disclaimer affidavit requirement of the National Defense Education Act, possibly the most eloquent and comprehensive is that written by President A. Whitney Griswold of Yale University and published in the *New York Times Magazine* of December 20, 1959, at p. 18. For a record of opposition among educators, see *Repealing the Disclaimer Affidavit*, 46 A.A.U.P. BULL. 55 (1960). For the result and a final list of protesting institutions, see Orentlicher, *The Disclaimer Affidavit: A Valedictory*, 48 *id.* 524 (1962).

⁵⁰ See the Arkansas act involved in *Shelton v. Tucker*, 364 U.S. 479 (1960). Although the decision invalidating the statute was placed on the ground of undue breadth of the required disclosure (*infra* text at note 65), the legislature of the state was clearly seeking to provide a means of identifying members of the National Association for the Advancement of Colored People (NAACP), and of discouraging membership in that organization. See also *NAACP v. Alabama*, 357 U.S. 449 (1958); *Bates v. Little Rock*, 361 U.S. 516 (1960); *Louisiana v. NAACP*, 366 U.S. 293 (1961).

⁵¹ See *Adler v. Board of Education*, *infra* note 61. The Association of American Law Schools (AALS) condemned sweeping investigations into the loyalty of university faculties in a resolution adopted in 1951, dealing also with other aspects of academic freedom in relation to national security. 1951 PROCEEDINGS 61-62, 98-101. For comprehensive reports of the Association's Committee on Academic Freedom and Tenure in this area, see *id.* 102-36; 1953 PROCEEDINGS 97-125; 1954 PROCEEDINGS 20-22, 115-20.

⁵² Under the provision, it becomes a criminal offense for a knowing member of an organization which is registered, or has been required by a final order of the Subversive Activities Control Board to register, under the Internal Security Act, to apply for a federal loan or grant.

⁵³ *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); see *Gibson v. Florida Legislative Investigating Committee*, 372 U.S. 539 (1963).

into the substance of the teaching in an institution seems, however, to be forbidden on constitutional grounds.⁵⁴ The character and incidental activities of those who participate in the educational process, in so far as they are deemed relevant to national security, are, on the other hand, subject to scrutiny.⁵⁵

Judicial enforcement of constitutional barriers to the impairment of academic freedom by governmental action, centering in the Supreme Court of the United States, has resulted in predominantly split decisions, falling now on one side of the line separating validity from invalidity and then on the other.⁵⁶ Most of the decisions involving faculty members have not turned on issues related specifically to academic affairs, but rather on such questions as whether a dismissal for past invocation of the fifth amendment violated the personal rights of the individual,⁵⁷ whether an oath law might require dismissal from any kind of public employment because of innocent membership in a proscribed organization,⁵⁸ whether a mandatory oath was invalidly vague in its terms,⁵⁹ or whether procedural due process was accorded in a legislative investigation.⁶⁰ The permissible scope of governmental inquiries into academic affairs and the permissible bases for excluding persons from teaching positions have, however, been considered; and in the opinions to which these questions have given rise the Justices of the Supreme Court have uttered formulations of academic freedom that will be enduringly influential.

The leading case is *Adler v. Board of Education*,⁶¹ involving the Feinberg Law of New York. The statute and regulations under it by the State Board of Regents required the Board of Education of the city of New York to list organizations found, after hearing, to advocate or teach overthrow of the Government by force or violence or other unlawful means, and further required that persons teaching or advocating overthrow of the Government by these means, or knowingly belonging to organizations so teaching or advocating, should not be appointed or retained as teachers in public institutions. Hearings were to be accorded before denial of appointment or dismissal under the law, with membership in an organization listed by the Board constituting prima facie evidence of disqualification. The Supreme Court sustained the statute in an opinion by Mr. Justice Minton which upholds the authority of the state to exclude from the "sensitive area" of the schoolroom persons

⁵⁴ *Infra*, text at note 63.

⁵⁵ *Barenblatt v. United States*, *infra* note 64.

⁵⁶ See Carr, *Academic Freedom, the American Association of University Professors, and the United States Supreme Court*, 45 A.A.U.P. BULL. 5 (1959); Fuchs, *The Barenblatt Decision and the Academic Profession*, *id.* at 333 (1959). For a penetrating discussion of restrictions on the freedom of teachers and the means of combating them, see *Racial Integration and Academic Freedom*, 34 N.Y.U.L. REV. 725, 899 (1959) (Part one of a study by the Arthur Garfield Hays Memorial Fund, School of Law, New York University).

⁵⁷ *Beilan v. Board of Education*, 357 U.S. 399 (1958); cf. *Nelson v. County of Los Angeles*, 362 U.S. 1 (1960).

⁵⁸ *Wieman v. Updegraff*, 344 U.S. 183 (1952).

⁵⁹ *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961)

⁶⁰ *Sweezy v. New Hampshire*, *supra* note 53.

⁶¹ 342 U.S. 485 (1952).

of the kind proscribed. The Court cited a decision the preceding year, in which a disclaimer oath requirement for Los Angeles municipal employees was upheld on the ground that public servants may be examined "as to matters that may prove relevant to their fitness and suitability for the public service."⁶² Justices Douglas and Black dissented, emphasizing the intimidation caused by such legislation and by the principle of guilt by association of which the New York statute made use. "Where suspicion fills the air," said Mr. Justice Douglas, "and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect."

In *Sweezy v. New Hampshire*, the decision reached by four concurring Justices turned in the end on a denial of due process through failure to show that the questions asked of a visiting lecturer at the University of New Hampshire about his lectures and party affiliations, during an official investigation, came within the authorized scope of the inquiry. The opinion of these four Justices, by Chief Justice Warren, expressed special concern over academic freedom. "The essentiality of freedom in the community of American universities is almost self-evident," he wrote:⁶³

No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Here, "We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread."

The same view was elaborated in a concurring opinion by Justices Frankfurter and Harlan, basing the decision on the freedom issue. As a result, in the later *Barenblatt* case,⁶⁴ the majority of the Court stated in an opinion by Mr. Justice Harlan that,

... broadly viewed, inquiries cannot be made into the teaching that is pursued in any of our educational institutions. When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain.

In the eyes of the Court majority in this case, however, the coercive effect of investigations into communist associations and activities of students and teachers is outweighed by the public interest in discovering such conduct, where there is reason to suspect it. A broadscale disclosure of all organizational affiliations cannot, however, be required of teachers in public institutions.⁶⁵

⁶² *Garner v. Los Angeles Board of Public Works*, 341 U.S. 716 (1951).

⁶³ 354 U.S. 234, 250 (1957).

⁶⁴ *Barenblatt v. United States*, 360 U.S. 109, 112 (1959).

⁶⁵ *Shelton v. Tucker*, 364 U.S. 479 (1960).

On the frontier of legal protection to academic freedom lies the possible availability of judicial remedies to aggrieved faculty members or students against impairment of their freedoms by actions of the institutions. Breach of contract, violation of an applicable regulation of a public institution, or unconstitutional use of public power (exercised by officers of a public institution as state officials or exercised by a private institution pursuant to delegation) might be the basis of relief. The same analysis as may justify recovery against violation of procedural or tenure rights⁶⁶ applies here; but the precise meaning of institutional documents securing the right to freedom is often subject to considerable doubt. The Illinois Court of Appeals has recently rejected a claim that institutional regulations securing faculty freedom provided anything more than due consideration within the university of a claim that freedom had been violated by a dismissal on account of a letter published in the student newspaper.⁶⁷ Courts will be reluctant in any event to review the determinations of academic authorities in such matters, and there is no strong demand that they do so.⁶⁸ Professional means of vindicating academic freedom against institutional action remain the chief reliance of faculties.

V

BY WAY OF SUMMARY

It should be apparent from even so brief an account as the one in the preceding pages that academic freedom rests on a variety of cultural and institutional factors; that it changes from time to time and from place to place; and that in the United States today it embraces more sweeping claims to independence, as well as a vastly greater range of educational activities, than ever before in history. Originating as a condition of scholarly endeavor in institutions that performed highly specialized functions closely related to philosophy, and restricted until recently to freedoms within those institutions, it has been expanded in the United States to cover faculty members in a great variety of institutions "beyond the high school,"⁶⁹ and to protect the liberty to participate in extramural as well as intramural activities. To render this expanded academic freedom secure, impressive professional enforcement machinery has been established and the law of the land has been invoked to a significant extent.

⁶⁶ See *Nostrand v. Little*, 58 Wash. 2d 111, 361 P.2d 551 (1961), *appeal dismissed*, 368 U.S. 436 (1962); Byse, *Academic Freedom, Tenure, and the Law*, 73 HARV. L. REV. 304 (1959).

⁶⁷ *Koch v. Board of Trustees of the University of Illinois*, 39 Ill. App.2d 51, 187 N.E.2d 340 (1962).

⁶⁸ Article 5(3) of the German Constitution reads: "Art and science, research and teaching, shall be free. Freedom of teaching shall not absolve from loyalty to the constitution." Even so explicit a provision might mean only that specified freedoms are guaranteed against interference by non-academic authority. The self-government of academic institutions is included in the guaranty, and is secured as well by state constitutional provisions. 3 *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS* 58, 143 (1953); 1 *MANGOLDT-KLEIN, DAS BONNER GRUNDGESETZ* 253 (2d ed. 1957). It seems unlikely, therefore, that an alleged denial of academic freedom by academic authority would be reached by the guaranty.

⁶⁹ The German constitutional guaranty of teaching freedom (*Lehrfreiheit*) is not deemed by commentators to extend to instruction that does not depend upon independent investigation. Hence it is confined to academic institutions and does not apply to those that prescribe the content of courses to be taught or the textbooks to be used. 1 *MANGOLDT-KLEIN, op. cit. supra* note 68, at 257, 258.

The same development as has produced teachers' colleges (now expanded to state colleges and universities), engineering and business education, art institutes, "department store universities," and many other forms of higher education in this country has, of course, brought a far larger portion of the youth of the land into these institutions as students than is or has been the case anywhere else. Popular concern with what goes on there is correspondingly great. The operation of colleges and universities is enmeshed in community affairs at many points. When to this factor is added the direct and immediate dependence of public institutions and many private ones on current appropriations, contributions, or tuition payments for support, the difficulties besetting the maintenance of full academic freedom become apparent.

Also relevant is the form of organization of colleges and universities in this country, which places them, with rare exceptions, legally under the control of lay governing boards. It is this factor which, along with the delegated authority of presidents and other administrators, accounts for the form—namely, contests over the dismissals of faculty members from positions they hold legally as employees—which academic freedom issues have assumed. It accounts, too, for the shape which professional protective measures have taken, opposing faculty judgments within an institution, or marshalled from outside by the national association of faculty members, to those of the legally constituted authorities. Collaboration between employees and employed on a professional basis is growing, however.⁷⁰ At the same time, small beginnings have been made at holding in check by legal means the power of the outside community to regulate the beliefs and associations of students and faculty members. On the other hand, litigation as a means of settling internal controversies, which occasionally arises, seems to have extremely limited possibilities.

Academic freedom, however, is by no means wholly or even largely dependent on formal protection for its strength and its survival. To a large extent it exists and is recognized because of professional tradition and because it resides inherently in the functions of teaching, learning, and research. Faculty members in colleges and universities are usually not employed to follow orders but to render instruction and to pursue inquiries in their fields of competence, largely free of supervision and direction, even though there still are exceptions in some small institutions. For students there is much more prescription; but election among an almost bewildering array of course offerings and curricula is quite common. And surely the dominant conception of the student in this country is that, within a given area of subject matter, he is learning to exercise independent judgment and must have his reason appealed to rather than dominated. Hence governing boards, administrative officers, faculty members, students, and the public respect academic freedom almost insensibly; and specific intrusions upon it are relatively rare, even though their absolute number

⁷⁰ Faculty participation in college and university government appears to be increasing in the United States. See Report of Committee on the Place and Function of Faculties in College and University Government, 41 A.A.U.P. BULL. 62 (1955).

is considerable. Oath laws and similar attempts at control may have persistent insidious effects, nevertheless, and need urgently to be eliminated.

Also badly needed is greater consciousness within the expanded academic community of the importance of academic freedom and of its exercise. The numerous faculty members who are content to perform their specialized work in a manner conducive to pleasant personal relations and to public inconspicuousness contribute little to the ends for which freedom exists.⁷¹ For them and for the general public, which can have the benefits of higher education only by maintaining the conditions in which it grows, judicial formulation of the nature and requirements of academic freedom, such as occasionally takes place in opinions, will (given the American penchant for seeking wisdom from the courts) operate with salutary effect. For the rest, progress is dependent on a developing "spirit of liberty" among academic personnel and in the community at large.

⁷¹ PAUL LAZARSFELD & WAGNER THIELENS, JR., *THE ACADEMIC MIND* (1958), contains evidence that even in areas of the colleges and universities where considerable independence might be expected a significant portion of faculty members were led by the agitation of the early 1950's to temper their expressions of opinion inside and outside of the classroom.