

# Academic Freedom: Freedom of Expression's Vulnerable Child

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In the early pages of his book on the history of the American notion of freedom, Eric Foner tells us that the US Constitution's First Amendment protections against state infringement of freedom of the press and freedom of speech were meant to protect both the right to "individual expression and as essential elements in democratic governance, since without a free flow of ideas and information, voters and legislators cannot reach decisions intelligently."<sup>1</sup>

The principle that without the free flow of information and ideas you cannot make sense of anything is a fundamental assumption behind academic freedom.<sup>2</sup> Censorship and academic work do not mix. One of the basic principles of academic freedom is that academics shall not be subject to any "prescribed doctrine"<sup>3</sup> which limits what can be discussed, investigated, debated, or expressed either inside or outside the academy. This is the prohibition against institutional censorship in the protected realms of teaching, research and scholarship, and intramural and extramural expression. Its purpose is to protect intellectual work and discussions from repression, no matter how disagreeable some may find the questions asked or the conclusions reached. This is an early modern idea derived from science: all that we think we know we know only provisionally and is subject to further correction in the light of new facts and understanding. Nothing can be protected as orthodoxy immune from scrutiny or criticism. Moreover, there is no stopping the investigation of reality because we think we have achieved certainty and have concluded that no further inquiry is appropriate or acceptable. This assumption is both the basis of all academic work and fundamental to political democracy.<sup>4</sup> Academic freedom can therefore be understood as an offspring of freedom of expression.

Academic freedom's lineage as a child of freedom of expression is, however, often obscured by commentaries that define it more narrowly as the precondition for the work of experts operating within the limiting framework of disciplinary norms and findings. After all, in the broader public realm every form of expression short of hate speech or clear incitement to violence is

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<sup>1</sup> Eric Foner, *The Story of American Freedom* (New York: W. W. Norton, 1998), 25.

<sup>2</sup> In this paper, "academic freedom" refers to the rights of individual faculty members. I do not discuss the academic freedom rights of students. The university as an institution does not enjoy academic freedom, though it should defend its institutional autonomy in ways that protect academic freedom as the fundamental regulatory principle of the university's operations.

<sup>3</sup> CAUT Policy Statement on Academic Freedom, November 2018, <https://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom>, accessed May 6, 2019.

<sup>4</sup> For a summary of the eighteenth century European version of the insistence on free expression as essential to the progress of knowledge, see Jonathan Israel, *A Revolution of the Mind: Radical Enlightenment and the Intellectual Origins of Modern Democracy* (Princeton: Princeton University Press, 2010), 204-206. On the self-correcting nature of inquiry see Isaac Newton, "Rules of Reasoning in Philosophy: Rule IV, (1686)" in *Newton's Philosophy of Nature: Selections from his Writings*, ed. H. S. Thayer (Hafner: New York, 1965), 5. See also Keith E. Whittington, *Speak Freely: Why Universities Must Defend Free Speech* (Princeton: Princeton University Press, 2018), Chapter 2.

permitted, no matter how unfounded its contents may be. By contrast, in the classroom, laboratory or study, academics must be concerned with how sound a particular claim might be in light of the prevailing disciplinary findings or norms--or, as Matthew Finken and Robert Post approvingly have it for some academic fields, disciplinary dogmas.<sup>5</sup> At the disciplinary boundaries, some version of these norms and findings, provisional though they must be, are assumed to constitute the limits to our speech as scholars and teachers. In this perspective, even the more robust rights to free expression attributed to academics for speech in the public realm (extramural speech) and in institutional governance (intramural speech) tend to be understood from the perspective of disciplinary norms.

This paper is anchored in a concern that too great a focus on the limits to academic freedom risks overlooking its origins and dependence upon freedom of expression writ large. We ignore at our peril the crucial importance of the broader right of freedom of expression as fundamental to academic freedom. It is not only in protecting the intramural and extramural rights of academic speech that a robust defense of freedom of expression is necessary. Even in the realm of strictly disciplinary work this is critical. For to mitigate the risk of creating our own "prescribed doctrines" in the form of disciplinary norms requires the broadest respect for dissent on the part of individual academics. Moreover, preserving the free exercise of the core functions of teaching and research demands the vigorous defense of freedom of expression in the external world governed by the public authorities. Finally, any restrictions on free expression in the extramural or intramural realms, will lead inevitably to professorial self-censorship in the work of teaching and research.

## **Teaching and Research**

At the centre of many discussions of academic freedom is a tension between the fundamental commitment to free expression on the one hand and on the other the discipline-based determination of what is, at the margin, acceptable teaching and research. Academic freedom is seen as fundamentally a right exercised by individual academics; and yet the individual academic deploys that freedom within a framework<sup>6</sup> that is policed by an impressive apparatus of peer reviewers, tenure committees, promotion committees, granting agencies, wielders of bogus metrics, and as often as not these days, keepers of the seal of civility and respect.

This tension between scientifically required openness of inquiry and communication on one hand and the boundaries of disciplinary norms and findings on the other is an ongoing and far from

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<sup>5</sup> See Matthew W. Finken and Robert C. Post, *For the Common Good: Principles of Academic Freedom* (New Haven: Yale University Press, 2009), 83-86, for a discussion of "dogmatic knowledge" as embodied in Anatomy and Mathematics as opposed to the more contested findings of the humanities and social sciences. (The starting point for both Post and Finken is the AAUP's 1915 founding document : Edward E. R. Seligman, et al., "General Report of the Committee on Academic Freedom and Academic Tenure: Presented at the Annual Meeting of the Association: December 31, 1915, *Bulletin of the American Association of University Professors(1915-1955)*, Vol. 1, No. 1 (Dec. 1915), 15-43.) For Post's arguments differentiating academic freedom from freedom of expression as guaranteed by the First Amendment of the US Constitution, see his *Democracy, Expertise, Academic Freedom: A First Amendment Jurisprudence for the Modern State* (New Haven: Yale University Press, 2012) and his more recent "Academic Freedom and the Constitution," in *Who's Afraid of Academic Freedom?*, eds., Akeel Bilgrami and Jonathan Cole, (New York: Columbia University Press, 2016), 123-152.

<sup>6</sup> Cary Nelson, *No University is an Island: Saving Academic Freedom* (New York: New York University Press, 2010), 7.

unproblematic reality of academic life.<sup>7</sup> The positions taken by Finkin and Post entail strong claims that academic freedom is a right of the scholarly profession organized into disciplines rather than fundamentally a right of individual academics. Indeed, Post worries that scepticism about disciplinary norms and findings will undercut what he sees as the one justification for public support for academic freedom which is that academic work serves the public interest by generating useful knowledge.<sup>8</sup> To those concerned about the danger of discipline-based orthodoxies preventing criticism and transformation of prevailing academic norms and methods, Post assures the reader that "an appreciation of controversy and hence of independence of thought and utterance, is built into the very structure of professional academic standards."<sup>9</sup>

One need only reflect, however, on the fierce determination of orthodox economists to oust their heterodox opponents from the academy to have doubts about Post's rosy view of professorial immunity to dogmatism.<sup>10</sup> Even scholars who basically accept Post's view of disciplinary authority nevertheless worry about its potential for generating orthodoxies. Reflecting on this problem and her own experience in the struggle against the establishment of the historical profession to gain recognition of the importance of gender as fundamental to historical understanding, Joan Wallach Scott remarks that:

Disciplinary communities provide the consensus necessary to justify academic freedom as a special freedom for faculty. But the inseparable other side of this regulatory and enabling authority is that it cannot suppress innovative thinking in the name of defending immutable standards. Paradoxically, the very institutions that are meant to legitimize faculty autonomy can also function to undermine it.<sup>11</sup>

For Scott, universities are places of "mutual acceptance of differences and an aversion to orthodoxy," where "there is ultimately no resolution, no final triumph for any particular brand of thought or knowledge."<sup>12</sup> Similarly, Judith Butler, in an essay emphasizing the diverse and unstable nature of academic norms against what she sees as the troubling rigidity of Post's characterization, makes a plea for the professional obligation to view the norms in the most flexible way. We must, she says, recognize that norms are multiple and contested and that scholars must find a way to "recognize good work that adheres to modes of inquiry and method

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<sup>7</sup> For a discussion of this problem see Mark A. Gabbert, "The Right to Think Otherwise," in James L. Turk, (ed.), *Academic Freedom in Conflict: The Struggle over Free Speech Rights in the University* (Toronto: James Lorimer, 2014), 89-109. The discussion of norms here is partly based on that essay.

<sup>8</sup> Robert Post, "The Structure of Academic Freedom," in *Academic Freedom After September 11*, ed. Beshara Doumani (New York: Zone Books, 2006), 74-79.

<sup>9</sup> *Ibid.*, 76.

<sup>10</sup> Allan Manson, Pamela McCallum, and Larry Haiven, Report of the Ad Hoc Investigatory Committee into the Department of Economics, at the University of Manitoba, January 2015, [http://www.umfa.ca/images/pdfs/CAUT\\_ECON.pdf](http://www.umfa.ca/images/pdfs/CAUT_ECON.pdf), accessed May 6, 2019.

<sup>11</sup> Joan Wallach Scott, *Knowledge, Power and Academic Freedom* (New York: Columbia University Press, 2019), 48-52.

<sup>12</sup> Joan Wallach Scott, "The Campaign Against Political Correctness: What's Really at Stake," *Change* 23, (Nov.-Dec., 1991): 43, accessed May 6, 2019, [https://www.jstor.org/stable/40165038?seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/40165038?seq=1#page_scan_tab_contents)

that we do not share."<sup>13</sup> For Scott and Butler, a plea for the broadest freedom of expression is deployed against the danger of too high a regard for prevailing disciplinary norms and findings.

The philosopher Akeel Bilgrami has also drawn attention to disciplinary repression as a major threat to academic freedom. Echoing Scott's account, he points to the potential that the prevailing perspectives in a discipline, enforced by the "unwitting disciplinary mandarins and gatekeepers" of the academic establishment, will rule out in advance "*alternative frameworks* for pursuing the truth". For Bilgrami, this "exclusionary phenomenon" confronted those who earlier struggled to get recognition for new approaches to understanding race and gender; but he also observes that scholars who dissented from such dominant approaches are now likely experiencing their own sense of marginalization. Bilgrami sees this sort of "unconscious" disciplinary dogmatism as a major threat to the university's health as a community of scholars. He argues that the necessary opening of the way for new approaches cannot be based on an initial estimate of the long-term contribution of new paradigms to knowledge, since the fruitfulness of a new approach can only be assessed "downstream" in light of longer term findings. Bilgrami rejects arguments for "balance" in the classroom or scholarly work of individual academics; but he sees the existence of a variety of perspectives as critically important to a healthy academic environment which requires "an attractively diverse intellectual ethos".<sup>14</sup> This is quite in contrast to Post's position on the process of disciplinary change which resists any easy introduction of alternative paradigms.<sup>15</sup>

Yale's Sterling Professor of English, David Bromwich, goes further yet in questioning Post's position. He rejects what he sees as the view that "you are licensed to say what you say by the previous and ever-to-be-renewed consensus of experts in the field."<sup>16</sup> On the contrary, once hired with evidence of professional competence, the individual academic should be granted the fullest exercise of intellectual freedom uninhibited by any "disciplinary consensus."<sup>17</sup> In Bromwich's view, academic freedom needs to be understood as "a category of political freedom"; and a university's faculty ought to be constituted of "a multiplicity of uncoerced individuals" whose individual freedom as scholars and teachers must not be restricted by externally imposed limits on their findings and arguments.<sup>18</sup> Bromwich also sees the "licensed expert" model of the scholar as narrowly preoccupied with the production of knowledge of the scientific sort at the expense of the quite different "insights or interpretations" in other fields that may result in what he calls "accuracy of imagination."<sup>19</sup> For him, the problem with the imposition of disciplinary norms is that "permission to work freely loses its force at the exact boundary of expertise. The intent is to purify, and at the same time to limit, the conditions that allow free inquiry to be counted as a right."<sup>20</sup> Aside from an agreement on subject matter

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<sup>13</sup> Judith Butler, "Academic Norms, Contemporary Challenges: A Reply to Robert Post on Academic Freedom," in Doumani, *op. cit.*, 121-3.

<sup>14</sup> Akeel Bilgrami, "Truth, Balance, and Freedom," in Bilgrami and Cole, 19, 22-23 (italics in the original).

<sup>15</sup> Post, "The Structure of Academic Freedom," 76, and 103 footnote 72.

<sup>16</sup> David Bromwich, "Academic Freedom and its Opponents," in Bilgrami and Cole, 32.

<sup>17</sup> *Ibid.*, 27, 39.

<sup>18</sup> *Ibid.*, 27, 30.

<sup>19</sup> *Ibid.*, 31-33. Bromwich's claim calls to mind the difficulty that Finkin and Post have in determining whether academic freedom protects university faculty who are creative artists since in their view, such work does not clearly qualify as knowledge producing research (Finkin and Post, 73-77).

<sup>20</sup> *Ibid.*, 32.

essential to shared intellectual engagement in the classroom, Bromwich argues there should be maximum freedom of teaching.<sup>21</sup>

Bromwich points out, too, that the imposition of academic norms as a limit to professorial speech can easily enough lead to justifications for restricting the extramural speech of academics. Here he cites the 2008 example of the dissident Israeli political scientist Neve Gordon, whose extramural commentary was publicly criticized by the university president for not using the term "apartheid" in a technically appropriate way thus calling into question his professional suitability.<sup>22</sup> Bromwich concludes that "certification of expertise in the disciplines, as in the professions, is good for the purpose it was intended to serve, the declaration of a desired competence, but it was never meant to limit or disqualify the work the mind may perform in the world."<sup>23</sup>

The philosopher Ronald Dworkin takes these concerns about the potential for transformation of norms into orthodoxies further yet. In Dworkin's view academic freedom not only serves to defend the academic's vocation to increase and communicate knowledge, but is also fundamental to what might be called the profession's moral integrity.<sup>24</sup> Dworkin accepts as reasonable the university's practice of hiring faculty members on the basis of their contribution to disciplinary knowledge and perspectives as understood at the time of their hiring.<sup>25</sup> That said, he argues that later shifts to dissident approaches have to be allowed since academics have a "responsibility to speak and write and teach truth as they see it."<sup>26</sup> On this view academic freedom is critical to producing "society's support for a culture of independence and of its defense against a culture of conformity."<sup>27</sup> For Dworkin, the university is not just a knowledge factory, but an arena in which an ethics of individual integrity and authenticity can be modelled and cultivated to the benefit of society as a whole. Rigorous enforcement of the norms and exclusion of dissenters pose a barrier to such integrity<sup>28</sup> and, one might add, stands in the way of developing the strength of character needed to challenge existing orthodoxies. Dworkin has bent the stick in the direction of free expression as an integral element of academic life, even at the expense of the norms. He joins the historian Carl Becker for whom an academic was "a person who thinks otherwise"<sup>29</sup>--or at least must have the freedom to do so.

To varying degrees, these commentators recognize that our currently accepted norms and findings may themselves have the effect of producing orthodoxy. They register academic freedom's abiding character as a form of free expression. This is reflected in their concern that intellectual work be founded in critical inquiry anchored in scepticism about the certainty of what we think we know and in a resistance to prescribed doctrine, which may be cloaked as

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<sup>21</sup> Ibid., 35.

<sup>22</sup> Bromwich, 34-39.

<sup>23</sup> Ibid, 39.

<sup>24</sup> Ronald Dworkin, "We Need a New Interpretation of Academic Freedom," in *The Future of Academic Freedom*, ed. Louis Menand, (Chicago: University of Chicago Press, 1996), 183-191.

<sup>25</sup> Ibid., 186.

<sup>26</sup> Ibid., 186, 191

<sup>27</sup> Ibid., 189.

<sup>28</sup> Ibid., 189-90.

<sup>29</sup> Carl Becker, "The Cornell Tradition: Freedom and Responsibility," *Bulletin of the American Association of University Professors* 26, no. 4 (October 1940): 509, accessed May 7, 2019, <https://www-jstor-org.uml.idm.oclc.org/stable/pdf/40219223.pdf?refreqid=excelsior%3A2a31bae8efbe5e9cf1395f8fd5ea7d3a>.

sound scholarly consensus. On this view, even discipline-based work must keep the fundamentals of free expression and scepticism constantly in play.<sup>30</sup>

Before concluding a discussion of teaching and research as intramural activities, it is important to remind ourselves of the way that the possibilities for academic freedom depend so utterly on the protection of rights to free expression in the world external to the academy. Viewed from this angle, academic freedom in the classroom, laboratory, library, or study absolutely requires the existence of a high regard for freedom of expression in the world outside the university. However much anchored in disciplinary norms, freedom in teaching and scholarship themselves require an external public realm in which free expression is protected. Failing that, the faculty member's freedom to teach and investigate may be radically undermined.

To take a recent example, in 2017 the Chinese government pressed Cambridge University Press to remove materials relating to the Cultural Revolution of the 1960s and the Tiananmen square crisis of 1989 from the Chinese editions of *China Quarterly*.<sup>31</sup> Though initially willing to comply, Cambridge eventually responded to international pressure from the academic community and reversed its decision.<sup>32</sup> One can fairly doubt, however, that China's own political scientists, political economists, historians or sociologists are free to investigate these matters and to publish their findings without subjection to state-enforced prescribed doctrine. In another case, a colleague returning from leave in Brazil reports that the new right-wing government there is busy attempting to purge the universities of subversive subject matter. One such subject is gender, which in the view of the state authorities must now be eradicated from the curriculum.<sup>33</sup> If the state intervenes to regulate expression in this way, the academic freedom of scholars and teachers is radically threatened. In such cases, academic freedom emerges starkly as the vulnerable child of freedom of expression.

The academy itself has sometimes enabled such state repression. One is reminded of the American Association of University Professors' support of wartime restrictions on civil liberties during World War I.<sup>34</sup> In justifying restrictions on academic freedom in wartime, the drafters

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<sup>30</sup> As indicated above, I am not discussing academic freedom rights of students; but see Michele Moody-Adams, "What's So Special about Academic Freedom?," Bilgrami and Cole, 97-122, for a careful application of the Post position to the classroom.

<sup>31</sup> Tom Phillips, "Cambridge University Press accused of 'selling its soul' over Chinese Censorship," *The Guardian*, August 19, 2017, accessed May 7, 2019, <https://www.theguardian.com/world/2017/aug/19/cambridge-university-press-accused-of-selling-its-soul-over-chinese-censorship>

<sup>32</sup> Maeve Kennedy and Tom Phillips, "Cambridge University Press backs down over China censorship," *The Guardian*, August 21, 2017, accessed May 8, 2019, <https://www.theguardian.com/education/2017/aug/21/cambridge-university-press-to-back-down-over-china-censorship>; Tom Phillips, "Cambridge University Press faces boycott over China censorship," in *ibid.*, accessed May 8, 2019, <https://www.theguardian.com/education/2017/aug/21/cambridge-university-press-faces-boycott-over-china-censorship>.

<sup>33</sup> For the Brazilian situation and the growing international threat to gender studies, see Elizabeth Redden, "Global Attack on Gender Studies," *Inside Higher Ed*, December 5, 2018, accessed May 8, 2019, <https://www.insidehighered.com/news/2018/12/05/gender-studies-scholars-say-field-coming-under-attack-many-countries-around-globe>.

<sup>34</sup> A. O. Lovejoy, Edward Capps, A. A. Young, "Report of the Committee on Academic Freedom in Wartime", *Bulletin of the American Association of University Professors* (1915-1955), Vol. 4, No. 2/3 (Feb. Mar., 1918), pp. 29-47, accessed August 6, 2015, <http://www.jstor.org/stable/40216871>. The statement was approved in December 1917.



declared they felt "that the present war is far more than a clash of national interests, and that to desire anything less than the realization of the essential objects which have been set forth by the President of the United States is to desire the triumph of moral evil in the world."<sup>35</sup> Hence, unless they were genuinely conscientious objectors to military service, teachers whose public statements could be taken to encourage resistance to wartime measures such as conscription should be dismissed even if not formally charged by the state with subversion. The AAUP rule was that, prior to a declaration of war, opposition to hostilities was acceptable; but once war had been declared, legal measures for waging war must not be actively resisted. Moreover, the report condemned public opposition to the purchase of war bonds or volunteer service in the reserves as grounds for dismissal.<sup>36</sup>

In March 1918, a *Nation* editorial attacked the AAUP position for undermining the university as an arena for free discussion. It was particularly appalled by the AAUP's advice to university authorities to fire people who had not even been convicted of any illegal anti-war activity. The *Nation* rejected the idea that university authorities should enforce the law, opting instead for Harvard President A. Lawrence Lowell's position that the university should remain neutral with respect to the opinions of its faculty.<sup>37</sup>

Arthur O. Lovejoy, who was both a drafter of the AAUP's 1915 Statement on Academic Freedom and the chair of the committee that had produced the statement on faculty comportment in wartime, hastened to respond to the *Nation's* criticisms. In his letter to the editor, Lovejoy repeated the boilerplate handwringing in the AAUP document on wartime that recognized difficulties of maintaining a balance between the needs of national security and the preservation of democracy.<sup>38</sup> However, in a particularly blunt remark that revealed his view of the limits of academic speech, Lovejoy reminded readers that the AAUP "has never declared it to be an infringement of academic freedom to remove a teacher for grave moral delinquencies, or for violations of professional ethics, or for gross and habitual discourtesy. It has, in short, never adopted the principle which appears to be the major premise of the *Nation's* reasoning--the principle of complete anarchism."<sup>39</sup> Lovejoy defended the AAUP's limitation of wartime speech as necessary to a struggle over "the future character of human life and human relations upon this planet." Neutrality in such a struggle would only have the effect of "not merely tolerating but facilitating the efforts of those who would repeat in America the achievement of the Lenines and the Trozkys [*sic*] in Russia." Academic freedom must not protect those who would "threaten the very existence of the state and weaken the forces upon whose strength and cohesion and eventual triumph the hope of freedom everywhere depends."<sup>40</sup> Evidently, in Lovejoy's view of acceptable comportment, threats to civilization justifying restrictions on professorial free expression could well be expected to extend beyond any wartime emergency.

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<sup>35</sup> *Ibid.*, 41.

<sup>36</sup> *Ibid.*, 34-39. For the enthusiastic patriotism of the American academic community during World War I see Carol S. Gruber, *Mars and Minerva: World War I and the Uses of the Higher Learning in America* (Baton Rouge: Louisiana State University Press, 1975).

<sup>37</sup> "The Professors in Battle Array," *The Nation* (Vol. 106, No. 2749), March 7, 1918, p. 255. For Lowell's position, see Timothy Reese Cain, *Establishing Academic Freedom: Politics, Principles, and the Development of Core Values* (New York: Palgrave MacMillan, 2012), 56.

<sup>38</sup> Arthur O. Lovejoy, Letter to the Editor, *The Nation*, (Vol. 106, No. 2753), April 4, 1918, pp. 401.

<sup>39</sup> *Ibid.*, pp. 401-402.

<sup>40</sup> *Ibid.*, p. 402.

It might be argued that the AAUP's position during World War I was more likely temporarily to restrict extramural commentary than to impact upon research and teaching strictly defined. That said, Arthur Lovejoy's wartime red baiting was an augur of things to come. In the United States, the fifty years following World War I were marked by repeated efforts to impose political conformity on the universities, culminating in the 1950s with the McCarthyite witch hunt for Communists. University administrators generally cooperated with this political campaign against Communist subversives in the academy.<sup>41</sup> The AAUP did nothing to defend victims of McCarthyism until well after the height of the campaign and even then left the way open to political tests for employment.<sup>42</sup> This attack on freedom of expression and association and the firings that resulted from it, inevitably had a major chilling effect on teaching and scholarship. As the US Supreme Court recognized in outlawing loyalty oaths in *Keynishian* (1967), such unacceptable practices "cast a pall of orthodoxy over the classroom."<sup>43</sup> The poet George Starbuck explained his refusal to sign the SUNY Buffalo loyalty declaration this way: "I'm just not going to sign one more sweeping general promise about what I will forbid myself to think, discuss or condone."<sup>44</sup> This was an apt summary of the impact fifteen years of state repression had on American academe. Years of demoralization and conformist pressure in the universities, consensus history, celebrating American exceptionalism, the abandonment of class analysis, neglect of questions of social reform, indifference to race and gender, the shift of funding to military oriented science, a fear of revealing personal views in the classroom, and caution about any outside political activity--such were the consequences of McCarthyism.<sup>45</sup>

In the world of scholarship, norms and findings are always changing; new questions are arising; but the free development of scholarly disciplines and teaching requires both internal and an external environment where free expression is strongly protected. Consequently, support for the maximum of freedom of expression should be among our highest priorities. University life should be shaped in a way that strongly affirms the central importance of free expression to the educational process and academic life.

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<sup>41</sup> Essential on McCarthyism in the universities is Ellen W. Schrecker, *No Ivory Tower: McCarthyism and the Universities* (New York: Oxford University Press, 1986); but for a summary account of the complicity of universities with McCarthyism, see her essay "Academic Freedom and the Cold War," *Antioch Review*, Vol. 38, No. 3 (Summer, 1980), 313-327, accessed May 10, 2019, : <https://www.jstor.org/stable/4638328> For a comprehensive discussion of cases of repression between World War I and the end of the Cold War, see John K. Wilson, "A History of Academic Freedom in America," (PhD diss., Illinois State University, 2014), chapters III-IV, accessed May 8, 2019, <https://ir.library.illinoisstate.edu/etd/257/>. See also Marjorie Heins, *Priests of our Democracy: The Supreme Court, Academic Freedom, and the Anti-Communist Purge* (New York: New York University Press, 2013).

<sup>42</sup> For the AAUP's belated and highly problematic attempt to come to grips with McCarthyism, see "Academic Freedom and Tenure in the Quest for National Security: Report of the American Association of University Professors," *AAUP Bulletin*, Vol. 42, No. 1 (Spring, 1956), 49-107, especially pp. 57-58.

<sup>43</sup> *Keynishian III*, 602-3, quoting *Adler*, 510, quoted in Heins, *Priests of our Democracy*, 215.

<sup>44</sup> Starbuck to "Mark" 1/10/1964, Buff-Starbuck, 1:1, quoted in Heins, *ibid.*, 195.

<sup>45</sup> Ellen Schrecker, *Many Are The Crimes: McCarthyism in America* (Boston: Little, Brown and Company, 1998). 404-409. See also Sven Beckert, "Cotton and the Global Origins of Capitalism," *Journal of World History*, 28, no. 1 (March 2017): 114-16 for his comments on the impact of the Cold War in repressing in mainstream scholarship the role of slavery as fundamental to capitalist development and the minority of scholars who worked on the problem.

## Intramural and Extramural Expression

In addition to protecting the core scholarly functions of teaching and research, in North America, academic freedom has also included protection for both the intramural and extramural speech of faculty members. Without the first, the possibility of faculty participation in collegial governance of the university vanishes. Absent the second, the speech of academics on matters of public concern is inhibited by the threat of employer discipline should public statements be deemed to damage the university's reputation. An institution that polices the extramural speech of its faculty also arguably undermines the faculty's capacity to foster debate and critical thought in the strictly academic realm.<sup>46</sup> The university is not supposed to be a workplace like any other, where the administration's authority over institutional governance or concern for the employer's public reputation trump the right of academics to freedom of expression on either matters of general public concern or the operation of the post-secondary institution itself.

The protection of extramural expression as a principle of academic freedom was an important concern in the AAUP's 1915 Statement on Academic freedom.<sup>47</sup> The drafters of the 1915 document had had bitter experience of employer retaliation against academics for their sometimes controversial interventions into public debates and felt compelled to offer some protection for colleagues who engaged in public controversy.<sup>48</sup> Nevertheless, concerned about professorial dignity and respectability, the AAUP weakened its defense of the faculty right to extramural speech by counselling professors against "hasty or unverified or exaggerated statements, and to refrain from intemperate or sensational modes of expression."<sup>49</sup> This caution about extramural speech reappeared later in the AAUP's 1940 statement that reminded teachers of the "special obligations" arising from the professor's "special position in the community". In speaking publicly, professors were advised to have regard for the reputation of both the profession and the university and to "be accurate,...exercise appropriate restraint, [and]...show respect for the opinions of others."<sup>50</sup>

The emphasis on professorial dignity and propriety that pervaded the AAUP's 1915 and 1940 statements on academic freedom reflected its commitment to what John Wilson has called the "gentleman scientist" model of academic freedom.<sup>51</sup> As noted, such principles did not inspire the profession to defend the rights of its beleaguered radical members during the McCarthy era. But even in the relative absence of such state led repression, when the university's reputation appeared to be at issue, administrators and boards could hit hard against an outspoken faculty

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<sup>46</sup> For an elaboration of this position, see Keith E. Whittington, "Academic Freedom and the Scope of Protections for Extramural Speech," *Academe*, Winter 2019, accessed February 17, 2019, <https://www.aaup.org/article/academic-freedom-and-scope-protections-extramural-speech#.XGnGbaB7mUn>.

<sup>47</sup> Edward E. R. Seligman, et al., 20, 37-38.

<sup>48</sup> A good many of these victims were economists fired for expression of views that generated public controversy. For an introduction to these early cases, see Schrecker, *No Ivory Tower*, chapter I. See also Wilson, "A History of Academic Freedom in America," 85-105.

<sup>49</sup> Seligman, et al., 37. See also Wilson, "A History of Academic Freedom in America," 136-8 for his discussion of the AAUP's early emphasis on the links between extramural restraint and the need to promote an image of scientific objectivity.

<sup>50</sup> "Academic Freedom and Tenure," *Bulletin of the American Association of University Professors (1915-1955)*, Vol. 34, No. 1(Spring 1948), 136.

<sup>51</sup> Wilson, "A History of Academic Freedom in America," 19-24. This is a topic to which Wilson returns throughout the work.

member. In such cases, the AAUP could find the 1940 declaration's emphasis on gentlemanly behaviour to be an albatross inhibiting the effective defense of colleagues accused of impropriety as a cover for a rejection of the content of their utterances.

This was strikingly shown in the case of Leo F. Koch at the University of Illinois at Urbana. In March 1960 Koch, an Assistant Professor of Biology, published a letter to the editor of the student newspaper in which he attacked the prevailing taboo against premarital sex among students as antiquated and unhealthy. Instead, Koch argued, students should have recourse to good medical advice and the use of contraception and feel free to engage in sexual relations if it were consistent with their circumstances and principles. In Koch's view, the repression he criticized was the negative consequence of "an extreme degree of brainwashing by our civil and religious authorities in the name of virtue and purity, to the point where the students have become psychologically inhibited from satisfying their needs in more obvious and healthy ways." <sup>52</sup>

Koch's letter sparked outrage from the local clergy and others, causing the university a major public relations problem. The university's president found Koch's views to be "a grave breach of academic responsibility" since Koch's letter expressed opinions that were "offensive and repugnant, contrary to accepted standards of morality, and their public espousal may be interpreted as encouragement of immoral behaviour." Koch had behaved in ways that were "prejudicial to the best interests of the University."<sup>53</sup> He had to go.

Koch's case was complicated by the intervention of the Rev. Ira Latimer, who circulated Koch's letter to parents of female students, describing Koch's views as "an audacious attempt to subvert the religious and moral foundations of America" consistent with "the standard operating procedure of the Communist conspiracy."<sup>54</sup> The university's board fired Koch, citing his "use of overstatement and ridicule", his sneering rejection of prevailing moral standards, his dismissing of his opponents as ignorant, and his failure to meet the "standards of temperance, dignity and respect for the opinions of others" which was expected of faculty members.<sup>55</sup>

Here was an imposition of prescribed doctrine which could only have a chilling effect on academic freedom at the University of Illinois and elsewhere. In light of the Koch case, if a professor's research or classroom lectures conveyed findings or arguments that could be considered immoral, irresponsible, subversive or damaging to the university's reputation, then there was no certainty that the proponent of such views would be protected against dismissal. Such limits on extramural speech implied similar limits to freedom of teaching and research.

In the Koch case, the AAUP's 1940 statement's insistence on the norm of professorial restraint in extramural speech came through loud and clear, with the Board itself citing it as support for Koch's dismissal.<sup>56</sup> Not surprisingly, in the aftermath of the Koch debacle, in 1964 the AAUP issued a clarification stipulating that dismissal for extramural speech was admissible only if

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<sup>52</sup> Thomas I. Emerson, et al., "Academic Freedom and Tenure: The University of Illinois," *AAUP Bulletin*, Vol. 49, No. 1 (Mar., 1963), 26, accessed October 5, 2018, <https://www.jstor.org/stable/40222951>

<sup>53</sup> *Ibid.*, 28.

<sup>54</sup> *Ibid.*, 27.

<sup>55</sup> *Ibid.*, 30.

<sup>56</sup> *Ibid.*

public "commentary clearly demonstrates the faculty member's unfitness for his or her position", adding that "[e]xtramural utterances rarely bear upon the faculty member's fitness for the position." This language was added to the 1940 statement as an explanatory passage in 1970 and remains the official AAUP stance.<sup>57</sup> In the event, the AAUP censured the University of Illinois for its dismissal of Koch, but censure was lifted when the University's statutes were appropriately revised. It was, of course, too late for Koch, whose academic career was over.<sup>58</sup>

If the outcome of the Koch case signaled a major shift away from the gentleman scientist version of acceptable academic comportment, a half-century later the University of Illinois' reforms turned out to be frail protection for Steven Salaita, who was fired for his provocative comments on social media in protest against the Israeli Gaza incursion of 2014.<sup>59</sup> At the University of Illinois Urbana-Champaign (UIUC), the administration claimed, rights to freedom of extramural expression would have to give way before a requirement for civility. The expressed concern was that Salaita's views would be deeply distressing to those students who did not share them, notwithstanding the UIUC administration's failure to assess evidence of Salaita's previous teaching record.<sup>60</sup> As the chair of the University's Board of Trustees put it, however, the UIUC had to be a "university community that values civility as much as scholarship."<sup>61</sup> Assessing the Salaita case from the perspective of AAUP policy on extramural speech, however, the AAUP subcommittee investigating the case concluded that the University had failed to show that Salaita's extramural comments on the Gaza question had proven his professional unfitness as a teacher or scholar.<sup>62</sup> Moreover, the AAUP investigators rejected the University's imposition of "civility" as a norm of academic speech, dismissing it as overly general, typically deployed in the interests of those in power or to repress controversial ideas and a ready excuse for repressing the often essential emotional content of speech.<sup>63</sup> In repudiating as contrary to academic freedom the University's use of civility, the AAUP supported the conclusions of the UIUC's own faculty Committee on Academic Freedom and Tenure (CAFT), as well as its affirmation that "[r]egardless of the tweets' tone and content, they are political speech--part of the robust free

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<sup>57</sup> AAUP "1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments", 15, accessed May 10, 2019, <https://www.aaup.org/file/1940%20Statement.pdf>. For a full analysis of this shift in the AAUP position, see John K. Wilson's "Academic Freedom and Extramural Utterances: The Leo Koch and Steven Salaita Cases at the University of Illinois," *AAUP Journal of Academic Freedom*, 6 (2015), 9-13, accessed May 10, 2019, <https://www.aaup.org/reports-publications/journal-academic-freedom/volume-6>. Wilson's fine piece provides an important perspective on both these cases. He makes the point that it was the environment of the 1960s and the contestations that swept across institutions of higher education, that paved the way for employers to agree to the 1970 revisions, which under the circumstances appeared as moderate (ibid., 11-12).

<sup>58</sup> John Wilson, "Academic Freedom and Extramural Utterances," 7-8.

<sup>59</sup> Ibid., 13-16 for Wilson's analysis of the flagrant violations of both the AAUP policy and the University's statutes regarding extramural utterance that led to the firing of Steven Salaita. See also Mark Gabbert and Penni Stewart, "Advisory on Respectful Workplace Politics," (CAUT, May 2018), 2-3, accessed May 12, 2019, [https://www.caut.ca/sites/default/files/caut-advisory-respectful-workplace-policies\\_2018-05.pdf](https://www.caut.ca/sites/default/files/caut-advisory-respectful-workplace-policies_2018-05.pdf).

<sup>60</sup> AAUP, "Academic Freedom and Tenure: The University of Illinois at Urbana-Champaign," (April 2015), 13-14, accessed December 29, 2016, <https://www.aaup.org/report/UIUC>. Hereinafter cited as UIUC Report. A useful chronology of events is found in *Report on the Investigation into the Matter of Steven Salaita*, UIUC Committee on Academic Freedom (n.d.), Appendix A, accessed May 7, 2018. <http://www.senate.illinois.edu/af1501.pdf>.

<sup>61</sup> Christopher G. Kennedy, Chair, University of Illinois Trustees, et al., August 22, 2014, accessed September 23, 2014, <https://cfailinois.files.wordpress.com/2014/08/civilitymassmail.pdf>.

<sup>62</sup> UCIC Report, 11-14.

<sup>63</sup> Ibid., 14-15.

play of ideas in the political realm."<sup>64</sup> Specifically on the matter of tone, the AAUP report cited the CAFT reference to a 1971 US Supreme Court decision giving constitutional protection to the affective content of speech on grounds that it is often as essential to the meaning of an utterance as the ideas being conveyed.<sup>65</sup>

The AAUP eventually censured UIUC and Salaita sued the University for violating his first amendment rights.<sup>66</sup> He settled out of court, but his academic career was ruined.<sup>67</sup> That the Chancellor was ultimately forced to resign her post was presumably small comfort.<sup>68</sup> In both the Koch and Salaita cases the rights to protection for extramural speech were eventually upheld, but at little benefit to the individuals whose rights had been violated.

The Illinois cases are examples of the unwillingness of administrators to respect the extramural free expression rights of faculty members and of the way that disrespect impacts on academic freedom, inevitably creating a chilling effect on research and teaching. The AAUP found that in violating Professor Salaita's academic freedom, the administration and board had "cast a pall of uncertainty over the degree to which academic freedom is understood and respected" at UIUC.<sup>69</sup> In their discussions with members of the UIUC faculty, AAUP investigators found anxiety about threats to their academic freedom among "a sizeable minority of faculty members", with particular concern among members of the College of Liberal Arts and Sciences and especially among faculty members in areas like ethnic studies, including the American Indian Studies program where Salaita had been appointed. Ethnic studies specialists feared that the firing of Salaita indicated that the administration would not defend faculty members whose public statements, scholarship or teaching generated opposition from either students or the local media.<sup>70</sup>

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<sup>64</sup> Committee on Academic Freedom and Tenure (CAFT) of the University of Illinois at Urbana-Champaign, "Report on the Investigation into the Matter of Steven Salaita," quoted in UIUC Report, 4. For the complete CAFT Report, accessed September 9, 2019, see <https://www.google.com/search?client=firefox-b-d&q=CAFT%E2%80%99s+Report+on+the+Investigation+into+the+Matter+of+Steven+Salaita+may+be+found+at+http%3A%2F%2Fwww.senate.illinois.edu%2Faf1501.pdf>. Hereinafter cited CAFT Report.

<sup>65</sup> The quotation is at CAFT Report, 26; the legal discussion is in Appendix B. The CAFT Report is partly founded on the AAUP's "On Freedom of Expression and Campus Speech Codes (November 1994)", accessed September 9, 2019, <https://www.aaup.org/report/freedom-expression-and-campus-speech-codes>.

<sup>66</sup> UIUC Report, 8-9 for reference to the court challenge and also 59\_2015-08-06 Order Granting in Part Denying in Part MTD-2.pdf, pp. 22-30, accessed December 31, 2016, [https://ccrjustice.org/sites/default/files/attach/2015/08/59\\_2015-08-06%20Order%20Granting%20in%20Part%20Denying%20in%20Part%20MTD.pdf](https://ccrjustice.org/sites/default/files/attach/2015/08/59_2015-08-06%20Order%20Granting%20in%20Part%20Denying%20in%20Part%20MTD.pdf). For the censure, see "The University of Illinois at Urbana-Champaign, May 30, 2015," accessed October 5, 2019, <https://www.aaup.org/sites/default/files/files/UIUC%20Statement%20-%2030%20May%202015.pdf>

<sup>67</sup> Jodi S. Cohen, "University of Illinois OKs \$875,000 settlement to end Steven Salaita dispute," accessed May 12, 2019, <https://www.chicagotribune.com/news/local/breaking/ct-steven-salaita-settlement-met-20151112-story.html> Salaita is now employed as a school bus driver. Steve Salaita, "An Honest Living," accessed May 12, 2019, <https://stevesalaita.com/an-honest-living/>.

<sup>68</sup> Scott Jaschick, "Illinois Chancellor Quits", Inside Higher Ed, August 7, 2015, accessed December 29, 2016, <https://www.insidehighered.com/news/2015/08/07/chancellor-u-illinois-urbana-champaign-resigns>.

<sup>69</sup> UIUC Report, 19.

<sup>70</sup> Ibid., 15-16.

The Salaita case demonstrates how administrations that discipline faculty members for extramural speech do not inspire confidence as protectors of academic freedom in either extramural matters or in purely discipline based teaching and research. The Illinois cases show with particular force the links between strong protection for academic freedom and the depth of the university's commitment to freedom expression in general. Moreover, UCIC's attempts to impose a standard of civility as a limit to academic freedom repeated the errors of the Koch case albeit in a language anchored in the more contemporary problematic rhetoric of speech codes and respectful workplace policies.

Canada has not been free of cases where faculty rights to extramural free expression have been infringed. Indeed, the Harry Crowe case, which arose in 1957 as the first case in the CAUT's long series of efforts to defend academic freedom, was triggered by a matter of extramural speech. While away on leave, Professor Crowe had sent a personal letter to a colleague of his at Winnipeg's United College in which he made unflattering comments about the impact of religion on institutional life, naming certain persons as examples of the problem. A private personal communication, Professor Crowe's letter never reached its intended recipient. Instead, it found its way to the desk of the Principal of United College who, outraged by its contents, eventually forwarded it to the College Board of Regents. Dismayed by Professor Crowe's incivility, the Regents fired him, justifying its action in part by claims that Crowe had violated the standards of professorial dignity and restraint articulated in the AAUP's 1940 Statement. Of course, the AAUP's policy was not binding on CAUT; and the subsequent CAUT investigation committee led by Professors Borah Laskin and Vernon Fowkes condemned the firing as a violation of Professor Crowe's academic freedom. A number of Crowe's colleagues resigned in protest; and Crowe himself found an academic position at Atkinson College, so his fate was happier than that of either Koch or Salaita.<sup>71</sup> The case itself, however, attained iconic status in the history of academic freedom in Canada as an example of the unacceptable repression of what amounted to extramural speech. Given Professor Crowe's treatment could any of his colleagues safely raise questions, whether in the classroom, publications, or the public arena, about the impact of religion on academic life or any other realm? Nobody could be certain.

The CAUT has no self-imposed 1940 declarations to live down, but that has not guaranteed robust respect for faculty speech in Canadian universities, either extramural or otherwise. One recent Canadian case which arose at Brock University reveals the sort of misery that colleagues on the ground can suffer when administrations do not properly respect the free expression rights upon which the intramural rights of academics depend.

At Brock, controversy over a University-sponsored international programme led to a conflict that resulted in charges against faculty and students under both the university's respectful workplace policy and before the Human Rights Tribunal of Ontario. While in the end the rights to academic freedom and free expression prevailed, the process that led to that outcome was arguably disruptive and traumatic to everyone involved; and it reflected an institutional culture

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<sup>71</sup> "Report of the Investigation by the Committee of the Canadian Association of University Teachers into the Dismissal of Professor H. S. Crowe by United College, Winnipeg, Manitoba," (CAUT January 1959), accessed September 27, 2019, <https://www.caut.ca/docs/default-source/af-ad-hoc-investigatory-committees/report-on-the-investigation-into-the-dismissal-of-professor-h-s-crowe-by-united-college-winnipeg-manitoba-%281958%29.pdf>. For a full account of the Crowe case, see Michiel Horn, *Academic Freedom in Canada* (Toronto:University of Toronto Press, 1999), chapter 9.

that was at best uncertain in its support of academic freedom as the fundamental regulating principle of university life.<sup>72</sup>

At issue at Brock were differences of opinion over the University- affiliated Solidarity Experiences Abroad (SEA) programme. A programme offering student experiences in Latin America, Asia and Africa, SEA was administered by Brock's Roman Catholic chaplains who were consecrated lay members of the Sodality of the Christian Life, itself a part of the global Christian Life Movement.<sup>73</sup> The aim of the program was to provide experiences relating to social justice and solidarity. University approved, SEA trips sometimes provided Brock courses for student participants.<sup>74</sup> For Brock, SEA had the advantage of offering opportunities for the University to meet its goal that 10% of the student body have international experience.<sup>75</sup>

Not everyone at Brock was enthusiastic about the SEA programme, including some student participants. In early 2006, several students contacted Professor Ana Isla, a Brock faculty member of both the Departments of Sociology and of Women's Studies. The concerns included allegations of unsafe working conditions on SEA projects, violations of the right to privacy of local people, and objections to Brock's identification with a conservative version of Catholicism. Professor Isla forwarded this information to the appropriate university authorities, who responded to concerns about safety and emphasized the voluntary nature of the religious activities, but the program continued.<sup>76</sup>

Controversy over the program re-emerged in 2011. This time, motions calling for an end of the University's affiliation with the program were passed by the Departments of Sociology and of Women's Studies. Similar positions were taken by the Brock University Faculty Association and the CUPE local representing sessional faculty. The University once again investigated, finding that concerns with student safety were groundless, but stipulating that students be made aware that the religious aspect of the program was voluntary, proper measures taken to protect privacy, and that Tri Council regulations regarding research with human subjects be followed. In the meantime, the Roman Catholic chaplains filed two separate complaints under the University's respectful workplace policy, charging Professor Isla with religious discrimination and/or harassment. Both complaints were rejected, the second one on grounds that Professor Isla was merely exercising her rights to academic freedom and participation in collegial governance.<sup>77</sup>

Things changed in early February 2012, when during Brock's participation in the Occupy Movement, the opponents of SEA took the occasion to make their views known more publicly. They spoke against the University's affiliation with the program and handed out leaflets from a

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<sup>72</sup> This account is based on the report of the CAUT ad hoc investigation committee into the Brock affair: John Baker, Mark Gabbert and Penni Stewart, "Report of the Ad Hoc Investigatory Committee to Examine the Situations of Drs. Isla, Van Engen and Corman, and Messrs. Wood and Fowler, at Brock University," (CAUT November 2015), accessed May 12, 2019, [https://www.caut.ca/docs/default-source/reports/caut-ahic-report---brock-isla-van-engen-corman-wood-fowler-\(2015-11\).pdf?sfvrsn=4](https://www.caut.ca/docs/default-source/reports/caut-ahic-report---brock-isla-van-engen-corman-wood-fowler-(2015-11).pdf?sfvrsn=4). Hereinafter cited Baker et al., Report

<sup>73</sup> For the movement's US site, see <http://clmusa.org/>, accessed December 31, 2018. For the Sodalit Family, see <https://sodalitium.org/what-is-the-sodalit-family/>, accessed December 31, 2018..

<sup>74</sup> Baker et al., Report, 8-9.

<sup>75</sup> Ibid, 13.

<sup>76</sup> Ibid., 10-13.

<sup>77</sup> Ibid., 14-15, 17-18.



table where students were fundraising for the program. In one case a faculty opponent refused to buy a rose from the SEA student fundraisers while indicating her objections to SEA. The chaplains now filed yet another respectful workplace complaint, charging that the protesters were guilty of harassment and bullying. The complaint named not just Professor Isla, but four other respondents engaged in raising questions about the SEA programme. This time the University accepted the complaint, notifying the five respondents on May 10, 2012.<sup>78</sup> In early April, one of the chaplains had already filed a separate complaint to the Human Rights Tribunal of Ontario (HRTO) charging that Professor Isla was guilty of discriminating against him on religious grounds.<sup>79</sup>

The case against Professor Isla before the HRTO was dismissed at a preliminary hearing to determine whether it had any reasonable chance of succeeding,<sup>80</sup> though the University had refused to provide Professor Isla with any legal support.<sup>81</sup> Notwithstanding the tribunal's ruling that the complaint was groundless, the Brock administration continued for a further five months to pursue the respectful workplace charges against Professor Isla and her colleagues. Those charges were only dropped after CAUT launched an investigation into the matter on February 8, 2013. A month later, on March 13, 2013, the Brock administration wrote to the respondents withdrawing the respectful workplace charges filed by the chaplains. The reason given was that, five months after the fact, the University's lawyers were of the opinion that the HRTO decision had obviated the need for any further action regarding the respectful workplace complaints.<sup>82</sup> The University's ultimate failure to defend the right of faculty members publicly to oppose a University sponsored program and then its refusal to provide legal assistance to Professor Isla is quite striking. The Brock administration had initially resisted earlier efforts to shut down the controversy; but eventually the chaplains' complaints against alleged bullying, harassment and discrimination were accepted and remained in effect for some months.

In the Brock case, all the elements of academic freedom were in play. In part, the controversy arose as a result of intramural criticism by faculty members of a Brock University program that the opponents found objectionable. At the same time, given that some of the opponents were specialists in areas relating to gender or Latin American questions, the opposition to SEA was arguably partly acting out of discipline-based learning and commitments that arose from their work as teachers and scholars. Finally, the whole matter became an extramural issue as the actions of the chaplains reached a larger public<sup>83</sup> and ended in a case before the Human Rights Tribunal of Ontario.

The Brock case shows how deeply reliant academic freedom is on strong protections for freedom of expression. Had there been a determination that the opponents of the SEA programme had acted in a discriminatory or otherwise unacceptable way, there is little doubt that the subsequent

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<sup>78</sup> Ibid., 18-19, 21-22.

<sup>79</sup> Ibid., 21-27.

<sup>80</sup> McKenzie v. Isla, 2012 HRTO 1908. A copy of the decision can be found in Baker, et al., Report, Appendix 4.

<sup>81</sup> Baker, et al., Report, 26.

<sup>82</sup> Ibid., 28-30.

<sup>83</sup> See Catholic News Agency, "Student fundraisers harassed over ties with Christian Life Movement," February 17, 2012, accessed September 13, 2019, [https://www.catholicnewsagency.com/news/student-fundraisers-harassed-over-ties-with-christian-life-movement?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%253A+catholicnewsagency%252Fdailynews-america%2528CNA+Daily+News+-+Americas%2529](https://www.catholicnewsagency.com/news/student-fundraisers-harassed-over-ties-with-christian-life-movement?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%253A+catholicnewsagency%252Fdailynews-america%2528CNA+Daily+News+-+Americas%2529)

intramural discussion of both university policy and discipline-based teaching and research would have suffered a chilling effect. The HRTO's upholding of freedom of expression was therefore fundamental to protecting not only the right to intramural criticism but also to extramural comment and against institutional interference in teaching and research.

What was at stake in the Brock case is well summed up in the remarks of the HRTO adjudicator when dismissing the claim against Professor Isla:

With respect to academic freedom, it is well-established that courts and tribunals should be restrained in intervening in the affairs of a university in any circumstance where what is at issue is expression and communication made in the context of an exploration of ideas, no matter how controversial or provocative those ideas may be....

In my view, given the importance of academic freedom and freedom of expression in a university setting, it will be rare for this Tribunal to intervene where there are allegations of discrimination in relation to what another person has said during a public debate on social, political and/or religious issues in a university.<sup>84</sup>

In this instance the extramural authorities acted to protect the academic freedom of members of the Brock community. Indeed, the agents of the state exhibited a livelier regard for the university's role as a site for free expression than did the university's administrators themselves. Such administration behaviour is unfortunately quite consistent with the 2011 Universities Canada statement on academic freedom.<sup>85</sup> The statement is narrowly focussed on teaching and research. Its language has the effect of making peer review into *the* omnipotent authority for scholarly speech. The statement remains silent on the rights of academics to exercise their civil rights without fear of reprisal from the employer. It says nothing about the intramural rights of faculty to participate in university governance or to criticize the administration. It gives special emphasis to university mission statements as regulators of academic life.

Such a narrowly construed version of academic freedom is inconsistent with the collective agreements that govern almost all the institutions that are members of Universities Canada. It cuts academic freedom off from both its origins and its essential protections in freedom of

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<sup>84</sup> McKenzie v. Isla, 2012 HRTO 1908, para. 35

<sup>85</sup> <https://www.univcan.ca/media-room/media-releases/statement-on-academic-freedom/>, accessed 19/02/2019.

expression. It is designed to make the university a workplace like any other. Its implementation would mean the end of the University as a place for critical inquiry and untrammelled debate, never mind any Dworkian quest for authenticity.

### Conclusion

As analyzed here, academic freedom is best understood as a special case of the right of freedom of expression. This view has the advantage of capturing academic freedom's origin as derived from freedom of expression's rejection of censorship as both a barrier to understanding and investigating the world and an enforcer of prescribed doctrine. For if the censor has the last word, then free inquiry is not possible. Even with respect to the core functions of teaching and research, the potential for disciplinary norms to become orthodoxies must be countered by protection of the broadest rights of individual academics to free expression and dissent from any provisional disciplinary consensus. Moreover, the free pursuit of academic work is utterly reliant on an external environment of free expression in the public realm, failing which the very subjects, approaches and findings of intellectual work risk being subject to repression. As the cases of Koch and Salaita show, the right of academics to extramural freedom of expression without fear of retaliation by the employer is absolutely essential to untrammelled freedom of inquiry in the laboratory, classroom and study. Finally, the collegial governance of post-secondary institutions is not possible without strong protections for faculty speech on matters of university policy and administration.

On this view, it is highly problematic to characterize academic freedom narrowly as a professional right enjoyed by academics bound by disciplinary norms and to emphasize the distinctions between it and freedom of expression as understood, for example, in the jurisprudence of the First Amendment of the US Constitution. Such a perspective obscures both academic freedom's origins in and its crucial dependence upon protections for freedom of expression. As the Universities Canada statement shows, the "licensed expert" model risks warranting a radical erosion of the freedom necessary for academic work. Academic freedom is freedom of expression's vulnerable child. Any weakening of freedom of expression, whether inside or outside the academy, threatens it with extinction.