CHAPTER 2

The End of Clear Lines

Academic Freedom and Administrative Law

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In this chapter I will be concerned with the legal structures and quasi-legal regulatory structures that relate to academic freedom, in addition to the basic theory that applies to them. My aim is to explain (1) how changes in them affect academic freedom, (2) the legal properties of the new constraints under which those in the academy operate, and (3) the differences between this current situation and academic freedom as it has traditionally been understood. The primary issues I will be concerned with are discretionary legal and administrative power and the way that regulations, as implemented by universities, have expanded this power, as well as the enlarged role of contract law and employment contracts as protections of academic freedom.

Academic freedom is undergoing a redefinition in the face of new legal circumstances. Its two traditional dimensions are the higher education institutions' autonomy from the state and the individual freedom of scholars. It was traditionally thought that independence from the state and the existence of strong faculty governance were the best guarantors of academic freedom (Tiede 2015). The American

Association of University Professors (AAUP) fought for both. Academic freedom, however, is increasingly restricted by regulations implemented by universities, which can take the form of institutional review boards, research misconduct tribunals, and Title IX enforcement. Because many federal regulations governing institutions of higher education are themselves vague and broad, the specific rules created by these institutions are a result of discretionary power over academics that is inimical to the traditional notion of academic freedom as a well-defined right. The idea of university autonomy, similarly, has undergone important changes. It has been significantly compromised as a result of federal regulation of a kind that did not exist in the first half of the twentieth century. One effect of intensified federal regulation is self-monitoring within higher education institutions (often with the assistance of an internal bureaucratic office) that not only seeks to conform to these externally imposed rules, but also to invent local variations that expand on them.

The Basic Legal Situation

There are several kinds of law that interact in cases of academic freedom: (1) statutory law, or law created by legislation; (2) constitutional law, which authorizes or limits the power of legislatures; (3) case law, which is created by judges through decisions that become precedents for other judicial decisions and follow legal or constitutional principles; (4) contract law, which bears on academic freedom, because the relation between professors and their university is defined by an employment contract; and (5) administrative law, which is the "law" created by bureaucrats that specifies and interprets legislation, as well as regulates the actions of the government itself and (indirectly) the actions of bodies, such as universities, that are expected to conform to administrative regulations. Many federal regulations compel institutions of higher education to produce their own internal regulations and leave them open to sanctions if they do not.[1] Theoretically, these directives are grounded in actual statutory law. But interpretation of the law by

the agencies, and by the organizations implementing their own regulations, often strays far from the text and the original intent of the law.

The procedures that directly govern faculty members are those of the university itself. The ones to be discussed here, involving equal opportunity, research misconduct, and a review of research to conform to ethical standards, are responses to federal administrative law—that is, to the law contained in directives, definitions, and "letters of guidance" provided by federal agencies—and are motivated in part by the threat of litigation or a withholding of funds. The procedures for implementing the directives in different academic institutions typically meet neither ordinary legal standards of predictability, transparency, or the equitable treatment of persons, nor are they required to do so. In law, they are viewed as an extension of the rights of employers to govern their employees as they see fit. But the contractual relation between universities and their employees itself has limits, and one of the features of the present situation is that these boundaries are being reached, making employment law the new arena for academic freedom issues.

The historical legal strategy of the AAUP, in its attempts to define academic freedom, was to delineate it as a contractual relation between higher education institutions and individual faculty members, in order to offer protections beyond those of ordinary employment law. The goal was to provide a definition of academic freedom that mimicked the form of law itself, rather than merely specifying an ideal. This meant establishing clear distinctions that could be appealed to by the AAUP to condemn and sanction universities and colleges for administrative actions inconsistent with academic freedom. Clarity in these distinctions served various purposes: it assured the credibility of the actions; provided guidelines for university administrators; protected the AAUP from charges of partisanship and inconsistency; and, perhaps most importantly, linked the notion of academic freedom to the legal idea of due process and the value of legal certainty. Thus this framework also aligned with one way in which courts decide cases—by striking down laws that are "unconstitutionally vague."

But the AAUP does not enact law, and its definitions are not law. The strategy was to assert certain rights for faculty, yet these were rights that went beyond anything codified in law. By describing correct standards, the AAUP could establish what Continental legal theory calls "customary law." Actual courts could defer to these standards in the name of normal and accepted practice when the term "academic freedom" appeared in employment contracts or handbooks. The AAUP standards thus served to provide a definition of the concept and of standard practice with a quasi-legal meaning (i.e., a bright-line rule) and the marks of legality in its own processes (a quasi-judicial process of inquiry). In addition, they carried the mark of law: a regime of sanctions applied by the AAUP itself, in the form of notifications to the scholarly community that a university was not in compliance.

The basic idea of the AAUP statements on the academic freedom of *individuals* (as distinct from the academic freedom of institutions from state interference), which have undergone only minor revision, is that:

> Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties . . .
>
> Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter that has no relation to their subject . . .
>
> College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. (AAUP 1940)

This definition had two elements: (1) professional autonomy, or freedom of teaching and research within the limits of the professional activities of the faculty member, and (2) freedom of speech and action as a citizen outside the classroom. In the past, virtually all academic

freedom issues, including those that motivated the original formulations of these principles in 1915 (AAUP [1915] 2015), fell into two categories: governance issues involving the freedom of colleges themselves (e.g., those regarding the interference of governing bodies), and the rights of academics as citizens (particularly issues of freedom of speech).

Citizen speech had a problematic legal status. Standard employment law *does not* protect free speech in the broad sense envisioned by the AAUP standards. Public speech deleterious to the interests of the employer *can* be sanctioned by employers, more or less at their discretion. They are free to protect their interests, as they understand them, by firing employees within some reasonably limited notion of harm. This contractual right overrides the freedom to speak guaranteed by the First Amendment and directly conflicts with the right to be "free from institutional censorship or discipline," as asserted by the AAUP. This special academic right is something the courts have never directly established, though there are no clear cases rejecting it, either. None of the standard First Amendment cases in employment law concerns professors. A few, notably *Pickering* (1968), relate to teachers.[2] In cases involving professors, courts have typically evaded the issue by deciding the cases on other grounds—for example, by pointing to the violation of a different rule to which the professor was bound as part of the employment relationship (Svrluga 2017), or rejecting the action of the university on the grounds that it was in violation of the employment contract.

In one recent case involving extramural speech, a jury trial found for the university against a fired tenured professor who, on a blog, asserted a conspiracy theory about the Sandy Hook shootings. The institution successfully argued that he had lied to them about his "use of university resources" for his blog and "repeatedly and intentionally refused to file mandatory disclosure forms that require all professors to reveal outside work and activities that could affect their work or the university." Though the trial showed that this policy was inconsistently applied, the professor lost the case (Ramadan 2016; McMahon 2017.). The greater bureaucratization of higher education institutions and the vast expansion of rules of this kind pose new risks for faculty. These

rules provide multiple occasions for their violation and many issues of interpretation. Under the law, employers have wide discretion in interpreting their own rules. The proliferation of vague language in them creates greater discretionary power for administrators, who can use them against faculty members they choose to punish, while avoiding overt challenges to academic freedom.

The core of academic freedom—freedom within the classroom and in professional writing—has no direct constitutional standing and no basis in federal law. It does, however, have an indirect existence in employment law. The courts acknowledge it as a "good" that is distinctive to the academic setting and indirectly affirm it as the basis of the contractual understandings governing academics—the thought being that the meaning of an employment contract is determined in part by normal practices in the field in question. But there is sometimes a more direct and stronger legal basis. To the extent that professors are protected, this occurs under the heading of employment law: for doing their job according to their employment contract, as other types of employees are. State law and state university charters also sometime guarantee academic freedom, and faculty handbooks asserting academic freedom have intermittently been held to be legally binding.

Employment cases have not, however, produced a body of case law. Case law is limited in this area, for a simple reason. Academic lawsuits that come before courts and juries tend to produce surprising results, because they are handled in terms of non-academic understandings of the same practices. Those in the professoriate avoid court cases, because they are typically advised that juries react to suits where an employee disobeys an employer by affirming that one should do what the boss says. Precedent-establishing legal cases involving academics are thus rare. Ordinarily, out-of-court settlements are negotiated. Partly, this is to avoid litigation expenses. In addition, it is because the courts have not been terribly respectful of standard academic practices and are consequently unpredictable when cases involving them arise, which poses a risk for both sides. For example, in dealing with publishers, one ordinarily signs a document asserting that one holds the rights to the book or paper one is publishing and that the work was not

done "for hire," which would mean that the rights would belong to the employer. A decision involving Brown University, however, addressed this question (*Forasté* 2003), and the judge found that academic publication was "for hire"—contrary to the documents academics routinely sign for publishers. The practice did not change, though some problematic legal documents were created by universities to release these rights to the professorial authors—but not without reserving for themselves final authority over the disposition of the work in question.

The California Oath Case

The University of California loyalty oath controversy was the most important academic freedom case of the twentieth century in the United States. It can serve as a baseline for understanding what has changed in the legal atmosphere of the university. The case began with two incidents that fell under the second area of academic freedom defined by the AAUP. Three professors were fired from the University of Washington in January 1949 for having Communist sympathies: Herbert Phillips, Joe Butterworth, and Ralph Gundlach (Lange 1999; Schrecker 1999). The UCLA Graduate Student Assembly received permission to host a debate featuring Phillips ("Prelude to Controversy" 1949). He was invited to speak at the Los Angeles campus of the university, which was not then a separate institution, as the Berkeley and Los Angeles faculty were nominally one unit. When the invitation was made public, members of the institution's Board of Regents moved to stop it.

The California state constitution "required [the University of California] to be free of all sectarian or partisan influences" (Gardner 1967, 15). This is a formulation of a fundamental principle of liberal democracy: the political neutrality of the state. The rules implementing this provision were understood by the provost to mean that controversial views could be presented, but only if both sides were represented. Despite the fact that the event was structured as a debate, the Regents expressed concern that the university was being used for propaganda purposes (Gardner 1967, 24). In response, the administration was led

to "strengthen" both the prohibitions against using the university as a platform for propaganda and the existing loyalty oath. Accepting the oath was already a condition of employment for all state employees.

The oath became the issue. Faculty who were opposed rejected the addition to the existing oath, which was an affirmation that the oath-taker did not believe in and was not a member of an organization advocating the overthrow of the US government. The Communist party was the only relevant example of such an organization (Gardner 1967, 26). The initial skirmish over the oath involved a graduate student instructor. In response, the body representing these non-faculty employees called for the elimination of political tests for appointments. The objections of the faculty, however, hinged on tenure and focused on the slogan "academic freedom does not exist where the right of tenure is not inviolate" (Gardner 1967, 121). There was also a due process objection, because refusals to sign the new oath could lead to firings "without the Regents ever bothering to investigate whether these men are in fact communists or otherwise disloyal" (Gardner 1967, 122).

The controversy ended with a long-delayed censure of the administration by the AAUP (Gardner 1967, 208–10), and a court case in which the California Supreme Court ruled that the Regents had invaded the authority of the legislature by its actions. The court ordered the Regents to appoint the non-signers of the new oath who had already signed the oath required of all state employees (Gardner 1967, 242–44). The principles at stake in this case were eventually affirmed in a decisive federal court case (*Keyishian* 1967), in which the court ruled that requiring faculty to sign a document asserting that they were not and had not been Communists was a violation of First Amendment rights and was also "vague and overbroad." This case produced the standard text on which legal appeals of academic freedom have since relied:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom . . . The classroom is peculiarly the 'marketplace of

ideas.' The nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues,' [rather] than through any kind of authoritative selection." (*Keyishian* 1967)

This is a succinct formulation of what we might dub the "liberal theory of academic freedom,"[3] and the participants in the oath controversy also adhered to it—namely, scholars were independent and beholden only to truth and their conscience in the pursuit of truth. As autonomous scholars, they were protected by the inviolability of tenure and free to make their own choices in the face of actual diversity of thought in a competitive marketplace of ideas (at a time when research was not yet grant dependent). The customs of the university, such as tenure and non-sectarianism, were to serve to protect this freedom. Although the issues in this controversy were complex, they involved statutes and bright lines, such as the inviolability of tenure and due process. The acts of the administrators were simple and objective: the Regents threatened dismissal for failure to sign a piece of paper.

The First Amendment and Employment Law

The liberal theory of academic freedom was thus endorsed by the courts in the *Keyishian* case cited above. The courts, however, did not create a novel right to academic freedom, but instead appealed to the First Amendment as the source of the right to reject the loyalty oath. The First Amendment has also played a role in many subsequent cases, but it is not as helpful as might be expected, because, in general, one gives up many of one's rights in an employment relationship, including much of one's free-speech rights. There is case law in the instance of state institutions, and it is clear: "Statements public employees make as part of their official duties are not protected under the First Amendment; thus, it does not protect employees who make them from disciplinary actions" (Norman-Eady 2006). The concern motivating this ruling comes from the consideration that "without some control over employees' words and actions, a government entity could not provide

services efficiently or effectively." Nonetheless, there is an important exception to this general rule. Speech that does not impair services is protected, if it *is* in fact speech as a citizen "about matters of public concern" (Norman-Eady 2006). The difficulty with this rule comes in drawing a line between citizen speech and speech related to duties.

The controlling case law is itself surprisingly narrow in its view of citizen speech. The *Garcetti* case involved a deputy prosecutor who was fired for concluding, as part of his duties, that an affidavit was flawed and testifying for the defense after the district attorney decided to prosecute the case anyway. The employee claimed that his speech was protected citizen speech because it met the test of public concern. The court ruled against this claim. Truth was not a defense. Justice Stevens, in a dissent, commented that this meant there was no protection for speech that "is just unwelcome speech because it reveals facts that the supervisor would rather not have anyone else discover" (*Garcetti* 2006; Kaplin and Lee 2013, 384–85).

Would *Garcetti* apply to professors who are state employees? There is no definitive case involving professors that would protect those who made public statements against the positions taken by a university. Moreover, there is little ground for thinking that an exception would be made. Employment law would protect professors from arbitrary actions by their university in violation of the contract with them as employees, but not from punishment for opposing the will of, or doctrines endorsed by, that institution. We will see an example of the use of this power in a later section (on Title IX). Although such power is not extensively invoked, there are few limitations on its use, and that, in itself, has a potentially chilling effect on speech. There is no clear line between "public" speech critical of a university's policies and speech that is disruptive of that institution's mission and, thus, punishable.

Administrative Law and Academic Freedom

Administrative law is law made in the form of rules and other authoritative pronouncements by bodies that are part of the executive branch and by judicial interpretations that modify these rules. It is not law

in the sense of incurring judicial penalties. The penalties are administrative, based on the idea that an agency can regulate bodies with whom they have a contractual relationship. For example, universities enter into this type of relationship by accepting federal funds, directly or indirectly, such as through governmental loans to their students for tuition. The rules implement and specify the legislation on which they are based. The core laws relating to higher education institutions include Title IX (the federal law against sex discrimination, which is implemented through regulations that universities are required to create); federal law relating to the responsible conduct of research (which is governed within the academy by institutional review boards); and laws against research misconduct (which are further specified by university regulations and dealt with by procedures the institutions create). Each will be discussed below.

Federal agencies implement these laws by developing rules that are more specific than the initiating legislation. There is a legislative basis for this practice in the 1945 Administrative Procedures Act, which specifies formal procedures for rule making and public input and requires a degree of transparency. Agencies may have their own courtlike, quasi-judicial structures to try cases involving these rules. The legal basis for this activity is the judicial finding that agencies have "the power to construe" legislation. There is, however, no direct constitutional basis for this kind of law or power, and, indeed, subdelegation of legislative powers is forbidden by the constitution. The courts have evaded this restriction by claiming that the agencies, in their rule making, are merely defining terms in the law. The grounds for permitting agencies to construe the law are that the legislature, by failing to be specific, grants discretion to the agencies to do so (Strauss 1989, 22–23). This is itself an oddity—traditional legal thinking is that ambiguity in the law grants discretion to the *courts*. Thus, in the US context, the doctrine of deference amounts to a grant by the judiciary of *their* authority to agencies. We can leave aside the vexing question of whether this judicial recognition and deference to these agencies is constitutionally justified (Hamburger 2014; 2017), or whether the administrative law "courts" are genuine courts, but it is important to note that there is a

fundamental issue here over the nature and legitimacy of authority. Judicial deference to the agencies, except in cases of clear failures of due process or other egregious errors, is a revocable judicial choice, not a constitutionally specified feature of the power of agencies or the executive branch.

The body of rules in administrative law today exceeds the body of federal legislation by a factor of ten. Yet the published rules are only part of the story. There is much more law making by agencies in the forms of "guidance," definitions, and authoritative interpretation of the statutes themselves. These activities are not subject to the restrictions on rule making, and the mere fact of selective enforcement of the rules requires the bodies subject to them to infer "the law" from the practices of the agency. Statute law is subject to legal construction, based on the explicit language of the statute, and, if this fails, on legislative intent. The courts, however, have treated administrative law differently, by introducing the element of "purpose." The discretionary power of agencies to issue rules in accordance with the supposed purpose of the legislation was affirmed in an opinion stating that "Title IX must [be] accord[ed] . . . a sweep as broad as its language" to realize its goals of eliminating discrimination and promoting equal opportunity (*North Haven* 1982; see also *Dickerson* 1983). In the case of Title IX, which merely forbids discrimination, the effect of agency and court decisions is to warrant precisely the opposite of the law. "Affirmative action" (the result of an additional executive order), which evolved, after litigation, into discrimination in the name of "diversity"—a doctrine unmentioned in the law—can be used to justify favorable treatment of historically disadvantaged groups.

Universities are obligated to regulate themselves by issuing rules implementing those devised by the agencies. They are granted discretion, however, in constructing their own regulations to enforce the rules, in accordance with the purpose of the law. A higher education institution is not limited by the law—it can introduce its own, more restrictive rules as part of its rights as an employer. The attitude of universities, to quote one official at my own institution, is that federal regulations are "the floor," or the minimum, and there may be compelling

interests in going beyond the minimum in constructing the regulations within a university that academics must follow. This means that university policies implementing the law and the administrative extensions of the law may vary substantially from one university to another and, like administrative law itself, create their own quasi-legal procedures for appeal, sanction, and the like. The role of a federal agency in relation to these internal university regulations becomes one of reviewing policies for conformity to the agency's construal of the law.

Courts may play a role if the approved policy conflicts with other explicit rights, including contractual rights that are part of the employment relationship. One place in which policies based on Title IX have come into conflict with academic freedom concerns anti-harassment policies. In the 1980s and 1990s, courts invoked the principles of free speech and academic freedom to protect the constitutional free speech rights of public university professors and students against encroachments by overly broad anti-harassment policies. For example, in a case brought by a biopsychology graduate student who was concerned that theories he wished to explore could be labeled as "racist" or "sexist" under the policy, a federal court found the University of Michigan's sexual harassment policy to be unconstitutionally vague and overly broad (AAUP 2016). A federal court also found the University of Wisconsin's harassment code to be unconstitutionally broad, notably in its prohibitions against "discriminatory comments, epithets or other expressive behavior directed at an individual . . . [that] intentionally . . . demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual . . . and . . . create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity" (AAUP 2016). These cases have turned on the problem of vagueness and illustrate the difficulty of distinguishing discriminatory speech from legitimate academic speech. They also, however, involve a novel assertion of administrators' power over speech.

The rules and procedures of universities in carrying out these laws do not have the usual features of actual law. They do not create visible

precedent (as secrecy is the norm for many of these procedures, and no public record is created), nor do they provide guarantees of due process similar to those in courts. Moreover, the responsible officials and committees carrying out these quasi-judicial functions are typically creatures of the administration, serving at its pleasure. Their findings are normally advisory and can be overruled by higher-level administrators. In this respect, they resemble administrative law generally, rather than proceedings in actual courts. Nevertheless, there are some constraints on administrative actions, and it is no coincidence that the issue of vagueness in policy statements plays a role in the relatively rare instances where courts intervene to protect academics from administrators. The policies are intentionally vague: this is what gives administrators discretionary power. These policies create or help define the contractual relation between an institution and its employee under employment law. Even the courts, which normally defer to a policy created to fulfill an administrative rule of the federal government and are reluctant to invoke constitutional considerations, recognize that the policies in question are too vague to support sanctions under employment law. The requirement that the regulations must meet some minimal standard of clarity does impose an important burden on administrators who act to sanction a faculty member in ways that curtail academic freedom.

Three Problem Areas

Title IX

According to the the text of Title IX, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" (US Department of Labor 1972, Section 1681, Sex, (a)). This law has been quite radically extended, both by the relevant agencies, notably the Office of Civil Rights (OCR) of the Department of Education through letters of guidance, and by its implementation in university regulations,

particularly in relation to ones involving the concept of "hostile environment," such as those that are understood as warranting restrictions on speech. Although some of the guidance relating to procedures governing student misconduct has recently been rescinded, the university regulations created in compliance with them have not, so this continues to be an important issue. According to the original guidance provided during the Obama administration, which did not go through the procedures necessary to make it an official regulation, there is a specific requirement for universities to educate students about what constitutes sex discrimination.

Title IX does not require a recipient of federal funds to adopt a policy specifically prohibiting sexual harassment or sexual violence. As noted in the "Revised Sexual Harassment Guidance" (2001), however, a recipient's general policy prohibiting sex discrimination will not be considered effective and would violate Title IX if, because of the lack of a specific policy, students are unaware of what kind of conduct constitutes sexual harassment, including sexual violence, or that such conduct is prohibited sex discrimination. The OCR therefore recommends that a recipient's nondiscrimination policy state that prohibited sex discrimination covers sexual harassment, including sexual violence, and that the policy include examples of the types of conduct that it covers (Ali 2011, 7).

This is an intrusion into academic freedom in one of the two meanings of this term: a university's autonomy from the state. It dictates what the students must be taught, even though the teaching, in this case, may not be in the classroom. Moreover, it is compelled speech, because it requires the university to say something. Yet it trades on an ambiguity between the task of informing students about the law and university regulations, and political indoctrination with respect to particular notions of proper gender relations.[4] The latter would be an intrusion on academic freedom; the former would not.

This issue takes a more extreme form when applied to faculty members. Because the use of anti-discrimination laws to justify various forms of preferential treatment in admissions have repeatedly been curtailed by the courts, universities have asserted an alternative argument: there

is an educational value in "diversity" that warrants certain forms of discrimination in favor of particular underrepresented groups. The courts have partially accepted this argument in the case of university admissions, subject to some limitations. In addition to these measures, universities have sought to assure the commitment of its faculty members to the concept of diversity. The need to generate such commitment has taken both positive and punitive forms. In a widely publicized case, a Duke theology professor was disciplined for sending an internal email critical of a "racial equity" training program that the dean was promoting. In an email to the faculty, the dean stated: "It is inappropriate and unprofessional to use mass emails to make disparaging statements—including arguments ad hominem—in order to humiliate or undermine individual colleagues or groups of colleagues with whom we disagree. The use of mass emails to express racism, sexism, and other forms of bigotry is offensive and unacceptable, especially in a Christian institution" (Stancill 2017). The dean and a professor sponsoring the training filed a complaint, which included a charge of sexual harassment on the basis of the theology professor's internal email. In response, the faculty member noted that there was nothing bigoted about his posts and objected that his intellectual freedom had been infringed. Nonetheless, he was disciplined. The sanctions included a ban from faculty meetings and a promise "that he would not receive future funds for research and travel" (Stancill 2017). He subsequently resigned.

This case illustrates some of the problems of the interaction of employment law, contractual assertions of academic freedom, Title IX, and other anti-discrimination policies. The oddity of Title IX–based policies is that they are directed against such things as "racism, sexism, and other forms of bigotry," none of which is mentioned in Title IX or any other anti-discrimination law. Categories like racism and sexism are doctrinal and rooted in controversial theories rather than neutral rules, such as the one against discrimination in the actual statute. If we incorporate doctrinal statements into a policy, however, they are no longer merely doctrines, but instead are the official policies of the employer. In the Duke case, objecting to these policies, or even to the means of promoting them, was construed as a form of sexual harass-

ment, or the creation of a hostile environment. The law offers no protection here: the employer has a right to demand agreement with the policy. If the faculty member's statement had been public (e.g., to a newspaper), this would have been grounds for discipline, and even for the firing of a tenured professor. Moreover, simply as an internal discussion, it would also be grounds for dismissal under normal employment law, because, as we have seen, there is no employment law provision for free speech within the normal activities of employment. A private university, such as Duke, is free, in principle, to demand doctrinal conformity.

The problem of doctrinal conformity in *public* institutions that also cannot, in principle, demand doctrinal conformity, arises in other ways, but it involves the same ambiguity between intellectual doctrines and policies. Ironically, given the long history of issues over oaths, Title IX and anti-discrimination law have generated oaths of their own. These take the form of "diversity statements," which faculty are required either to sign or to submit as part of the job application process (Oregon Association of Scholars 2017; for guidelines, see UC 2015). The statements are designed to compel the applicant to both affirm and prove their commitment to diversity. This form of oath taking has yet to be tested in court, although the requirement of oath taking to demonstrate commitment to diversity is widespread, and the statements are taken seriously. As sociologist Tanya Golash-Boza (2016), in an *Inside Higher Ed* article, advises job applicants:

> Many faculty members truly care about diversity and equity and will read your statement closely. I have been in the room when the diversity statement of every single finalist for a job search was scrutinized. The candidates who submitted strong statements wrote about their experiences teaching first-generation college students, their involvement with LGBTQ student groups, their experiences teaching in inner-city high schools and their awareness of how systemic inequalities affect students' ability to excel. Applicants mentioned their teaching and activism and highlighted their commitment to diversity and equity in higher education.

A typical statement (from a sociologist), which was recommended as a model on the official website of the University of California system, includes this example of evidence of one's commitment: "In my advising capacities, I encouraged my students to ponder the roles they might play in the alleviation of the vast inequities that continue to shape our world" (UCSD n.d.). Are these oaths political tests of the kind rejected in the California loyalty case? It depends. If diversity is a *political* issue, these are political tests. To the extent that doctrinal statements of political beliefs, such as a conviction regarding the evils of inequality, are considered as a basis for employment, there are First Amendment issues, at least in a public institution. If it is a *policy* commitment, it is plausible for an employer to require adherence to the employer's policies. Separating the two presents the same kinds of difficulty as harassment guidelines.

Some of these oaths are simple affirmations that have to be signed off on by the applicant. It is an open question as to whether they are enforceable after employment—that is, whether someone could be said to have violated the oath, or have made it falsely, or have renounced it. Nonetheless, the requirement is designed to have an effect on hiring. The act of assessing a person's commitment to a policy—even if this were an appropriate requirement, consistent with academic freedom—is a matter of largely arbitrary personal judgment, exercised by people who are unconstrained by rules or the possibility of appeal. Moreover, they may have an ideological commitment to the policy and to a personal view of its meaning, as the statement by Golash-Boza (2016) makes clear. When academics adapt their behavior to vague threats of this kind, they are giving up some of their freedom, and other academics are complicit in depriving them of it.

Research Misconduct Proceedings

Research misconduct operates in the same way as other administrative law domains, with the addition of a federal Office of Research Misconduct that issues federal funding bans for institutions involved in the individual cases that reach it. The primary bodies in this regard are

internal to universities, which adopt their own research misconduct rules and procedures. The cases that have occurred in sociology include the highly visible University of Texas project, which indicated that children of same sex marriages were harmed by this practice (Regnerus 2012). It resulted in multiple misconduct and ethics charges. Citation of this research in a related court case led to judicial examination of the editorial decision making of the journal in which the study was published. Cases prosecuting research misconduct in the social sciences are quite rare, and also extremely selective. Lenore Weitzman (1987) produced data showing differential economic harm for women as a result of divorce proceedings. These findings influenced legislatures and were warmly supported as an example of effective policy-oriented research. Yet such results, which fit a political agenda but did not mesh with the research's overall consensus, were dubious. As Christian Smith points out, it was never treated as a research misconduct case, and Weitzman's results were never subjected to juridical or quasi-juridical scrutiny, despite such red flags as missing data sets (Smith 2014, 97–101). The risk to academic freedom by the combination of selective prosecution and unclear standards is that the threat of misconduct charges will deter research that undermines dominant political biases. If scholars adapt to vague standards and the likelihood of the threat of politically motivated complaints by self-silencing or by choosing to avoid controversial topics, they forfeit their academic freedom.

The IRB Puzzle

Institutional review boards (IRBs) were mandated as part of the same kinds of administrative law procedures as anti-discrimination and research misconduct rule making, but they work in ways that are especially problematic from the point of view of the First Amendment. They represent a form of prior restraint on speech, rather than a system of sanctions on speech. The issue of clear lines is thus particularly important here, because enforcing sanctions on past actions requires some clarity in the rules *in advance* of the action. This is why courts have

repeatedly ruled against universities' punishment of faculty for speech violations. IRBs, however, review research proposals on human subjects before that research is conducted. Moreover, they are, in the usual manner of administrative law requirements imposed on institutions, removed legally from the authorizing legislation and the possibility of judicial review.

The "Belmont Report" (HHS 1979) provided the philosophical basis for the regulatory regime that was established. Medical research was the model. The report focused on such topics as informed consent and harms, as well as the confidentiality of records. Social scientists were not involved in the writing of the report, and the application of these standards to social science research was an accidental outcome. The bulk of research similar to that in the social sciences is psychological and educational research. As with medical research, anonymity and the protection of subjects, particularly through informed consent, has been a primary focus. The effect of applying these standards to academic social science fields has been to restrict social research in ways in which non-academics, such as journalists, were not hampered, even when the risk of harm was minimal. For example, IRBs have been prone to require elaborate statements regarding the purposes of projects, based on the requirement of informed consent.

Much of the discussion of issues over the application of these standards has involved ethnography and oral history, the areas closest to journalism and non-academic writing. The key topics have involved informed consent and anonymity requirements, which are hot button issues for medical records, and thus strenuously enforced by IRBs. These issues have been partially resolved by a change in the rules, redefining "research" so that some kinds of human subjects research, such as oral history, journalism, biography, literary criticism, legal research, and historical scholarship, are no longer regarded as research per se.

The distinction that this redefinition was grounded in, however, produces an additional complication for social research. These activities were excluded because they were not "designed to develop or contribute to generalizable knowledge" (Abbo 2007, 575). Taken literally, many

of the classics of social research (such as the Middletown books or the Yankee City series, as well as many classic ethnographies) included material that could be identified with specific incidents and persons and thus violate privacy requirements. The thin protection of not naming the cities in which the research was done speaks to the desire to generalize, but it did little to protect identities. Neither was informed consent, typically associated in medical research with consent forms, possible for public events or the casual conversations between participant and observer on which the researchers depended.

This change is not mandated for university IRBs, which can continue to treat federal regulations as the "floor," and thus do not exempt any researchers. An employee's relation to the IRB is mediated by employment law: the requirement to submit one's research proposals to an IRB is a matter of honoring the rules of the university. IRBs typically do not offer blanket exclusions. Ordinarily, exemptions must be specifically approved by the IRB. Many IRBs, which have become de facto representatives of a university's concerns about other subjects—including liability, bad publicity, and political exposure—have not adopted a permissive attitude to these projects, and some advocates of the IRB process bristle at the thought that the social sciences would not follow the rules imposed on medicine. Evidence on IRB workings is scant, because these boards operate secretly, and researchers tend to conform rather than risk sanctions. The AAUP, however, has collected a large number of horror stories about aggressive IRBs, some of which relate to social science projects (AAUP 2006).

IRBs exercise considerable power. They can tell the applicants what kinds of research they may do, and even rewrite protocols. Proponents of the IRB system treat these actions not as a matter of the application of clear rules, but as a means of balancing the interests of research against other interests. But do IRBs actually affect the kind of research that is done, and the topics studied, or are they merely a paperwork hurdle whose effects are largely random? Ceci, Peters, and Plotkin (1985) conducted a survey that showed IRB members were less likely to approve research that challenged left-wing biases. There is also much evidence of inconsistency. One ethnographic study of IRBs tells the

story of a study of landlords in impoverished areas that was rejected at Brandeis for consent reasons but accepted at the University of Wisconsin (Stark 2012, 54). Another case, reported in an AAUP journal, reflected the extensive sense in which the notion of "harm" could be applied outside of medical contexts to block research. A Caucasian PhD student studying ethnicity and career expectations was told that it might be traumatic for Black PhD students to be interviewed by him (Thomson et al, 2006, 96).

The overall effects of the IRB system on actual research choices are more difficult to detect. Within sociology, however, one can observe a few long-term changes that might well be attributed to the increased difficulty of performing human subjects research. Areas that require IRB approval have declined, while those that do not necessitate it have grown. Social psychology, as a field within sociology, has suffered a radical decline in section membership in the IRB era, and some forms of politically sensitive research, notably community power studies, have disappeared entirely. At the same time, areas such as cultural sociology, which can rely on public material and thus not have to face IRB scrutiny, and autoethnography, which does not directly involve subjects other than the author and, hence, not require IRB approval, have flourished.

IRBs present the clearest of all threats to academic freedom. They are explicitly designed to curtail research in the name of other goals and values. Yet it is controversial whether these restrictions represent the kind of abridgement of speech by the First Amendment doctrine forbidding prior restraint (Bledsoe et al. 2007; Charrow 2007). It is apparent, however, that the absence of clear rules and the IRBs' use of their discretionary power to mandate changes in research protocols create an environment to which researchers must adapt, consciously or unconsciously.

Do the Two Forms of Academic Freedom Conflict?

In his history of the German idea of freedom, Leonard Kreiger (1957, 435) mentions the "traditional German notion of freedom as the essential harmony between popular liberty and monarchical authority."

For most of the twentieth century, there was a similarly strong relationship between the two forms of academic freedom: freedom of the individual faculty member, and freedom of the institution from state interference. Threats to a person's academic freedom often came from the state, such as from politicians incensed at something done at a state university, as in the California loyalty oath case. The freedom of a higher education institution was a means of protecting faculty from political interference, and, in turn, faculty members supported the freedom of their university as the basis of their own freedom. The current situation raises new issues that disrupt this commonality of interests. The conflict is especially well articulated in a recently decided Wisconsin Supreme Court case, which pitted a faculty member against Marquette University. Both concepts of freedom were articulated in detail in the rulings, which divided the court. The legal facts of the case, as recorded in the majority opinion, were the following:

> Marquette University suspended a tenured faculty member because of a blog post criticizing an encounter between an instructor and a student. Dr. John McAdams took exception to his suspension, and brought a claim against the University for breach of contract. He asserts that the contract guarantees to him the right to be free of disciplinary repercussions for engaging in activity protected by either the doctrine of academic freedom or the United States Constitution. The University denies Dr. McAdams' right to litigate his breach of contract claim in our courts. Instead, it says, we must defer to its procedure for suspending and dismissing tenured faculty members. It claims we may not question its decision so long as it did not abuse its discretion, infringe any constitutional rights, act in bad faith, or engage in fraud. (*McAdams* 2018, ¶1)

The university was declaring its freedom from state supervision and the legal priority of its own procedures in relation to employment questions. McAdams was defending his constitutional rights and the guarantee of academic freedom explicitly written into his employment contract. The university believed—and asserted—that it could define, through its own procedures, what these guarantees meant and act accordingly.

The university won its initial case. The circuit court adhered to the notion that "public policy compels a constraint on the judiciary with respect to Marquette's academic decision-making and governance," out of a recognition that "professionalism and fitness in the context of a university professor are difficult if not impossible issues for a jury to assess" (*McAdams* 2018, ¶55). The university nevertheless lost on McAdams's appeal to the Wisconsin Supreme Court. The majority opinion was that the university was not free to define the terms that appeared in its employment rules. The court also ruled that Marquette's quasi-judicial procedure, which was the basis for its actions, was merely an informal dispute-resolution process, and that "as a replacement for litigation in our courts, it is structurally flawed" (*McAdams* 2018, ¶2). Thus it rejected the circuit court's finding that McAdams had received due process. It noted as dubious the claim that juries could not assess fitness cases and rejected deference as an unsound practice. These responses recapitulate the standard issues with administrative law generally: lack of due process, lack of access to a jury trial, and quasi-judicial processes where their authority, particularly with respect to a question of the autonomy of the hearing officer, is suspect.

The definition of academic freedom came from the Marquette handbook itself, which was explicitly based on the AAUP definitions of academic freedom. As this is a frequent feature of faculty handbooks, and thus forms part of the contract with faculty members, the above analysis is important. The higher court made the point that the 1940 AAUP statement is out of date and does not reflect current practice, which is that faculty members are largely unconstrained in their extramural comments. The current standard, rather, was one that was narrowly related to the performance of the faculty member's job: "The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his or her position" (*McAdams* 2018, ¶67).

As the AAUP pointed out (*McAdams* 2018, ¶68), this was a stringent standard, one which was rarely invoked by universities. Marquette University, as the higher court indicated, did not show that the particular

expression by McAdams proved his unfitness, and it invoked considerations that uncoupled the doctrine of academic freedom from any stable reference points. The form of this argument is important, for it goes to the heart of the notion of academic freedom as a right, rather than as just one consideration among many. The university argued that educational institutions assume academic freedom as just one value that must be balanced against "other values core to their mission." Some of those values, it said, include the obligation to "take care not to cause harm, directly or indirectly, to members of the university community"; to "respect the dignity of others and to acknowledge their right to express differing opinions"; to "safeguard the conditions for the community to exist"; to "ensur[e] colleagues feel free to explore undeveloped ideas"; and to carry out "the concept of *cura personalis*," which involves working and caring "for all aspects of the lives of the members of the institution" (*McAdams* 2018, ¶69).

This line of argument would have the effect of eliminating academic freedom as a contractual right and subjecting its exercise to a wide range of other, largely subjective considerations. The minority opinion of the higher court, which may reflect the dominant legal reasoning on these issues, affirmed the superiority of an institution's academic freedom to the academic freedom of an individual. This argument was based on the concept of shared governance: "Within academic freedom lies the concept of shared governance. It includes the right of faculty to participate in the governance of the institution on academic-related matters. Shared governance in colleges and universities has been forged over decades to address the specific issues that arise in the workplace of higher education" (*McAdams* 2018, ¶139).

The relevant faculty right, in short, is to participate in shared governance.[5] Thus, as the dissent claimed: "The majority [opinion] errs in conducting only half of the academic freedom analysis. It fails to recognize, much less analyze, the academic freedom of Marquette as a private, Catholic, Jesuit university. As a result, it dilutes a private educational institution's autonomy to make its own academic decisions in fulfillment of its unique mission" (*McAdams* 2018, ¶140).

The dissent also rejected the idea that courts, rather than faculty operating in shared governance structures, should be able to define the meaning of academic freedom: "Apparently, the majority thinks it is in a better position to address concerns of academic freedom than a group of tenured faculty members who live the doctrine every day" (*McAdams* 2018, ¶141). The dissent also added, significantly, that McAdams's "contract does not give him the full-throated First Amendment rights that would be given a private citizen vis-à-vis the government," despite its affirmation of his academic freedom (*McAdams* 2018, ¶145). Therefore, the institution, in accordance with its autonomy, can regulate McAdams's extramural speech.

Conclusion

As all of these examples show, the present legal system produces an unequal conflict between academic freedom, which has only the most fragile and indirect legal basis, and employment law. The latter is backed by administrative law, which, in turn, is supported by the practice of judicial deference and the absence, in most cases, of statutory law providing for and defining academic freedom. A recent University of Texas lawsuit indicated how low on the legal hierarchy academic freedom is. A lawyer representing the state and the university affirmed the state's view that academic freedom was a "workplace policy," not a First Amendment right (Ellis 2018). This is the language of standard employment law. If a university is allowed to define academic freedom as a workplace policy, then it has little legal significance. Policy is a prerogative of the employer. Employers have been reluctant to act on this prerogative, but they have been less hesitant in applying regulations backed by administrative law, which represent different policy values. In the cases we have discussed, academic freedom is considered to be one policy value among several and, therefore, subject to being balanced against other interests or public purposes.

The effect of this new regime of administrative law, which holds employers responsible for fulfilling a vast array of policy *desiderata*, is to create an equally vast array of new discretionary powers for academic

administrators and committees, such as IRBs. The mere existence of these powers marks the end of academic freedom as it was traditionally understood: both as a right, instead of an interest against which other interests are balanced, and as a concept superior to employment policy, rather than subject to it. Without clear demarcations and the legal priority of a right—even if it is only an implied contractual right in employment law, with a defined meaning apart from the interpretation placed on it by universities—it is impossible to defend traditional academic freedom against the ever-encroaching body of administrative law and university procedures.

One may ask, however, whether there is much traditional academic freedom left to defend. The "marketplace of ideas" image referred to in the classic legal defenses of academic freedom depended on the real autonomy of faculty members to pursue inquiry as they saw fit and to occasionally express their opinions in public without penalty. The present regime of science is governed by a grant system that ties a scientist to the judgments of peers through a brutal system of competition for funds. The rest of academia is bound to a competitive system of quantitative reputation assessment, to which our submission is, as Gloria Origgi (2017, 218) has called it, a form of voluntary epistemic servitude that has the same effects. This coincides with, and perhaps produces, a cultural change in the professoriate. The constituency for traditional academic freedom within a university would be the people who were exercising freedom in accordance with the liberal theory of science. This constituency barely exists today. It is noteworthy that of the university cases discussed here, three of them (at Texas, Duke, and Marquette) involved objections to either an ideologically dominant position or to practices enforcing ideological conformity. The suppression of one faculty member was supported by much of the rest of the faculty. Conformity has an active constituency. Indeed, for topics involving diversity, it has an institutionalized presence in the university, many means to enforce it, and enthusiastic support among the faculty. Academic freedom has only the few legal means outlined above. We have come full circle, culturally as well as legally, from the California loyalty oath case.

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Notes

1. One complication with this kind of "law" is that for most of its application to universities there is no direct constitutional basis for them in the "enumerated powers" of the US Constitution, which do not include any authority to regulate research or education. The regulations instead are conditions of contractual relations between the federal government and universities or states, relations that result from grant programs.

2. This case involved a letter to the editor criticizing actions of the school board and affirmed Marvin Pickering's First Amendment right as a citizen to speak on public issues.

3. It is worth noting that a loyalty oath requirement was already under attack from the 1930s on by the Communists of the era, and the requirement was defended against their contestation of it by such figures as Michael Polanyi and Sidney Hook.

4. Seminars on "whiteness" directed at employees and students characteristically take the form of indoctrination, by directing them against resistance to the message and by declining to respond to counter-arguments, which are treated as pathologies (Watt 2007).

5. As Henry Reichman points out in his commentary on this case, shared governance was something of a sham. This point is also made in the majority opinion. Marquette's president imposed an unusual and legally problematic demand that went beyond the advice of the faculty committee, namely that McAdams apologize (Reichman 2019, 101). This apology would have the effect of protecting McAdams against a civil lawsuit by the instructor who was criticized by him.

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