Frank Donoghue

Why Academic Freedom Doesn't Matter

The streamlined version of my thesis is that academic freedom doesn't matter because professors don't matter. This essay seeks to track the intersection of academic freedom and tenure (the defining feature of our profession), pulling apart the two concepts in order to discover how they became spliced together initially. Both concepts were oddly and poorly defined separately in debates that have been waged about them since 1915 when the American Association of University Professors (AAUP) and its lesser-known counterpart, the Association of American Colleges (AAC), were founded. We know that they have been fused at least that long. As historian Walter P. Metzger wryly puts it, "The martyrology of academic freedom has a much longer history than its seminal formulations."[1] Indeed, that martyrology is rehearsed in the most hyperbolic terms. Metzger himself, in a different essay, claims that academic freedom "is not only relevant to the modern university, but essential to it—the one grace the institution may not lose without losing everything."[2]

Tenure, on the other hand, understood as a uniform set of protections against unfair or politically motivated dismissal, has been an incon-

South Atlantic Quarterly 108:4, Fall 2009
DOI 10.1215/00382876-2009-010

sistent factor in the history of what academic faculty can expect from institutions of higher learning. When the AAUP was founded, there was no such thing as tenure. Tenure existed as an unofficial tradition, and even then only at select institutions (the elite eastern universities, the Midwestern land grant institutions). Now, nearly one hundred years later, we are steadily slipping into a new era in which tenured faculty are disappearing. Only one-third of America's teaching workforce in higher education has it or is eligible for it. Yet scholars continue to magnify the significance of tenure too. Louis Menand claims that tenure is the guarantor of academic freedom, which itself is the key "legitimating concept of the entire enterprise" of higher education. Fritz Machlup says that academic freedom "can only be guaranteed by the instrument of tenure."[3]

Consider, first, that academic freedom and tenure are not historically stable and integrally related concepts and, second, that only by relinquishing that assumption can we learn anything about their actual institutional connection and thereby rewrite the history of academic freedom. This is easier said than done: professors have spent decades insisting on the relationship, all the while enshrining both tenure and academic freedom as sacred. Doing so has not only led us to misrepresent our work *to ourselves*, but has given our enemies targets to which they assign their highest priority. Conservative detractors of the current state of higher education invariably single out tenure and academic freedom for special abuse. Being misguided ourselves, we have misguided these detractors, and our encounters with them have been shrill and confrontational.

The tenure system itself does more to constrain than to promote academic freedom. It may seem counterintuitive to argue that, but that position is now one to consider seriously. The American Federation of Teachers and former general secretary of the AAUP Roger Bowen have both recently made the same point. Consider too that academic freedom would matter only if professors had standing as public intellectuals, but that standing has never been more than a distant aspiration for us. If the public actually cared about what professors have to say, if academic speech and writing really influenced public opinion, then academic freedom would be important. People would either treasure the pronouncements of professors, and thus fight to sustain academic freedom, or they would fear the rhetorical power of professors, and thus try to deprive us of our special exemption from the obligations of employee loyalty, patriotism, and conventional thinking. The fact is that we're not that important; therefore, the academic freedom we

profess to stand for is unimportant too. The proof is that professors who are perceived as pushing the limits of academic freedom are punished on the most mind-numbingly *procedural* grounds, that is, in a way that focuses on their status as employees, ignoring their status as intellectuals. In other words, administrators can and do sidestep any ideological issues and challenge the "occupational" competence of professors whose opinions they find objectionable. They do so to remind professors that they are employees first and foremost.

How then did academic freedom achieve sacrosanct status? To find an answer, I start with the founding members of the AAUP and how and why they produced their inaugural document in 1915, the "Declaration of Principles on Academic Freedom and Academic Tenure." I next examine the reception of that document and its fundamental revision, in 1940, as the "Statement of Principles on Academic Freedom and Academic Tenure." Finally, I analyze some of the key court cases and economic realities that define academic freedom in our own time.

Ralph Brown and Jordan Kurland correctly say that the AAUP's 1940 "Statement" "marks the maturity of the linkage of academic tenure to academic freedom," that the "Statement"—"incorporated, often verbatim, in the policies of hundreds of colleges and universities—is the yardstick for measuring adherence to proper standards of academic freedom and tenure."[4] That linkage seems absent from the 1915 "Declaration of Principles." So how did it come into being in the first place, and what accounts for its being judged as mature in 1940?

Here's the story, or at least my version of it.

The AAUP Committee on Academic Freedom and Academic Tenure assembled by the association's president, John Dewey, in 1915, radiated prestige. All fourteen members taught at what the Carnegie Commission on Higher Education would later classify as Research I universities: A. O. Lovejoy was at Johns Hopkins, nine were from Ivy League universities, and four were from flagship state universities (Wisconsin, California, Washington, and Indiana). To use Jeffrey Williams's term, the committee members were the "academostars" of their day.[5] Further, the members were predominantly progressive social scientists: three were economists, including the committee's chair, Edwin R. A. Seligman; two political scientists; two sociologists; and a psychologist (plus Dewey, wherever one places him). The domain of their knowledge is significant because social scientists, by virtue of the subjects they study, were and are most likely to make controversial

assertions and thus attract scrutiny from administrators and the extramural world. Further, more than half of the members had done graduate study in Germany, the cradle of the concept of academic freedom.

This combination of people—their intellectual prowess, prestigious affiliations, Germanic training, and disciplinary vigilance—produced a document, the 1915 "Declaration of Principles," that allots an implausibly fantastic amount of power and autonomy to professors. From the complex cluster of three ideas that constituted the German conception of academic freedom, the AAUP's committee plucked out one. That one, much enhanced, became academic freedom, as we in the United States understand it. *Lernfreiheit*, the notion that university students should be largely unsupervised, and not required to take specific courses, was in that original German cluster. Since *lernfreiheit* went against the grain of both the U.S. university curriculum (which included requirements as well as electives) and the Anglo-American notion that professors served in loco parentis, the committee largely ignored it. Another notion that also vanished was the German insistence that faculty govern themselves, *Freiheit der Wissenschaft*, since the academostars of the committee with their privileged working conditions had little interest in the day-to-day operations of the universities that treated them so well.

What remained was an intense and expansive articulation of *lehrfreiheit*, the freedom to teach and to inquire. As Metzger explains, in the German tradition, and indeed in Prussian law, *lehrfreiheit* was a "limited privilege (it did not exempt professors from the civil service code, which demanded loyalty to the state, and it likewise held them accountable for their political and social behavior as private citizens)."[6] Moreover, this statutory right was extended only to full and associate professors. Lovejoy, however, convinced his fellow AAUP committee members to adopt a far more comprehensive definition. In the 1915 "Declaration," academic freedom would protect "not just freedom to teach and to inquire . . . but also 'extramural freedom,' by which it meant freedom to speak . . . without the warranty of professional task or acknowledged expertise."[7] And it would apply to all faculty.

Thus, the AAUP's original understanding of academic freedom rested on a reconstrued vision of professors as powerful, oracular social figures. The details of this reconstrual bear that out. Early in the twentieth century, a rash of endorsements of the corporate university emerged. Now largely forgotten, polemics by industrialists such as Clarence Birdseye's *Individual Training in Our Colleges* (1907), Richard Teller Crane's *The Futility of Higher*

Schooling (1910), and Morris Llewellyn Cooke's *Academic and Industrial Inefficiency* (1910) were extremely influential in their time.[8] I suspect that they may have alarmed the fledgling AAUP as much as if not more than notorious contemporary cases of unfair dismissal, such as Stanford's firing of Edward A. Ross in 1900. The AAUP's founders expressed dismay that anyone would think of the university as "an ordinary business venture" and of academic teaching as "a purely private employment." Such thinking, they assert, "manifests . . . a radical failure to apprehend the nature of the social function discharged by the professional scholar" ("Declaration," 3). The founders thereupon base the scholar's relationship to the university on an analogy fundamentally different from that of employee to employer. Faculty, they assert, are "appointees" and not employees of the university. They elaborate:

> So far as the university teacher's independence of thought and utterance is concerned . . . the relationship of professor to [university] trustees may be compared to that between the judges of the Federal courts and the Executive who appoints them. University teachers should be assumed to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the trustees than are judges subject to the control of the President with respect to their decisions. (Ibid., 4)

This explicit analogy makes clear that the professor's independence of thought and utterance, his or her academic freedom, takes its warrant from that professor's *initial appointment*. Moreover, it is protected by a mechanism akin to the checks and balances that the U.S. Constitution places on the three branches of government; academic freedom, in other words, is guaranteed by something *other* than the provisions of the First Amendment.

Of course, no one in 1915 would ever have confused this idealistic vision of academic freedom with the real working conditions of professors at the time. They were not, in fact, appointed like federal judges but rather employed at will, typically on annual contracts. At the elite eastern universities and the flagship Midwestern land grant institutions, these contracts were all but automatically renewed year after year. But, as is well known, the AAUP was spurred into existence by scandalous instances in which the employment contracts of professors were *not* renewed. The ideal of academic freedom expressed in the 1915 "Declaration of Principles" was not

defined in practical terms until 1940, when the much more well-known "Statement of Principles on Academic Freedom and Tenure" was drafted. This document formalizes both the demotion of professors as figures of social importance and the contraction of academic freedom.

What happened in the intervening years? To put it simply, the AAC got involved. I don't mean to downplay the changing extramural contexts. The 1915 "Declaration" is a classic Progressive Era manifesto, epitomizing the idealism and optimism that was no longer available to American intellectuals in the aftermath of the Great Depression and in the first year of World War II. But the intramural history is still crucially important. The AAC, an organization of university presidents and deans (that is, of administrators, not of faculty), developed a fundamentally different understanding of academic freedom than we find in the AAUP's 1915 "Declaration." The very first bulletins of the AAC questioned both how academic freedom might reasonably be restricted and how issues of faculty reappointment and dismissal might be resolved procedurally. The questions themselves go against the idealistic spirit of the "Declaration," but they ultimately set the tone for the far more cautious and pragmatic 1940 "Statement."

The first extended discussion of academic freedom and academic tenure by members of the AAC appears in the second volume of the *AAC Bulletin* in 1916. The keynote report, presented by Herbert Welch, president of Ohio Wesleyan University, anticipates the conflicts that ultimately brought academic freedom into America's courtrooms. Welch sounds the cautionary note that "freedom is always only relative"[9] and poses the question: "if it is to be granted that some limits are to be set about academic freedom, by whom shall they be established and guarded? To leave the matter entirely to each individual concerned is obviously to return to anarchy" ("Tenure of Office," 167). He notes the AAUP's stance that "authority shall be professional rather than lay authority, that decisions as to the competence and personal fitness shall be made by the faculty instead of the trustees." He immediately questions that position, setting the AAC in opposition to the AAUP on the "central question" of "the appointment, reappointment, promotion, retirement, or dismissal of members of the teaching staff" (ibid., 168), that is, on the procedures by which competence and personal fitness are determined.

After characterizing as "extreme" the policy expressed by Professor Lovejoy of Johns Hopkins that the faculty alone should make these decisions

(ibid., 169), Welch concludes that "final authority for action in these cases should inhere in the trustees" (ibid., 170). His rationale foreshadows future debate about whether professors are employees or appointees. Certainly, he concludes, professors, like physicians, lawyers, and clergymen, "are responsible only to members of their own craft," but the preliminary question of whether a professor "is to have any continued professional standing, any right to practice his craft at all . . . whether he shall be employed in this place or that is generally decided in all crafts by laymen" (ibid.). Welch thus subordinates the nuances of academic freedom to the material question of who employs whom. Though he does not push the implications of his claim to its logical limit, Welch implies that *all* professors, not just the untenured, are employees rather than appointees.

This hard line never became the official stance either of the AAC or of the AAUP, but Welch's report shaped the AAC's thinking on the relationship between tenure and academic freedom, and influenced the association's subsequent statements.

Two critical pronouncements followed in later *AAC Bulletins*, the first in 1921 and the second, more detailed, in 1925. In 1921, Dean Charles N. Cole of Otterbein College in Ohio, echoed some of Welch's concerns. He worries about "persistent injury" to colleges from the "utterances of the incompetent and injudicious" and suggests that professors need a professional code of conduct (which, according to Welch's thinking, would be overseen by trustees). Cole then makes two new suggestions that eventually became staples of the debate about academic freedom. He first wonders whether "the question of academic freedom is merely a special application of the protection of freedom of speech."[10] Even though many late-twentieth-century cases that reached the courts tried to sort out this relationship between academic freedom and the First Amendment, Cole's premise—that professors may be no different from ordinary citizens—would have been anathema to the AAUP's founders. Cole's second suggestion is the first sketching out in print of the rudiments of the tenure system. He recommends that professors be given secure appointments only "after a suitable period of probation has been passed," noting that "[all] methods of appointment, probation, reappointment, termination of appointment and dismissal" are "of prime importance in connection with the subject of tenure." He elaborates. First appointments "should as a rule be temporary and followed by renewals or short-term appointments until the competence of the appointee and

the mutual compatibility of the college and the appointee are fully established."[11] The cornerstones of the tenure system as we know it today are, of course, rule-governed appointments and a probationary period before tenure is granted.

Most scholars of tenure acknowledge the 1925 *AAC Bulletin* as being a rough draft of the AAUP's 1940 "Statement." Further formalizing Cole's vision, the "Report of the Commission on Academic Freedom and Academic Tenure," written by Dean John R. Effinger of the University of Michigan, describes the resolutions adopted at a meeting in January 1925 that brought the AAC together with a large assortment of academic associations, including the AAUP (represented by Lovejoy and Northwestern's F. S. Deibler). The conferees unanimously adopted the central recommendations of the report, which define both academic freedom and tenure, restricting both concepts but treating them as related.

The report confines academic freedom to the professor's field of expertise, stating that "a university or college may not impose any limitations upon the teacher's freedom in the expression *of his own subject* in the classroom or in addresses and publications outside the college" (emphasis mine). The report underscores the significance of its statement by repeating it in different terms: "No teacher may claim as his right the privilege of discussing in the classroom controversial topics outside of his own field of study," and "a university or college should recognize that the teacher in speaking and writing outside of the institution upon subjects beyond the scope of his own field of study is entitled to precisely the same freedom and is subject to the same responsibility as attach to all other citizens."[12] Thus is Cole's suggestion of four years earlier codified. On the issue of academic tenure, the report recommends that "termination of a permanent or long-term appointment for cause should regularly require action by both a faculty committee and the governing board of the college." As for those holding "a temporary or a short-term appointment," the report recommends only that they be given "timely notice of [an institution's] desire to terminate."[13] These two recommendations make clear exactly what is at stake in Cole's suggestion that short-term contracts precede tenured appointments. Those who have earned tenure can be fired only "for cause." Untenured employees are employees at will.

The AAUP's 1940 "Statement" builds on the AAC's 1925 report. The "Statement" is the AAC's document rather than the AAUP's. Dramatically different in tone and focus than the AAUP's earlier "Declaration," which

seems utopian by contrast, the "Statement" describes the following stipulations in terms now familiar to us all. Anyone appointed "to the rank of full-time instructor or a higher rank" shall serve out a "probationary period" that "should not exceed seven years." Following "the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies" ("Statement," 2). These provisions came with a mandate that "the precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated" (ibid.). Both the detailed procedure and the requirement that it be in writing conferred a nationwide uniformity of expectations about the conditions of professorial labor. Professors have received them as such in a uniformly positive way. Indeed, for all practical purposes, they should be so received. But all this is nothing but the invention of tenure. As of 1940, professors first have to work as employees before they qualify for tenure itself, the appointment that confers on them the security and autonomy of federal judges. For that seven-year probationary period, universities assign professors a role that, according to the AAUP's founders in 1915, is a "radical failure" of understanding. Thus does the 1940 "Statement" reflect the AAC's evolving critique of the AAUP's original 1915 "Declaration," now significantly contained.

The fact that the 1940 "Statement" requires professors to serve as employees before they can enjoy the protection of tenure makes us far more vulnerable to unfair management practices than did the ideal conditions set out in the 1915 "Declaration." The authors of the 1940 "Statement" clearly recognize this, but the tenure system that their document creates leaves them very little latitude to fix any potential problems. Most significant, declassing the appointment of professor (at least during the first seven years) disrupts the connection between the role of professor and academic freedom. That is, a professor must now earn tenure by first being a good employee, by following rules not necessarily made by professors, and by enduring an extended period of enforced conformity while on probation. The 1940 "Statement" asserts at one point, "During the probationary period a teacher should have the academic freedom that all other members of the faculty have" (ibid.). Yes, he or she *should*, but the tenure system itself, by separating professors into two categories—insecure employees and secure appointees—takes away any guarantee that he or she *will*. The subsequent

history of academic labor underscores this concern: employees in the postsecondary education teaching workforce now greatly outnumber appointees, and the gap between the two groups is continuing to widen.

The 1940 "Statement" retrenches the AAUP's original position on academic freedom in another fundamental way as well, once again consistent with the AAC's views, especially those of the 1925 report. The 1940 "Statement" stipulates: "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 which has no relation to their subject" (ibid., 1). This requirement marks academia's entrance into the era of expert professionalism. This is how the 1940 "Statement" compels us to interpret its decision to tie academic freedom to professional competence in a specific subject.

In Stephen Brint's analysis of expert professionalism, which sees a process of displacement accelerating rapidly in the 1960s, social trustee professionals embrace collegial organization, learning, and the spirit of public service—occupational values that support and perpetuate a healthy democratic society.[14] Not coincidentally, these are the traditional values of the university, especially of the liberal arts, and the language of social trustee professionalism suffuses the 1915 "Declaration of Principles." By 1925 if not earlier, though, the AAC insisted on defining professors first as experts.

Expert professionalism can be characterized as value neutral. It foregrounds technical know-how and local problem solving. Expert professionals can know "their subject" in isolation, independent of any value system or institutional mission in which that subject might be imbricated. Expert professionals operate in a way that is perfectly consistent with the writings of Frederick W. Taylor, the legendary pioneer in scientific management. Taylor's central work, *Principles of Scientific Management*, originally appeared in 1911, but it reached a wide audience when it was reissued in 1916.[15] As historians of labor well know, Taylor's theory that the work done in factories could be segmented, routinized, and methodically divided among workers was quickly and widely adopted. It transformed manufacturing in America by turning each worker into an expert—at riveting, in welding, in a specific area of quality control. Brint's expert professionals at universities are essentially Taylorized white-collar workers. In the vision of administrators, their social consciousness and ideological commitments extend no further than the mission of the organization or corporation that employs them. Marc Bousquet refers to this mentality as "Toyotism."[16] And

Brint has written persuasively that the expert professional has now completely displaced the social trustee professional.

By stipulating that a professor's appointment as a tenured figure, analogous to that of appointees to the federal bench, begins only after seven years as a regular employee, and by stating as well that, even once tenured, a professor's freedom of thought and utterance is protected absolutely only so long as the professor sticks to his or her subject, the 1940 "Statement on Academic Freedom and Tenure" severs the tie that binds academic freedom to tenure. In doing so, the 1940 "Statement" ushers the concept of academic freedom into the legal system. For during his or her first seven years of employment, no postsecondary teacher has special status beyond that granted to every ordinary citizen under the First Amendment.

The timeline of academic freedom court cases certainly bears comment, since it masks the connection between the 1940 "Statement" and subsequent court rhetoric. There were no cases of note from 1940 through the peak of the McCarthy era. This should come as no surprise: during times of what we might call ideological exigency, any debate about academic freedom ceases. This was true in World War I, when Columbia's academic departments were reorganized into military corps and when AAUP cofounder Lovejoy published a pamphlet outlining talking points that unequivocally justified the United States' entrance into the war. It was true of World War II as well and of the early 1950s, when, for many, *intellectual* and *communist* were synonymous terms, giving the Cold War palpable consequences for American academics.[17]

When in 1957 academic freedom finally did present itself before judges, it appeared as a strange and foreign concept. So foreign was it then that when the U.S. Supreme Court first discussed it, in *Sweezy v. New Hampshire* (1957), Justice Felix Frankfurter found it necessary to quote his definition of the term from a statement on academics in South Africa.[18] In 1954, the New Hampshire attorney general's office subpoenaed Paul Sweezy and questioned him about his allegedly un-American activities. When Sweezy refused to answer all the questions, he was arrested for contempt. Both the circumstances of this case and the man at its center are fascinating. Although the case worked its way through the appeals process, reaching the U.S. Supreme Court in 1957, and stands to this day as a landmark case in the legal history of academic freedom, *Sweezy v. New Hampshire* had noth-

ing to do with academic freedom. Sweezy himself makes that clear; yet the Court confuses the issue nevertheless.

Though Sweezy was a remarkable intellectual, a traditional academic career was never in store for him. He certainly seemed groomed for one, graduating from Phillips Exeter and earning both his BA (in 1931) and his PhD from Harvard (in 1937), and reaching the rank of assistant professor of economics at Harvard in 1940. During World War II, Sweezy, who had already published his first book, *The Theory of Capitalist Development: Principles of Marxian Political Economy* (1942), joined the U.S. Army and worked in the Office of Strategic Services—such was the elasticity of American attitudes toward Marxism in the early years of the war. But by the time the war had ended, the ideological tide had turned, and Sweezy became convinced that, as a self-proclaimed "classical Marxist" (*Sweezy*, 3), he would never receive tenure at Harvard. So, in 1946, he resigned his position. He went on to a career as an independent scholar (benefiting from the fact that his father was a wealthy Wall Street investment banker) and is perhaps best remembered today as the cofounder of the *Monthly Review*, the country's most significant Marxist journal. But as of 1946 and throughout the period that brought him before the Supreme Court, he was no longer an academic.

In short, Sweezy was neither tenured nor a faculty member when he delivered a guest lecture on the subject of communism at the University of New Hampshire in 1953 and thereby ran afoul of a newly passed state law aimed at thwarting subversive activities. Once subpoenaed, he was asked all the invasive questions we have come to associate with the Red scare: Had he ever been a member of the Communist Party? Had he, his wife, or his friends been members of the Left-leaning New Hampshire Progressive Party? He was asked about the content of his (public!) lecture. When he refused to answer some of these questions about the Progressive Party and the content of his lecture, he was convicted of contempt. Three years later, he found himself at the end of the appeals process, before the U.S. Supreme Court. The text of the Court's decision contains Sweezy's statement to the New Hampshire attorney general, in which he defends his refusal to answer the questions posed to him: "I shall respectfully decline to answer questions concerning ideas, beliefs, and associations which could not possibly be pertinent to the matter here under inquiry and/or which seem to me to invade the freedoms guaranteed by the First Amendment to the United States Constitution."[19] Surprisingly, the Court's decision swerves from Sweezy's

First Amendment defense, hedges on the question of academic freedom's immunity from legal challenges, and launches into a panegyric on academic freedom itself, a phrase that Sweezy never once invokes. In reversing the New Hampshire court's decision, the Supreme Court makes the vague claim, "We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression, areas in which government should be extremely reticent to tread" (*Sweezy*, 5). The Court's elaboration on the importance of academic freedom is even more bizarre, extending the concept beyond professors (tenured or untenured) to students and putting the fate of our civilization in the balance:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. (Ibid.)

The dissonance between the Court's rhetoric and Sweezy's own understanding of what he was doing—deliberately impeding an investigation because he believed that that investigation was a threat to the First Amendment—is baffling. Examining Sweezy's own career, though, is the clearest way to make sense of it. He figured out long before his controversial lecture at the University of New Hampshire that his heterodox political views would keep him from receiving tenure, would prevent him, in other words, from making the transition from employee to appointee that would ensure the protection of his written and spoken views, and thus of his employment. He opted to resign rather than go through the tenure process because his record of nonconformity as an assistant professor would make a positive outcome unlikely. Regardless of the Court's rhetoric and the status of the case in legal scholarship, *Sweezy v. New Hampshire* was not about academic freedom because Sweezy himself decided in 1946 that academia could not provide a safe haven in which he could express his views. He chose instead to defend himself as an ordinary citizen whose First Amendment rights had been violated.

It's fair to say that the court system has never gotten comfortable with a

concept that announces itself as distinct from, yet seems so similar to, the freedom of speech that the First Amendment protects. Legal scholar J. Peter Byrne captures that discomfort in the following complaint: "Attempts to understand the scope and foundation of a constitutional guarantee of academic freedom . . . generally result in paradox or confusion. The cases, shorn of panegyrics, are inconclusive, the promise of rhetoric reproached by the ambiguities of academic life. The problems are fundamental. There has been no adequate analysis of what academic freedom the Constitution protects or why it protects it."[20] Yet the paradox and the confusion make perfect sense in light of the combat that implicitly became a collaboration between the AAUP and the AAC between 1915 and 1940. The panegyrics stem from the 1915 "Declaration"; the ambiguities of academic life became apparent as soon as the AAC began qualifying the "Declaration" and asserting, to whatever extent possible, the authority of university trustees as employers. The U.S. Supreme Court, for example, has called academic freedom a "transcendent value to all of us," but, as Byrne notes, "What consequence any of this [rhetoric] has in determining which officials can do what to which professors has remained largely unexplained. A gross imbalance between encomium and rule suggests an extreme reluctance by or difficulty for a court to find any particular practice to be a violation of academic freedom."[21]

A later landmark case, *Hetrick v. Martin*, illustrates the pitfalls that can await an untenured assistant professor (Sweezy's last academic rank). Phyllis Hetrick was terminated in 1970, after one year as an assistant professor of English at Eastern Kentucky University. She was given neither a hearing nor a letter explaining the reasons for her dismissal. When she sued the university, it came to light that the chair of her department, Dr. Kelly Thurman, had convened a "secret evaluation committee" to review all untenured teachers. Its findings about Hetrick were as follows: First, "Dr. Hetrick, who is a divorced mother, made the remark during an introductory session of one of her English Composition classes that, 'I am an unwed mother.' Presumably the statement was made to exhibit the irony and connotative quality of the English language."[22] Second, Hetrick agreed to complete her PhD within her first semester at Eastern Kentucky, but the degree was not granted until her second semester. This consternated Dr. Thurman, who concluded, "Dr. Hetrick had a propensity to temporize about things which he [Dr. Thurman] considered to be of importance" (*Hetrick*, 13a). Third, Dr. Thurman had expected that Hetrick would cover twenty plays in her

Modern Drama course, but she only covered eleven. Thurman thus concluded that the class was not rigorous enough (ibid., 13a). Finally, Hetrick discussed "with one of her sections of English Composition the Vietnam War and the military draft" (ibid., 12a). It's obvious to anyone that all but the last of these charges were preposterously trivial. Hetrick's central assertion in her lawsuit was that she was fired because of her views on the war. Yet both the Eastern Kentucky District Court and the Sixth Circuit of the U.S. Court of Appeals sided with Eastern Kentucky University. The district court claimed that evaluating "the wisdom of the University's decision not to renew the contract" was beyond the scope of the law. Its elaboration makes clear, though, that the duty of an assistant professor has nothing to do with freedom of thought or utterance but rather with uncritically conforming to departmental policy:

> It simply seems that Dr. Hetrick's teaching methods were too progressive, or perhaps less orthodox than the other faculty members in her department felt were conducive to the achievement of the academic goals they espoused. The court must conclude that the State University has the authority to refuse to renew a non-tenured professor's contract for the reason that the teaching methods of that professor do not conform with those of the tenured faculty or with those approved of by the University. (Ibid., 13)

The court of appeals uses the same language, noting, "Whatever may be the ultimate scope of the amorphous 'academic freedom' guaranteed to our Nation's teachers and students . . . it does not encompass the right of a nontenured teacher to have her teaching insulated from review by her superiors when they determine whether she has merited tenured status just because her methods or philosophy are considered acceptable somewhere within the teaching profession" (ibid., 9a). The district court sidesteps the connection between academic freedom and the First Amendment and instead concludes, "The non-renewal of Dr. Hetrick's contract was . . . based . . . on the feeling that . . . [her] teaching philosophy and the manner in which she implemented it were not adaptable to the achievement of the academic goals of the University" (ibid., 14a).

Hetrick v. Martin perfectly illustrates Byrne's claim that the greatest challenges to academic freedom come not from the courts but from the concept's own institutional contradictions.[23] In *Keyishian v. Board of Regents*, the U.S. Supreme Court cautioned that academic freedom is "a special

concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[24] Yet there *were* no intolerable laws in *Hetrick v. Martin*: Eastern Kentucky University's policies and pedagogical philosophy provided the pall of orthodoxy. The district court plainly acknowledges this in its reasons for dismissing *Hetrick*: "A University has a right to requiring some conformity with whatever teaching methods are acceptable to it. In this case, it simply appears that Dr. Hetrick's teaching techniques were not acceptable to the University" (*Hetrick*, 16a). Eastern Kentucky University did not challenge Phyllis Hetrick's right to academic freedom, even though this was clearly the reason for the university's dissatisfaction with her. Instead the university shifted the grounds of its assessment of Hetrick's work to questions of "methods" and "techniques," and fired her for reasons that, by any measure, were ridiculously petty and political. In other words, the university administration ostensibly judged her as an employee and as an expert professional, and found her wanting. It thereby demonstrated how easily the provisions of the 1940 "Statement" could be perverted: they leave a professor so vulnerable during his or her probationary period. One can only imagine that Paul Sweezy would have been equally at risk from what Brown and Kurland call the university's "ample recourse to ambiguity, rationalization and subterfuge."[25]

What might have happened had Sweezy already been a tenured professor when he gave his controversial lecture on communism? The best place to look for an answer is not the still-fresh but unresolved example of Ward Churchill (fired from the University of Colorado in July 2007), but rather that of Leonard Jeffries, who earned tenure at the City University of New York and served as chair of its Black Studies Department beginning in 1972. In July 1991, Jeffries's speech "Our Sacred Mission," delivered at the Empire State Black Arts and Cultural Festival in Albany, claimed that Jews who invented and expanded Hollywood conspired to denigrate African Americans and more broadly that rich Jews financed the slave trade.[26] The lecture ignited a firestorm of controversy that led CUNY, under the leadership of President Bernard Harleston, to demote Jeffries, removing him from his chairmanship. The college justified the demotion in the same style that Eastern Kentucky had used to justify firing Phyllis Hetrick, emphasizing procedural orthodoxy and sidestepping academic freedom. New York District Court Judge Kenneth Conboy, though, recognized this ruse and ruled that "the action taken by the University was constitutionally impermissible." He elaborates:

> This need not have been the case if the University had offered convincing firsthand proof at trial that either the consequences of the speech disrupted the campus, classes, administration, fund-raising or faculty relations, or that the professor had turned his classroom into a forum for bizarre, shallow, racist and incompetent pseudo-thinking and pseudo-teaching. While a few shards of hearsay and self-serving evidence were offered halfheartedly by the University to suggest potentially viable defenses along these lines, the University cannot escape the astonishing picture it painted for the jury: high public and academic officials swearing under oath that they had removed the professor for tardiness in arriving at class and sending in his grades, and for asserted brutish behavior which had either been ignored or condoned by the University.[27]

Two key differences between Jeffries's case and Hetrick's are worth noting. First, CUNY never tried to fire Jeffries. Brown and Kurland would credit this decision to the power of a tenured appointment. Speaking generally, they observe that, in the case of a tenured professor, the *university* has "the burden to demonstrate that the faculty member has said or done things offensive enough to warrant dismissal." Moreover, beyond this burden of proof, the whole question of what constitutes adequate cause for dismissal is unresolved.[28] Howard Bowen and Jack Schuster note that the procedures for getting rid of a tenured professor "are so arduous and so embarrassing that they . . . take on the flavor of a trial for murder."[29] Second, at no point in Jeffries's case or in CUNY's appeals is the term *academic freedom* invoked, either solemnly, as in *Sweezy*, or in scare quotes, as in *Hetrick*. The court of appeals, which reviewed *Jeffries* twice, simply designates Jeffries as a "government employee": "One of the principles driving our earlier *Jeffries* decision was that the First Amendment protects a government employee who speaks out on issues of public interest from censure by his employer unless the speech *actually* disrupted the employer's operations."[30] Academic freedom comes up as an issue only very early in the controversy, in a letter from President Harleston to his CUNY colleagues, where he adopts a cautious stance identical to that of Ohio Wesleyan President Welch in his 1916 AAC report. Harleston's letter maintains: "Certainly we must insure the right of our faculty and students to express their ideas both in and outside the classroom, without fear of institutional censorship. However, the right to free expression and, indeed, to academic freedom is not and cannot be absolute. With freedom must come responsibility."[31]

The differences among these scenarios, which involve a journalist speaking on campus (Sweezy), an untenured academic (Hetrick), and a tenured academic (Jeffries), underscore the power of tenure to protect a professor's right to academic freedom. These differences highlight what I have argued is an unexamined yoking of tenure and academic freedom. And because tenure is disappearing, academic freedom will, over time, apply to fewer and fewer scholars and teachers.

Two recent interventions address this grim prediction with admirable candor, but neither one offers a hopeful solution. In 2007, the American Federation of Teachers released a pamphlet, *Academic Freedom in the 21st-Century College and University*. Its central message: "We believe that the greatest threat to academic freedom today is the subtle removal of many faculty positions from the tenure track and from shared governance structures."[32] The AFT certainly recognizes that academic freedom does not remain a static concept even as the university changes; the pamphlet suggests, "It is important to restate academic freedom standards in the context of today's college and university setting."[33] Within the framework and expectations of the AFT, however, this could be done only through activism and collective bargaining. Thus the struggle to preserve academic freedom would have to be part of the more difficult struggle to gain and preserve collective bargaining rights.

Former AAUP general secretary Roger Bowen makes an even more radical suggestion. He too asks the essential question, "How can we secure academic freedom when its guarantor—tenure—is on the wane, and the public is indifferent or even hostile to it?"[34] After concluding that "tenure . . . is bound to be eventually scuttled," he asserts, "Decoupling academic freedom from tenure just may be . . . the best way to preserve academic freedom." That is, Bowen recommends that we follow the lead of the British, elevating academic freedom to constitutional status and giving up our system of academic tenure, a "Faustian bargain," as he characterizes it, but possibly "the best way to preserve academe's highest value." My worry about Bowen's proposal is that it wouldn't be a "bargain" at all, that professors (in the role of Faust) would in fact not get academic freedom in return for surrendering the security of tenure. The court cases I have reviewed here bear this out: university administrators have established a consistent record of evading issues of academic freedom and instead have manufactured arguments about professional incompetence to justify dismissing controversial professors.

We might need an even more extreme remedy. What if we could abandon the view that research is the requisite model for professional activity? For many of us, that model controls our daily work and our careers, but it has become unsustainable. The increasing pressure on tenure-track assistant professors to do research and to publish has been well documented. That meeting these daunting expectations requires a great deal of time to meet has given rise to a curious development that the authors of the 1940 "Statement" did not foresee: it is now absolutely necessary for professors to fulfill the seven-year probationary period stipulated in that document, which implicitly defines professors as at-will employees. That is, assistant professors now need every month of their probationary period in order to produce the quantity of published research that administrators demand of them. Our profession has indeed made tenure the guarantor of academic freedom, but it has also made publication the guarantor of tenure, and there is a limit to the amount of hurrying that publication can tolerate. If universities were able and willing to give up the research model and to scale back the demands that they place on assistant professors to publish, is it utopian to think that tenuring professors after a far shorter probationary period than seven years might then be justified? This would hardly solve all of our problems, since shortening the apprenticeship period and bringing professors sooner to the status of appointees (rather than remaining employees so long) would not affect the two-thirds of our teaching workforce that is ineligible for tenure. However, such a seemingly minor change might create a different culture among the professoriate. It might spawn a generation of teachers and scholars who would be empowered by the protections of academic freedom far earlier in their careers.

Notes

I wish to thank Alice Koller for her careful reading of this essay.

1 Walter P. Metzger, "Profession and Constitution: Two Definitions of Academic Freedom in America," *Texas Law Review* 66 (1987–88): 1265.

2 Walter P. Metzger, "The 1940 Statement of Principles on Academic Freedom and Tenure," in *Freedom and Tenure in the Academy*, ed. William Van Alstyne (Durham, NC: Duke University Press, 1993), 65.

3 Louis Menand, *The Future of Academic Freedom* (Chicago: University of Chicago Press, 1996), 4. Machlup quoted in Lionel S. Lewis, *Scaling the Ivory Tower: Merit and Its Limits in Academic Careers* (Baltimore: Johns Hopkins University Press, 1975), 25.

4 Ralph Brown and Jordan Kurland, "Academic Tenure and Academic Freedom," *Law and*

Contemporary Problems 53 (1990): 327. AAUP, 1915 "Declaration of Principles on Academic Freedom and Academic Tenure," www.aaup.org/AAUP/pubsres/policydocs/contents/1915.htm (accessed May 7, 2009); hereafter cited parenthetically by page number as "Declaration." AAUP, 1940 "Statement of Principles on Academic Freedom and Academic Tenure," www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm (accessed May 7, 2009); hereafter cited parenthetically by page number as "Statement."

5 The term appears in "Academostars," special issue of *Minnesota Review*, 52–54 (2001).

6 Metzger, "Profession," 1269–70.

7 Ibid., 1275.

8 Clarence Birdseye, *Individual Training in Our Colleges* (New York: Macmillan, 1907); Richard Teller Crane, *The Futility of Higher Schooling* (Chicago: H. O. Shepard, 1910); and Morris Llewellyn Cooke, *Academic and Industrial Inefficiency* (Boston: Merrymount Press, 1910).

9 Herbert Welch, "Academic Freedom and Tenure of Office," *Association of American Colleges Bulletin* 2.2 (1916): 164; hereafter cited parenthetically by page number as "Tenure of Office."

10 *Association of American Colleges Bulletin* 8.2 (1922): 97.

11 Ibid., 102.

12 John R. Effinger, "Report of the Commission on Academic Freedom and Academic Tenure," *Association of American Colleges Bulletin* 11.3 (1925): 180–81.

13 Ibid., 181.

14 See Steven Brint, *In an Age of Experts: The Changing Role of Professionals in Politics and Public Life* (Princeton, NJ: Princeton University Press, 1994).

15 Frederick W. Taylor, *Principles of Scientific Management* (New York: W. W. Norton, 1967).

16 Marc Bousquet, *How the University Works: Higher Education and the Low-Wage Nation* (New York: New York University Press, 2008), 101–5.

17 Albert Bushnell Hart and A. O. Lovejoy, eds., *Handbook of the War for Public Speakers* (New York: National Security League, 1917). See also Ellen Shrecker, *No Ivory Tower: McCarthyism and the Universities* (New York: Oxford University Press, 1986).

18 Frankfurter quotes a statement of a conference of senior scholars from the University of Cape Town and the University of Witwaterrand on the "four essential freedoms" of a university—"to determine itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), 12; http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=354&invol=234; hereafter cited parenthetically by page number as *Sweezy*.

19 Paul M. Sweezy, "Statement to the New Hampshire Attorney General," *Monthly Review* 51.11 (April 2000): 4, www.monthlyreview.org/400pms1.htm.

20 J. Peter Byrne, "Academic Freedom: A 'Special Concern of the First Amendment,'" *Yale Law Journal* 99.2 (1989): 252–53.

21 Ibid., 257. The phrase "academic freedom, which is of transcendent value to all of us," is from *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

22 *Hetrick v. Martin*, 480 F.2d 705, 73–470 (6th Cir. 1973); hereafter referred to parenthetically by page number as *Hetrick*.

23 Byrne, "Academic Freedom," 283.

24 *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

25 Brown and Kurland, "Academic Tenure," 328.
26 Leonard Jeffries, "Our Sacred Mission" (speech given at the Empire State Black Arts and Cultural Festival, Albany, NY, July 20, 1991), www.africawithin.com/jeffries/our_sacred_mission.htm (accessed May 13, 2009), 3, 5.
27 *Jeffries v. Harleston*, 828 F.Supp. 1066, 1071–72 (S.D.N.Y. 1993).
28 Brown and Kurland, "Academic Tenure," 328n1.
29 Howard R. Bowen and Jack H. Schuster, *American Professors: A National Resource Imperiled* (New York: Oxford University Press, 1986), 243.
30 *Jeffries v. Harleston*, 52 F.3d. 9, 12 (2d. Cir. 1994).
31 *Jeffries v. Harleston*, 828 F.Supp. at 1073.
32 American Federation of Teachers, *Academic Freedom in the 21st-Century College and University*, 2007, www.aft.org/higher_ed/pubs-reports/AcademicFreedomStatement.pdf, 2.
33 Ibid.
34 Roger Bowen, "A Faustian Bargain for Academic Freedom," *Chronicle of Higher Education*, October 3, 2008.