

AALS Annual Meeting Luncheon Keynote

Academic Freedom and Legal Scholarship

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Academic freedom did not always exist in the United States. It emerged during the first few decades of the twentieth century. Its birth was a result of a transformation of the mission of higher education in America.

During the first half of the 19th century, the objective of most American colleges was to instruct young men in received truths, both spiritual and material. It is only when American scholars after the Civil War became infected with the German ideal of *Wissenschaft*, with the idea of systematizing and expanding knowledge, that American universities began to change their educational aspirations.

It was a moment of great historical significance when Daniel Coit Gilman could in 1885 address the assembled officers, students and friends of the John Hopkins University to assert, with confidence and at length, that the “functions” of the university “may be stated as the acquisition, conservation, refinement and distribution of knowledge. ... It is the business of a university to advance knowledge.”¹

As a result of the sea-change signaled by Gilman, virtually everyone in this room is likely to find unexceptionable, perhaps even banal, Karl Jasper’s post World War II proclamation that “the university is the corporate realization of man’s basic determination to know. Its most immediate aim is to discover what there is to be known and what becomes of us through knowledge.”² Almost every modern university now includes in its mission statement the ideal of striving “to create knowledge.”³

The invention of academic freedom in the United States was a direct result of this momentous transformation in the purpose of the American university. Academic freedom is at root about how universities might be able to fulfill the function of producing new knowledge.

At the beginning of the 20th century, a great many American universities were owned and operated by churches, by private proprietary owners, or by the state. Whatever their status, those who paid for a university believed they had the concomitant responsibility of controlling what was taught at the university, or what was published by employees of the university, including faculty.

So, for example, when Edward A. Ross, an economist at Stanford, wrote that the United States should move to a silver standard instead of a gold one, and when he wrote that we should support American workers by cutting off the supply of cheap immigrant Asian labor, the co-founder and proprietor of Stanford University, Mrs. Leland Stanford (whom Albie Small regarded as the dowager empress of Palo Alto), was outraged.⁴ Her late husband, Leland Stanford, had built his fortune as a railroad baron on cheap Asian labor, and, like most good Republicans of her day, Mrs. Leland Stanford believed devoutly in the gold standard.

In 1900 Mrs. Leland Stanford famously wrote David Starr Jordan, President of Stanford, instructing him that someone of Ross’s views should not be permitted to remain an employee of Stanford University. Jordan obediently fired Ross. He was entitled to do so because in 1900 faculty were regarded merely as employees, serving at the will of their employers. The resulting shock spread horror throughout American academia. Professors felt themselves at risk, fearing that their work might offend the public trustees or private proprietors of their universities.



Eventually, American professors responded by forming in 1915 a new organization, the American Association of University Professors (AAUP), dedicated to defending academic freedom throughout the country.⁵ But the AAUP first had to define what academic freedom actually meant. So it immediately published what to my mind remains the greatest exposition of the nature of American academic freedom ever written—the *1915 Declaration of Principles on Academic Freedom and Academic Tenure*. This year, we mark the centenary of this marvelous document, which fundamentally altered the status of faculty throughout the United States.

The ideas of academic freedom theorized in the *Declaration* would later be incorporated into the canonical *1940 Statement of Principles on Academic Freedom and Tenure*, which has been endorsed by over 180 educational organizations, including the AALS. The *1940 Statement* has become “the general norm of academic practice in the United States.”⁶

The 1915 *Declaration* defines academic freedom as consisting of three dimensions:

*Academic freedom ... comprises three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action.*⁷

Twenty-five years later these same three components of academic freedom were reaffirmed in the 1940 *Statement*.⁸ Today we are likely to add a fourth dimension of academic freedom—intramural speech.⁹

If you were to ask the average American professor what academic freedom of research might mean, they would likely analogize it to the First Amendment right to publish whatever they please without fear of sanction or penalty. But this would be a fundamental misunderstanding of the nature of academic freedom of research.

To put the point as coarsely as I can: Although the First Amendment would prohibit government from sanctioning an editorialist for the *New York Times* if he were inclined to write that the moon is made of green cheese, no astronomy department could survive if it were unable to deny tenure to a young scholar who was similarly convinced.

Standard First Amendment doctrine prohibits the state from compelling speech or from engaging in content or viewpoint discrimination. But in universities we routinely compel speech. We demand publication before awarding tenure. We also engage in continuous content and viewpoint discrimination. We evaluate the merits of research whenever we decide whether to promote or to tenure members of the faculty. Academic freedom of research is thus nothing at all like a First Amendment right to say what one pleases without fear of legal repercussions.

So how, then, should we define academic freedom of research? The 1915 *Declaration* conceives academic freedom of research as the freedom to pursue the “scholar’s profession”¹⁰ according to the standards of

that profession. The *Declaration* asserts that the “liberty of the scholar within the university to set forth his conclusions, be they what they may, is conditioned by their being conclusions gained by a scholar’s method and held in a scholar’s spirit; that is to say, they must be the fruits of competent and patient and sincere inquiry.”¹¹ Academic freedom, the *Declaration* precisely notes, upholds “not the absolute freedom of utterance

“At its root, academic freedom is about how universities can fulfill their function of producing new knowledge.”

of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion and of teaching, of the academic profession.”¹²

We are so used to the idea of individual rights, that this may at first seem like an odd conception. What could it mean to guarantee a freedom that does not accrue to professors as individuals, but instead to a profession itself? How can we make sense of such an alien idea?

Reduced to its essence, the complex argument advanced by the 1915 *Declaration* rejected the image of the modern university as an “ordinary business venture.”¹³ The *Declaration* instead conceptualized universities as unique institutions bearing a public responsibility to preserve, enhance, and distribute knowledge. The *Declaration* did not have in mind just any kind of knowledge. It did not refer to the kind of charismatic knowledge that comes from art. Nor did it invoke the kind of Cartesian knowledge that comes from immediate sensory apprehension, like the knowledge I have by opening my eyes that

I standing in a room full of people. The *Declaration* instead focused on the kind of expert knowledge that is produced by close-knit and integrated communities of inquiry.

Communities of inquiry, otherwise known as disciplines, are united by allegiance to common practices, beliefs and methods of knowing.¹⁴ They produce the kind of expert knowledge that is essential to the modern state. One cannot know the half-life of plutonium 230 simply by staring at the element. One cannot know if cigarettes are carcinogenic simply by inhaling and seeing what happens. One cannot know whether the climate is changing merely by walking outside. The answer to all these questions requires the resources of expert disciplines—like medicine or chemistry or physics or geology—whose cumulative store of knowledge and methods can supply the epistemological resources required to provide answers on which we might choose to rely.¹⁵

Disciplines are hierarchical in nature. One cannot speak with authority within a discipline until one is first trained in the relevant beliefs, practices, and methods of knowing. That is why most disciplines subject new devotees to long and arduous apprenticeships in the course of graduate education. Disciplines are premised on the idea that there are better and worse ways of knowing.

Disciplines are also committed to progress, to the expansion of knowledge. For this reason, disciplines encourage criticism and dissent. Academic freedom of research protects these aspects of disciplinarity. As Arthur Lovejoy, one of the authors of the 1915 *Declaration*, would later put it: the function of seeking new truths

will sometimes mean ... the undermining of widely or generally accepted beliefs. It is rendered impossible if the work of the investigator is shackled by the requirement that his conclusions shall never seriously deviate either from generally accepted beliefs or from

*those accepted by the persons, private or official, through whom society provides the means for the maintenance of universities. ... Academic freedom is, then, a prerequisite condition to the proper prosecution, in an organized and adequately endowed manner, of scientific inquiry ...*¹⁶

Unlike the First Amendment, however, academic freedom of research also limits dissent, for it requires that dissent be cognizable as an exercise of disciplinary competence. Disciplines that do not encourage internal criticism risk atrophy and death, but disciplines that do not bound internal criticism risk disintegration and incoherence.

Living disciplines are therefore condemned to inhabit the unstable territory between received hierarchical practices and constant dissent. Continuity is maintained because dissenters must first be sufficiently socialized into existing disciplinary practices that their criticisms can be formulated in a manner that is intelligible to members of a discipline.

The 1915 Declaration justifies academic freedom of research on the ground that it is necessary for universities to fulfill their public obligation to produce and distribute knowledge. If faculty were merely employees of those who happened to own a university, controllable at the will of their employers, disciplines would be subordinated to the uneducated opinions of lay persons. Yet the free development of disciplines is a precondition for the advancement of knowledge.

John Dewey, the first president of the AAUP, understood this logic as early as 1902, writing that real universities should be contrasted to faux universities (like Stanford in 1900) that merely “inculcate a fixed set of ideas and facts” “current among a given body of persons.” Such faux universities, Dewey asserts, seek “to disciple rather than to discipline.”¹⁷ Dewey’s premise is that a healthy disciplinarity is necessary for the production of knowledge, which is the purpose of true universities.

For this reason, the 1915 Declaration imagines faculty as, first and foremost, the representatives of their profession and disciplines. Faculty are not merely the employees of a university; they are instead its “appointees.”¹⁸ The Declaration argues this point by borrowing an analogy from the autonomy of legal knowledge:

*[O]nce appointed, the scholar has professional functions to perform in which the appointing authorities have neither competency nor moral right to intervene. The responsibility of the university teacher is primarily to the public itself, and to the judgment of his own profession; and while, with respect to certain external conditions of his vocation, he accepts a responsibility to the authorities of the institution in which he serves, in the essentials of his professional activity his duty is to the wider public to which the institution itself is morally amenable. So far as the university teacher’s independence of thought and utterance is concerned—though not in other regards—the relationship of professor to trustees may be compared to that between judges of the federal courts and the executive who appoints them. University teachers should be understood 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; while of course, for the same reason, trustees are no more to be held responsible for, or to be presumed to agree with, the opinions or utterances of professors, than the president can be assumed to approve of all the legal reasonings of the courts.*¹⁹

Comparing faculty to federal judges may seem to overstate the case, because short of impeachment federal judges are immune from external control.

Yet on closer inspection the work of judges is subject to continuous peer scrutiny through appellate review, and the work of faculty is similarly subject to constant peer assessment through decisions to hire, promote and tenure. Conversely, the work of federal judges is immune from oversight by non-Article III officials. The Declaration means to argue that the research of faculty ought to be similarly immune from review by lay university proprietors, like Mrs. Leland Stanford, who have no authority or capacity to judge the professional competence of faculty work. The Declaration means to ground academic freedom of research on the claim that the evaluation of professional competence can be entrusted only to the safe hands of peer professionals, who must employ accepted disciplinary standards.

This is what the Declaration means by affirming that academic freedom of research requires the “absolute freedom of thought, of inquiry, of discussion and of teaching, of the academic profession.” A necessary implication is that in the United States, academic freedom of research can be claimed only by those who participate in the kind of discipline that is capable of advancing knowledge.

What are the implications of this concept of academic freedom of research for those of us in this room, who have dedicated our lives to the vocation of legal scholarship?

There has been much handwringing in our profession about whether law professors actually possess a scholarly discipline capable of producing knowledge. Debates on this question go back to Langdell and the founding of the AALS in 1900. The negative view was perhaps most pungently asserted by Thorstein Veblen in 1918 in his *The Higher Learning in America*. Veblen distinguished between the “disinterested intellectual enterprise which is the university’s peculiar domain” (208) and

professional schools, which in his view merely trained “men for work that is of some substantial use to the community at large.”²⁰

On the basis of this distinction, Veblen famously asserted that “the law school belongs in the modern university no more than a school of fencing or dancing.”²¹ Veblen emphasized that this conclusion “is particularly true of the American law schools,” which use the “case method” and “devote themselves with great singleness to the training of practitioners, as distinct from jurists,” and whose faculty “stand in a relation to their students analogous to that in which the ‘coaches’ stand to the athletes.”²² Athletic coaches, of course, do not produce expert knowledge and so do not merit academic freedom of research.

Veblen correctly perceived that since their inception American law schools have sought to train lawyers. It is on the basis of this function that the ABA claims the authority to accredit us. The question I wish to raise is whether it follows from this function that law faculty, when they do engage in research, do not qualify for the privilege of academic freedom, as Veblen no doubt would have thought.

I unequivocally reject Veblen’s thesis. I believe that Veblen is wrong to analogize professors of law to athletic coaches.

Faculty in contemporary American law schools study law in two distinct but interconnected dimensions. First, legal scholars study the law from an external perspective. They use the accepted methods of social science to study how legal institutions actually work, how legal systems actually function. These institutions and systems range from police to legislatures to the provision of legal services; from courts to agencies to groups of citizens who mobilize to change legislation. Legal scholars study the operation, effects, and social meanings of these institutions and systems; they study how these institutions and systems may be rendered more effective, more legitimate, or more efficient. When professors of law study legal institutions and systems from this external perspective, they produce the kind of knowledge usually associated with disciplinary expertise.

Second, legal scholars study law from an internal perspective. This is the perspective adopted by those who actually participate in the making of law. The rule of law exists entirely in the beliefs and practices of these participants. An important dimension of these beliefs and practices is the aspiration to make law more coherent and orderly, to increase what Ronald Dworkin calls its integrity²³ or Jeremy

Waldron calls its “systematicity.”²⁴ As Waldron notes, law does not present itself as simply an “unrelated and unreconciled heap of commands.” It aspires instead “to fit together into a system, each new rule and each newly-issued norm taking its place in an organized body of law that is fathomable by human intelligence.”²⁵

The need for law to reaffirm its integrity explains why judges reasoning in common law systems seek to integrate their rulings into a larger coherent whole. The aspiration to integrity underscores the law’s ability to “present itself to its subjects,” in Waldon’s words, “as a unified enterprise of governance that one can make sense of.”²⁶

The law’s integrity is a matter of its meaning. It must be hermeneutically constructed by those well socialized into the practices and beliefs of the law. Establishing the law’s integrity is an inherently normative task, because integrity is an aspirational virtue. The law’s integrity will always depend upon the kinds of ends we believe the law ought to serve. These ends can range from justice, to fairness, to efficiency, to deterrence, to moral transformation. As we understand the ends of law, so we will understand its possible forms of integrity.

When legal scholars study law from the internal perspective, they seek to make



better sense of the law as a whole. They do this even if they are studying only one small aspect of the law, such as the law of contracts. When they engage in the internal study of law, the relationship of legal scholars to positive law is analogous to the relationship of moral philosophers to the actual moral instincts which we inhabit. Both the legal scholar and the moral philosopher seek to clarify and integrate the forms of life into which we are thrown. When legal scholars engage in the internal study of law, they produce knowledge of what the law might look like were it to become clarified and coherent.

The internal and external perspectives on law are complementary. It is a premise of modern legal scholarship that we can improve the law, from an internal perspective, if we understand how legal institutions actually function from an external perspective. We know that something is seriously amiss if the internal understandings of legal participants are out of line with the law's actual effects and operation.

It is also a premise of modern legal scholarship that law cannot adequately be studied from an external perspective alone, without a concomitant understanding of law's internal aspirations and principles. Otherwise the scholar is put into the position of the anthropologist who seeks to study an alien culture merely on the basis of its external artifacts and behavior, without any comprehension of the meaning of these artifacts and behavior to those within the culture.

There is no doubt but that the training of lawyers requires their socialization into the internal practices and beliefs of the law. This is usually what we actually mean when we say that we aspire to teach students to "think like lawyers." The socialization of aspiring lawyers can be accomplished by anyone fluent in the language of the law.

But law schools seek to produce more than mere fluency. We hope also to transmit the knowledge we produce by the internal and external study of law. We regard this

knowledge as essential for the training of lawyers. It is a premise of modern legal education that lawyers will better practice their craft, and be of greater use to society, if they understand how legal institutions and systems actually work. And it is also a premise of modern legal education that lawyers will better practice their craft, and better help to achieve the rule of law, if they understand the aspirations of the law to integrity.

“We are engines of improvement and knowledge. This is the vision for which AALS has always stood, and we ought not to lose sight of it now.”

In imparting these forms of knowledge, legal scholars are not at all analogous to athletic coaches. It is no part of the duty of an athletic coach to study the actual operation of the institutions and systems of his sport. Nor is it the duty of an athletic coach internally to increase the integrity of his sport. It is instead his duty to teach his athletes how to win competitions. Veblen was therefore incorrect to analogize law professors to coaches.

Ambiguity about the disciplinarity of legal scholarship arises, however, when our work is evaluated from the narrow perspective of method. When we seek internally to understand the law, we employ hermeneutic methods that we share with all literate members of the legal profession. Judges, no less than legal scholars, can perceive and seek to improve the integrity of the law. Law professors may have the advantage of time for study, reflection, and specialization, but we have no monopoly of method.

This shared commitment to legal hermeneutics has been responsible for depriving legal academia of some of the traditional institutional indicia of a scholarly discipline. We do not possess programs specifically devoted to the professional training of apprentice scholars, for example. We do not reproduce the legal professoriate through PhD programs, as do most other disciplines. We have historically believed that candidates for legal scholarship need only be excellent lawyers, fluent in the language of the law.

When legal scholars engage in the external study of law, moreover, we generally deploy the methods of allied disciplines in the social sciences. We typically employ the techniques of disciplines like economics, political science, history, sociology, philosophy, or anthropology to understand the actual operation of legal institutions. When we do so, we also confess our lack of any monopoly on method.

Can legal scholars nevertheless claim the disciplinary authority necessary to justify academic freedom of research? I believe that we can. The justification for our claim derives from two aspects of our work. The first is the scope of our expertise. We are the only institution within the university comprehensively to study legal institutions in all their many manifestations. Insofar as legal institutions share features, by virtue of their common commitment to the rule of law, we study a unique object of expertise, whose features are not studied anywhere else in society.

The second aspect of our work that supports our claim to academic freedom of research is the fusion of internal and external perspectives that is characteristic of modern legal scholarship. Lawyers and judges may claim an expertise in the internal dimensions of law, but neither lawyers nor judges can systematically claim the kind of external knowledge of legal institutions that is routinely wielded by legal scholars. When individual judges

like Richard Posner claim to illuminate their internal apprehension of law by virtue of external scholarly methods (like those of economics), they almost always do so by virtue of scholarly techniques that they bring with them into the judiciary from legal academia. Law schools are the only place on earth where the internal study of law is systematically interrogated by external accounts of how legal institutions actually operate.

So, *contra* Veblen, it seems to me that the AALS was correct to stake out for legal scholars the prerogative of academic freedom of research. Our scholarship qualifies as producing unique disciplinary knowledge. To get some sense of the distinctiveness of our common work, recall what it means to think that the publications of some young scholar would better qualify her for placement in a department of economics or history than in a law school.

It is intelligible for us to make judgments of this kind because we inhabit a shared community of inquiry that uniquely fuses

internal and external perspectives on law. Legal scholarship is characteristically normative, for example, precisely because of the pressures that arise from an internal point of view. This normativity would render much legal scholarship out of place in departments of political science or history. Legal scholarship differs from the work of lawyers and judges, on the other hand, because the merely internal understandings of the law are not received with piety, but instead scrutinized in light of what our external study of law tells us about the actual operation of legal institutions and systems.

And, *pace* Judge Edwards, our work is relevant to judges because they need a better external understanding of the nature of law. Never forget that you in this room are educating the next generation of judges. If you succeed, future judicial decision-making will be better informed than that which preceded it. You will teach future judges how the actual operation of legal institutions ought to affect internal understandings of law. If

considerations of role morality predispose sitting judges to ignore these lessons, we can afford to be patient. Our work will ripen in time.

We should be proud of our mission and of our unique expertise. We should stand tall in these days of crisis for legal education, when we hear so many advocate that law schools should offer only what amounts to coaching for future athletes. Of course we ought to make every effort to insure the future careers and livelihood of our graduates. But at this time of “Legal Education at the Crossroads,” we should also remember that we have something important to contribute to the world, something that cannot be duplicated anywhere else.

We are engines of improvement and knowledge. This is the vision for which AALS has always stood, and we ought not to lose sight of it now. This is the vision that justifies our claim to academic freedom of research and that testifies to our proper position within the modern research university.

References

¹ D.C. GILMAN, *THE BENEFITS WHICH SOCIETY DERIVES FROM UNIVERSITIES: AN ADDRESS* 16 (1885). Gilman’s view should be contrasted with John Henry Newman’s assertion in 1852 that the “essence” of a university was to be a place “of teaching universal knowledge,” which for Newman implied that the purpose of a university was “the diffusion and extension of knowledge rather than the advancement. If its object were scientific and philosophical discovery, I do not see why a University should have students.” JOHN HENRY NEWMAN, *THE IDEA OF A UNIVERSITY* 3 (Frank M. Turner Ed. 1996).

² KARL JASPERS, *THE IDEA OF THE UNIVERSITY* 2 (H.A. T. Reiche and H.F. Vanderschmidt trans. 1959).

³ *What is Harvard’s Mission Statement*, www.harvard.edu/siteguide/faqs/faq110.html (last visited March 8, 2008). For a good survey, see R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 NEB. L. REV. 793 (2007).

⁴ The story is told in ORRIN LESLIE ELLIOTT, *STANFORD UNIVERSITY: THE FIRST TWENTY-FIVE YEARS* 341-43 (1937); MARY O. FURNER, *ADVOCACY AND OBJECTIVITY: A CRISIS IN THE PROFESSIONALIZATION OF AMERICAN SOCIAL SCIENCES, 1865-1905*, 229-59 (1975).

⁵ RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1955).

⁶ William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONT. PROB. 79, 79 (Summer 1990). See *Browzin v. Catholic Univ. of Am.*, 527 F.2d 843, 848 & n. 8 (D.C. Cir. 1075) (“[The 1940 Statement] represent[s] widely shared norms within the academic community, having achieved acceptance by organizations which represent teachers as well as organizations which represent college administrators and governing boards.”).

⁷ For ease of reference, I shall cite to the version of the *Declaration* that is reproduced in MATTHEW W. FINKIN AND ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* 157-181 (2009). The quotation in text may be found at page 157.



References, continued

⁸ The 1940 *Statement* is also reproduced in *id* at 183-89. See *id* at 1940 *Statement*, at 184-85:

Academic Freedom

1. 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; but research for pecuniary return should be based upon an understanding with the authorities of the institution.
2. 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. [Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.
3. 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. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

⁹ FINKIN AND POST, *supra* note 7 at 113-48.

¹⁰ *Id* at 163.

¹¹ *Id* at 173. On the relationship between academic freedom and a theory of knowledge, see John R. Searle, *Two Concepts of Academic Freedom*, in EDMUND L. PINCOFFS, ED., 88-89 THE CONCEPT OF ACADEMIC FREEDOM 92 (University of Texas Press 1975).

¹² FINKIN & POST, *supra* note 7 at 179-80. Hence the conclusion of Thomas Haskell: "Historically speaking, the heart and soul of academic freedom lie not in free speech but in professional autonomy and collegial self-governance. Academic freedom came into being as a defense of the disciplinary community (or, more exactly, the university conceived as an ensemble of such communities)." Thomas L. Haskell, *Justifying the Rights of Academic Freedom in the Era of "Power/Knowledge"*, in Louis Menand, ed., THE FUTURE OF ACADEMIC FREEDOM 54 (Chicago: University of Chicago Press 1996).

¹³ FINKIN & POST, *supra* note 7 at 162.

¹⁴ For a discussion, see Robert Post, *Debating Disciplinary*, 35 CRITICAL INQUIRY 749 (2009).

¹⁵ ALLAN GIBBARD, THINKING HOW TO LIVE 226-27 (2003).

¹⁶ Arthur O. Lovejoy, *Academic Freedom*, in EDWIN R.A. SELIGMAN & ALVIN JOHNSON, EDs., ENCYCLOPEDIA OF THE SOCIAL SCIENCES 384-85 (New York: MacMillan 1930).

¹⁷ John Dewey, *Academic Freedom*, 23 EDUCATIONAL REV. 1, 1 (1902). "The university function is the truth-function. At one time it may be more concerned with the tradition or transmission of truth, and at another time with its discovery. Both functions are necessary, and neither can ever be entirely absent." *Id* at 3. For an example of how academic freedom would appear under the more traditional concept of education, see *Kay v. Board of Higher Education of City of New York*, 18 N.Y.S. 2d 821, 829 (N.Y. SUP. CT. 1940) (Upholding dismissal of Bertrand Russell from the College of the City New York on the grounds that "this court ... will not tolerate academic freedom being used as a cloak to promote the popularization in the minds of adolescents of acts forbidden by the penal Law. ... Academic freedom does not mean academic license. It is the freedom to do good and not to teach evil. ... Academic freedom cannot teach that ... adultery is attractive and good for the community. There are norms and criteria of truth which have been recognized by the founding fathers.").

¹⁸ FINKIN & POST, *supra* note 7 at 164.

¹⁹ *Id* at 164-65.

²⁰ THORSTEIN VEBLEN, THE HIGHER LEARNING IN AMERICA 207-08 (1918).

²¹ *Id* at 211.

²² *Id*

²³ RONALD DWORKIN, LAW'S EMPIRE (1986).

²⁴ Waldron, *The Concept and Rule of Law*, 43 GA. L. REV. 1, 32-26 (2008).

²⁵ *Id* at 33.

²⁶ *Id* at 35.