

## THE LAW AND PHILOSOPHY OF ACADEMIC FREEDOM

Brian Leiter

[bleiter@uchicago.edu](mailto:bleiter@uchicago.edu)

9/26/24

### 1. 1940 AAUP statement:

- A. “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” (freedom in research).
- B. “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” (freedom in teaching).
- C. “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” (freedom in extramural speech).

Freedom in extramural speech is unique to the American approach (and academic freedom controversies often involve extramural speech). One might think all citizens should enjoy it!

Freedom in research and teaching is the *core* of distinctively *academic* freedom, and it is more narrow than the general right of free speech: *its limits are set by standards of the scholarly discipline of the faculty member, as assessed by disciplinary peers.*

### 2. AAUP statement is *not* law, although often treated as authoritative by courts, and explicitly endorsed by most U.S. universities. Two main sources of legal protection:

- A. Faculty at *public* universities enjoy constitutional protection for academic freedom. 1967 SCOTUS case: academic freedom is “a special concern of the First Amendment.” (Note: SCOTUS silent since, but lower federal courts often treat academic freedom as a 1<sup>st</sup> Amendment right [*vide* David Rabban]. The specter of *Garcetti* [2006], however, looms over all this, and Florida is pushing that envelope.)
- B. Faculty at both public and private universities typically enjoy *contractual* protection for academic freedom (as part of their employment contract). Universities typically endorse the AAUP principles and incorporate them into the faculty handbook. (Whether faculty handbook is contractually binding does vary by jurisdiction: e.g., no in Texas, yes in Wisconsin.)

- C. By way of comparison: in the U.K., core academic freedom was protected by statute in late 1980s (after Thatcher abolished tenure); in Germany, core academic freedom is explicitly protected by the constitution (“the Basic Law”) (it is even a “positive” right).

3. Why protect core academic freedom at all? Basic rationale: disciplinary inquiry produces knowledge; and knowledge contributes to the well-being of society.

- A. Wilhelm von Humboldt (1767-1835), creator of the concept of a modern research university, developed arguments for free expression and *Wissenschaftsfreiheit*, which in turn influenced J.S. Mill (who acknowledged the influence). (*Wissenschaft*=“science,” i.e., any disciplined methods for discovering truths about a subject matter [not just natural science].)
- B. Recall Mill’s version of the argument (*On Liberty*) for freedom of expression. Truth promotes happiness. If what we believe is false (or partly false), we will not discover that in the absence of confronting contrary views; and even if what we believe is wholly true, we will not believe it for *good reasons* (rather than dogmatically) without confronting contrary views. The state should only limit our freedom when its exercise “harms” others (“Harm Principle”).
- C. Free expression only produces knowledge of truths, however, if certain background conditions obtain: Mill mentions education and maturity (“human beings in the maturity of their faculties”). He explained:

“We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others must be protected against their own actions as well as against external injury. For the same reason we may leave out of consideration those backward states of society in which the race itself may be considered as in its nonage....Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement and the means justified by actually effecting that end. Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion.”

(Recall Mill served the East India Company in the British colony of India.)

4. In a 1965 essay (“Repressive Tolerance”), the Hegelian/Marxist philosopher Herbert Marcuse argued against liberty of expression for those defending imperialist aggression: “[S]ociety cannot be indiscriminate [in what it tolerates] where the pacification of existence, where freedom and happiness themselves are at stake: here certain things cannot be said, certain

ideas cannot be expressed, certain policies cannot be proposed, certain behavior cannot be permitted without making tolerance an instrument of the continuation of servitude.”

- A. Marcuse’s argument, however, was Millian: he thought the Millian “background conditions” did not obtain in capitalist America in the 1960s. Whether he was right does not matter for my purposes.
  - B. What matters is that Marcuse was also a defender of academic freedom! While he rejected “indiscriminate” toleration that “protect[s] false words and wrong deeds which demonstrate that they contradict and counteract the possibilities of liberation,” he went on to write: “Such indiscriminate tolerance is justified...in academic discussion; it is indispensable in the scientific [*wissenschaftlich*] enterprise...”
  - C. *The relevant difference: “in academic discussion” and the “scientific enterprise,” the background conditions obtain that ensure that open discussion leads to truth, and thus maximizes utility.*
  - D. Academic freedom is justified, even on Millian grounds and even for skeptics about free expression generally (like Marcuse), precisely when universities protect scholarly inquiry, within disciplinary boundaries, wherever it leads.
5. The central “paradox” of coreacademic freedom: it is only justified when research and teaching proceeds in accordance with the standards of a *Wissenschaft*. Who decides what is a *Wissenschaft*? Administrators? Anyone with a PhD in any subject? Alas, there is no simple formula. Here is what I proposed in an essay on the subject,<sup>1</sup> and I will end with this earlier description of the indicia of *Wissenschaft*:

[T]he only evidence we have to go on is the *actual track record*, i.e., the extent to which [a discipline’s] claims generate good predictions [or] survive scrutiny and apparently contrary evidence...[T]he possession of and ability to teach *methods* of inquiry for epistemic ends is another good sign of a *Wissenschaft*; and receptiveness to critique from other *Wissenschaften* in the university is probative. (Academic fields that want to insulate themselves from assessment by “outsiders” should be treated as inherently suspect, though not necessarily pretenders to being a *Wissenschaft*.) But, again, we must remember that the evidential standards for truth regarding, e.g., the authenticity of ancient texts, the correct translation of Augustine, the causes of suicide bombing, and the relative contribution of natural selection and genetic hitchhiking to evolution will be multivarious, and admit only of evaluation by reference to pre-existing expert opinion. This is the potentially dangerous circularity of academic freedom based on disciplinary expertise, but I see no way around it, except to require that all university disciplines be open to critique from other university disciplines.

---

<sup>1</sup> Brian Leiter, “Why Academic Freedom?”, in D. Downs & S. Suprenant (eds.), *The Value and Limits of Academic Speech: Philosophical, Political, and Legal Perspectives* (London: Routledge, 2018), pp. 31-46.