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Intramural Musings on Academic Freedom: A Reply to Professor Finkin

Mark G. Yudof*

On my way to last October's Symposium on Academic Freedom, I came across a crew of painters busily repainting the walls outside of the dean's office. These painters, employees of The University of Texas, were rather erudite types and, while rolling away at the walls and re-arranging their tarpaulins, they were discussing their concerns and dissatisfactions with their plight and the direction of the university. I believe their story is relevant to the questions raised by Professor Finkin¹ about the scope of academic freedom.

One painter, a rather crusty fellow well along in years, remarked that, due to the tremendous workload, the Division of Physical Plant gave painters no opportunity for personal development. Things were so rushed that he did not have the time to do a professionally satisfying job—to paint with the perspective of an artist. He lamented that he felt like a hireling or servant, and he was angered by his own cowardice in the face of his “corruption by the institution.”

These remarks provoked a response from a second painter, a young woman who only recently had taken up painting for a living. She complained that she had never received any guidance on how well she painted, and she questioned whether there were intelligible standards for evaluating her work. She tended to emphasize “brush work” over rollers, but she worried that her style might stifle advancement opportunities.

A third painter piped in that his biggest complaint was the decline in hiring standards and the failure to recruit top-notch painters to the university. Too many recent recruits were just working for the money and had no sense of pride in their work. They were careless with the tarpaulins and were unconcerned if drops of paint fell on the furniture. They were pitiful when it came to safety. He thought it just a matter of time until a bucket of paint, precariously hanging from a ladder, fell on some unsuspecting professor.

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1. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEXAS L. REV. 1323 (1988).

The fourth painter in the crew was more philosophical. She was disillusioned with the overall direction of the university. She complained of entrenched bureaucratic authority and the administrative controls exercised over her work. She could use only officially approved colors, and she argued that administrators were just plain dumb about the relationship between a humane environment, with cheerfully painted walls, and academic achievement, good teaching, and research. In a civilized community, she thought painters would hold an independent place. Under current conditions, "society at large fails to get from its [painters], in unadulterated form, the peculiar and necessary service which it is the office of the professional [painter] to furnish."² She openly suggested that the painters declare their lack of confidence in the president and his "underlings."

At this point, I could no longer resist interposing myself. I said: "Painters, I am not only a dean but also a lawyer. You could be fired for this type of irresponsible talk. I fear that some powerful officials believe that there is no room for miscreant painters at this institution. The piper's payer calls the tune! Stick to painting!"

They were aghast. The senior painter responded angrily: "Surely, you are not saying that the ancient law of master-servant still applies in this day and age, that a so-called 'servant' cannot complain or be disrespectful of a so-called 'master.' The common-law doctrine of 'respectful subservience' has been repudiated! Even you cannot be so unenlightened and committed to hierarchical arrangements as to ignore modern developments favoring the worker."

I replied meekly that I was no labor lawyer, though I had taken the course twenty years ago. But before I could expound on constitutional alternatives or display my learning of hermeneutic principles, another painter beat me to the punch. She said: "Frankly, I am worried. While the common law may have changed, the *Pickering* decision teaches us that constitutional protections for employee speech under the first amendment are afforded only to speech that addresses issues of social or political importance to the larger community.³ But who cares about our concerns outside of these drying walls? The average Joe or Mary cannot tell teal from azure! I say that we ought to investigate our rights under the National Labor Relations Act⁴ and under Texas law. I know an in-

2. American Ass'n of Univ. Professors, Declaration of Principles (1915), reprinted in *ACADEMIC FREEDOM AND TENURE* app. A at 157, 162 (L. Joughin ed. 1969) [hereinafter 1915 Declaration], quoted in Finkin, *supra* note 1, at 1333.

3. See *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968).

4. 29 U.S.C. §§ 151-169 (1982).

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genious fellow at the University of Illinois Law School who teaches labor law, and he”

I tried to remind the group that no one had been fired yet, but I was greeted with hoots and references to “chilling effects.”⁵ At last one of the painters stood atop his ladder and addressed the group, which had now grown to include professors and students attracted by the vociferous argument. “All of this is nonsense; we have no reason to worry. We have the freedom of professional utterance or, as some call it, academic freedom. By virtue of our long professional training, our mastery of the building arts, the intimate relationship between learning and painting, our association with a university, and our quest for self-respect and personal autonomy, we have rights not shared by the citizenry at large. If we were not permitted to say what we think, if we could be dismissed for intramural speech, we would be corrupted as a profession of painters. The university would be all the worse for it. First the painters, then the students and professors! We need to stand together, or all of the dominoes will fall.” He continued: “We are the appointees of the university, not its employees. This is a dispute over status and equality. Personal loyalty to the institution has no role in this. If the price of personal differences on matters of institutional policy is the extreme sanction of discharge, then the institution will be a sterile place. Independent men and women cannot endure such a stifling environment. Contrary to the accepted wisdom, academic freedom includes speech about grievances, the selection of colors, the quality of administrative leadership—and even disputes over parking and coffee breaks. Once a public employer is allowed to go down the slippery slope of censorship, where will it stop? I say that we can be dismissed only for willful obstruction, defamation, or incitement to riot. Only when blood and paint are flowing on the streets can our academic freedom be checked. Power to the painters!”

At this point, I felt that I should respond, however sheepishly, relying on my own research on academic freedom. I pointed out that academic freedom derived from notions of the freedom of the teacher and researcher to investigate, discuss, teach, and pursue research and learning wherever it might take one.⁶ It involves the ability to criticize the current social and political order and its institutions in the course of aca-

5. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 610 n.40 (1976) (Brennan, J., concurring) (noting possible chilling effect on vigorous public debate if prior restraints of speech are upheld); *Keyishian v. Board of Regents*, 385 U.S. 589, 603-04 (1967) (noting possible chilling effect on expression protected by first amendment when academic freedom is restricted).

6. See A. GUTMANN, *DEMOCRATIC EDUCATION* 175 (1987); W. VAN ALSTYNE, *INTERPRETATIONS OF THE FIRST AMENDMENT* 52 (1984); 1915 Declaration, *supra* note 2, at 162.

demetic pursuits.⁷ What in the world did the painters' expression of their plight and working conditions, however noble and important to them, have to do with advancing knowledge and freedom of inquiry?

The painters glared at me; I feared that the brushes would begin to fly. Fortunately, however, calm prevailed. The senior painter, taking charge of the situation, decided to rely on words and not actions: "Academic freedom is about professional autonomy. It repudiates outmoded doctrines of master and servant. In that sense, we are as one with the professors and researchers at the university. If intramural utterances are part and parcel of academic freedom for professors, why not our concerns about working conditions? The courts eventually will recognize a genuine public interest in the free play of all personalities within the university,⁸ which is implicated even by the private venting of grievances by mistreated painters. Any other conclusion would be ridiculous. The courts would be creating a privileged class of classroom mandarins."

In the light of my experience with the painters, let me raise some questions about Professor Finkin's paper on intramural speech and academic freedom. I am concerned that academic freedom for Finkin is coextensive with his concept of an autonomous professional. But if this is the case, then academic freedom would apply not only to teachers and researchers, but also to any group with a strong claim to professional status—for example, engineers, physicians, lawyers, and, perhaps, my painters.⁹ Professor Finkin and I do not disagree about the need for professional autonomy within universities, though perhaps we would disagree about its reasonable limits. The problem is that the equation of academic freedom with a broad conception of professionalism releases academic freedom from its conceptual moorings.¹⁰ The engineer at NASA, the physician at a public hospital, and the accountant in the state

7. See W. VAN ALSTYNE, *supra* note 6, at 52.

8. See Finkin, *supra* note 1, at 1338-39, 1347.

9. Consider the similarity of the forms of argument in Finkin's plea for the protection of intramural speech and the traditional definition of the culture of professionalism:

The culture of professionalism emancipated the active ego of a sovereign person as he performed organized activities within comprehensive spaces. The culture of professionalism incarnated the radical idea of the independent democrat, a liberated person seeking to free the power of nature within every wordly sphere, a self-governing individual exercising his trained judgment in an open society. . . .

In contrast to the tradesman and the craftsman, the professional person defined the unique quality of a subject, its special basis in an exclusive and independent circle of natural experiences. The craftsman traditionally handled a series of individual objects, according to the custom of his work, varying his own specific practices by trial and error. The professional excavated nature for its principles, its theoretical rules. . . .

B. BLEDESTEN, *THE CULTURE OF PROFESSIONALISM* 87-88 (1976).

10. See Yudof, *Three Faces of Academic Freedom*, 32 *LOY. L. REV.* 831, 834 (1987). One commentator has noted:

budget office have equally plausible claims to such a distended version of academic freedom, though they are not working in the academy.

I also see a tendency in Professor Finkin's work to incorporate a progressive view of labor-management relations into the concept of academic freedom. I am tremendously ambivalent about this effort. On the one hand, I do see a connection between curriculum, tenure, and faculty hiring decisions and academic freedom, because these matters are close to a core concern with creating institutions that nurture freedom of inquiry and discussion in the classroom and in research. On the other hand, I believe that Professor Finkin risks corruption of the concept of academic freedom by placing all speech on working conditions for professors and teachers under that umbrella. I do not think that academic freedom is simply another articulation of the goals of the labor reform movement. If it is, the painters ought to have the same range of protections. To urge that the academic "profession did not assert that *as employees* the professoriate had more rights than groundskeepers or food service workers," that the "professoriate claimed that . . . it should not be thought of in terms of an employment relationship *at all*," or that "the claim of liberty in intramural utterance for academics is not purchased at the expense of denying workplace liberties to anyone"¹¹ simply does not counter this argument. The question is why academics, with respect to matters not directly related to teaching and scholarship, have a higher order of liberty in the workplace than others.

Perhaps the problem lies with the very notion of intramural speech. The Oxford English Dictionary defines intramural as "[s]ituated, existing, or performed within the walls of a city or building."¹² This definition captures Professor Finkin's perspective. He wishes to protect all, or perhaps nearly all, utterances of the teacher and researcher within the academic city, because he fears that any restrictions, however indirectly related to teaching and scholarship, will destroy the quest for knowledge and critical thought within the city. Finkin's academy cannot be " 'half slave and half free.' "¹³ But, alas, I fear that lines must be drawn.

Academic freedom allows scholars to follow their autonomous judgment wherever it leads them, provided that they remain within the bounds of scholarly standards of inquiry.

The proviso of remaining within the bounds of scholarly standards is sometimes overlooked, but it is necessary to justify the social office that scholars occupy, and to distinguish academic freedom from the more general freedoms of citizens to think, speak, and publish their ideas. If academic freedom knew no scholarly bounds, the freedom of scholars would be indistinguishable from these more general freedoms.

A. GUTMANN, *supra* note 6, at 175 (footnote omitted).

11. Finkin, *supra* note 1, at 1339.

12. 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 1472 (1971).

13. Finkin, *supra* note 1, at 1341.

There are many elements necessary to sustain the university, just as there are many services essential to the survival of the city. Inadequate salaries, miniscule library collections, poor working conditions, uncomfortable buildings, or low achieving students may undermine the quest for professional autonomy and intellectual truth. A professor lacking a parking space and using public transportation may have less time for scholarly pursuits. Inadequate medical care may stifle the creative impulses of the disease-prone philosophy professor. But, in my judgment, we ought to resist the temptation to bring all talk about conditions that have an impact on professional autonomy, no matter how far removed from teaching and research, under the umbrella of academic freedom.

At bottom, I fear that Professor Finkin's approach to academic freedom lends itself to a kind of unbridled libertarianism for academicians. Permit me to suggest an analogy. Some scholars of the first amendment perceive that such values as self-fulfillment, self-realization, and personal autonomy underlie rights of freedom of expression.¹⁴ But, as Professor Schauer¹⁵ and others¹⁶ have noted, such abstractions tend to support liberty in all of its forms, actions, and words, and fail to make a special case for protecting speech:

I do not mean to be taken as saying that communication is not valuable. I am only arguing that it is but one aspect of an Aristotelian argument for an extremely wide-ranging freedom to engage in multitudinous varieties of conduct. The argument from self-fulfillment can be a powerful argument for freedom in a very broad sense, but it tells us nothing in particular about freedom of speech. Freedom of speech under such a theory is merely a component part . . . of that general Good that we often call "freedom" or "liberty". . . . [T]o the extent that a given society or government has for some reason elected to limit individual liberty in the broad sense, there remains no reason freedom of speech should not be subject to equivalent limitations.¹⁷

I perceive a similar problem with Finkin's analysis of academic freedom. The types of personal and professional development that he describes, detached from the linchpin of teaching and research, are

14. See, e.g., Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 1010 (1978) (arguing that self-fulfillment and participation in change are two central values of the first amendment); Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (arguing that the constitutional guarantee of free speech ultimately serves only the value of "individual self-realization").

15. F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 47-59 (1982).

16. See, e.g., Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678, 683-85 (1982) (arguing that free speech guarantees must be distinguished from liberty concepts); Yuciof, *In Search of a Free Speech Principle*, 82 MICH. L. REV. 680, 691-92 (1984) (same).

17. F. SCHAUER, *supra* note 15, at 57-58.

desirable for all employees, workers, and professionals—whether professors, painters, or librarians. He has not identified a set of arguments unique to academicians or academic freedom. Rather, he has erected a structure that generally supports liberty in the workplace. It does not demean that general theory to note that it does not support a special theory for teachers and researchers.

On the constitutional issues, Professor Finkin is precisely right in saying that *Pickering v. Board of Education*¹⁸ and particularly *Connick v. Myers*¹⁹ do not effect a perfect jointure with academic freedom.²⁰ Nor is it clear that such an amalgamation would be desirable. Moreover, the line between “employment dispute[s] . . . involving free speech [allegations]”²¹ and disputes involving “speech on a matter of public concern”²² is often not very bright. For example, is a complaint about sexual harassment a private employee grievance or a matter bearing on public policy?²³ For my own part, I am not sure that *Pickering* and *Connick* reach an appropriate accommodation of the relevant interests. Thus, some of the speech in the story of the painters ought to receive constitutional protection. But this has no bearing on the appropriate scope of academic freedom.

The philosopher Isaiah Berlin once wrote that “[e]verything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience.”²⁴ So too, academic freedom is what it is. It is not general liberty, pleasant working conditions, equality, self-realization, or happiness. If academic freedom is thought to include all that is desirable for academicians, it may come to mean quite little to policy makers and courts.

18. 391 U.S. 563 (1968).

19. 461 U.S. 138 (1983).

20. Finkin, *supra* note 1, at 1345-47.

21. *Callaway v. Hafeman*, 832 F.2d 414, 416 (7th Cir. 1987).

22. *Connick*, 461 U.S. at 146.

23. *See Callaway*, 832 F.2d at 417 (holding that a sexual harassment complaint “stands unprotected from employer scrutiny when uttered in the pursuit of purely private interests”).

24. I. BERLIN, *FOUR ESSAYS ON LIBERTY* 125 (1969).

