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Academic Unfreedom, Unacademic Freedom

Part One of Two

I.

ON MARCH 2, 2017, the American Enterprise Institute political scientist Charles Murray stood behind a podium at Middlebury College. Because his coauthored *The Bell Curve* (1994) had lent support to the notion of genetically determined racial inferiority, a significant number of Middlebury College students and faculty already had concluded that Murray was an unwelcome presence. Rather than let him speak, several hundred Middlebury students turned their backs and chanted as one, saying, among other things, “Your message is hatred, we will not tolerate it.” In the end, Murray was unable to deliver his speech. Later that same evening, as he attempted to leave campus, he and a Middlebury professor were physically attacked by a group that seems to have included students.

The national reaction was swift. At a moment of U.S. history characterized by high levels of political polarization, intellectuals from both the left and the right combined in a chorus of denunciation, harmonizing around two interrelated arguments. The first, juridical in character, was that protesting Middlebury students neither understood nor respected the basic principles of free speech as set forth in the First Amendment. The second, drawn from political theory, was that they neither understood nor respected the basic concept of public debate as set forth in J. S. Mill’s 1859 essay “On Liberty.” Often these arguments would be paired with a curious intergenerational complaint: students these days are not only too soft (they are vulnerable snowflakes who melt in the heat of public dispute) but also too hard (they are incipient totalitarians whose overriding wish is to persecute dissenters). Unlike prior generations of students, presumably, today’s students are “crybullies” whose uncivil acts and rigid thoughts are symptomatic of a deeper malaise in higher education. Today’s students

are, in short, the very embodiment of academic unfreedom, and because today's students are tomorrow's leaders, their unfreedom is anything but merely academic.

In the midst of this moral panic, a friend reminded me of a quote from Hannah Arendt's 1954 essay on the "Crisis of Education." "A crisis forces us back to the questions themselves and requires from us either new or old answers, but in any case direct judgments. A crisis becomes a disaster only when we respond to it with preformed judgments, that is, with prejudices. Such an attitude not only sharpens the crisis but makes us forfeit the experience of reality and the opportunity for reflection it provides."¹ This welcome note of dissonance, which Arendt first sounded in the midst of a historical moment that bears certain resemblances to our own, should give pause even today.

The preformed judgments brought to bear on the Middlebury affair, it turns out, are almost too many to recall.

2.

LET'S BEGIN by remembering just a few, as a sort of dream sequence.

Imagine we're in a space together—it could be a lecture hall or gymnasium, but it also could be a grove or a promenade. There are a number of us. We form, or imagine ourselves to form, what's called a *collegium*. *Collegium*, a preformed word if ever there was one, a most ancient word, a term from Roman Law: a community, an association, a partnership.

And the principle of our community, our association, our partnership? That's even more preformed still: we form what's still called, all too casually, an *academy*, the first example of which dates to Plato himself, to the beginnings of philosophy.² Or better: to the beginnings of *the survival* of philosophy in the wake of the polity's execution of the founder of philosophy. Well before Alexis de Tocqueville would warn against the forces tending toward the suppression of thought in American democracy,³ the inaugural democracy already had demonstrated hostility to the minds that stung it like gadflies, not to mention to the "thinkeries" that proposed to host those minds.⁴ *Academy*: one name for a community that is, among other things, in mourning for its founding figure, a community located outside the walls of the polity, a community that remains exposed to violence by the polity.

So here we are today: an academy, a college. What are we? We're a late modern iteration of premodern forms of association. We inhabit institu-

tions that—like the university itself, which is medieval in origin, and which is, as Arendt noted in April 1969, the “last remnant of the Middle Ages”⁵—precede not only modernity, but also the modern juridical protections that have been added to these institutions only fairly recently. Academic freedom applies to the academy less like a glove to a hand than a retrofit to the building it both preserves and alters. To speak of a crisis of academic freedom *reflectively*—in the Arendtian mode—is therefore to speak with an awareness of just how difficult it is for the remnants of incommensurable historical epochs to coincide and coexist coherently. As if that were even possible, without first dreaming.

There, onstage: a speaker. Is he a scholar? An academic? We don’t know. He certainly does speak our language, or at least he seems to. We’ve been enjoined to listen to him. But we’ve already concluded that what he announces is hostility to our very organizing principle, to the very core of our collegium or academy. He’s our guest, we’re his host. But if we’re his host, then perhaps he’s our parasite. Perhaps he’s not here to speak to us, to bring us food for thought. Perhaps he’s here to feed on us without also nourishing us. Perhaps he’s here to poison us through the ear.

First preformed judgment: The college should negate the speaker that threatens it as if from the outside. Or, to be more exact, it should use noise to drown out the speech it regards as noise. It should hiss, shuffle its feet, turn away, cough in unison, set its alarm clocks to ring simultaneously, let out pirate cheers.⁶ Or it should go beyond the heckler’s veto: it should break windows, smash bottles in the hallway, cut down pulpits, tear out pages from the Bible, burn down administration buildings.⁷

This is no nightmare, but a partial list of examples of actual student conduct over the course the nineteenth century and early twentieth century. Beginning from the very beginning: this is how “the sons of the founders” behaved at college.⁸ On this point we need to be unequivocal: it’s very difficult to find *any* decade in American history where students have *not* rioted or rebelled against speakers who threatened to fill their ears with noise. Beginning from the very beginning—and not simply in the 1960s, as our preformed judgments would have it—student riots and rebellions recur throughout the history of American higher education with fascinating consistency.⁹

Given this consistency, in fact, we might think twice about the credibility of contemporary critics who speak as though today’s students are

somehow *uniquely* or *unprecedentedly* intolerant. *Either* it is the case that these critics write about American higher education in ignorance of the history of recurrent student agitation in American higher education, unknowingly presenting the most recent waves of unrest as an unusual exception to some imagined period in the history of American higher education when students were *not* rebellious or riotous, in which case we would be obliged to conclude that our critics speak of that which they do not understand. *Or else* it is the case that our critics *are* in fact historically informed, and *do* understand the long history of student agitation in the United States, but simply prefer to remain silent on the precedents in that history for today's student tumult in order to strengthen the case they make against today's students, in which case we might conclude our critics speak not out of ignorance, but simply bad faith.

Second preformed judgment: The public should negate the college that criticizes it from within. The college is atheist, unpatriotic, licentious, subversive, a den of bad habits and worse morals. It's corrupting the youth, promoting unbelief not only in Christianity but also individualism and free market capitalism, and replacing those beliefs with belief in its own strange deities.¹⁰ The college, in short, is Socratic.¹¹

Let it not be forgotten that one of the paradigmatic texts of twentieth-century American conservatism is subtitled "The Superstitions of 'Academic Freedom,'" and speaks derisively of "academic freedomites," as if "academic freedom" were a "strange deity" that had displaced Christianity. The "failure to Christianize Yale," wrote William F. Buckley Jr. in his exposé of atheism at his alma mater, is due "to the shibboleths of 'academic freedom' that have so decisively hamstrung so many educators in the past fifty years."¹² "The campus is the single most dynamic source [of] the assault on the free enterprise system," wrote Justice Lewis Powell in a secret memo to the Chamber of Commerce, one year after the Kent State massacre. The difficulty, Powell continued, "is that 'balance' is conspicuous by its absence on many campuses, with relatively few members being of conservative or moderate persuasion and even the relatively few often being less articulate and aggressive than their crusading colleagues."¹³ Powell, more ecumenical than Buckley, goes on to say that "if academic freedom is to retain the qualities of 'openness,' 'fairness,' and 'balance'—which are essential to its intellectual significance—there is great opportunity for constructive action."¹⁴ Buckley and Powell are not alone in their criticisms of campus shibboleths and crusades; the examples, as we know, could be multiplied.

It's a commonplace to say that student riots are unwittingly tragic: students' own insubordination, on this view, is "the greatest obstacle to their education."¹⁵ But to this it must be added that conservative criticism of colleges is unwittingly comic. Aristophanes's *Clouds*, one of the first examples of the genre, presents Socrates's "thinkery" as a lice-infested lair that saps vim and vigor from formerly athletic young men, turning them into effete, amoral sophists while sticking their fathers with the bill. Buckley and his contemporary imitators don't stray far from this script.¹⁶ And of course, that this criticism is comic does not also mean that it's funny. In the final scene of the *Clouds*, an irate father finally revenges himself on the school he blames for ruining his son and bilking him of his cash. He burns Socrates's thinkery to the ground while also throwing rocks at the terrified students fleeing from it. Plato has Socrates punished in a trial; Aristophanes has him punished in a laugh riot.

3.

IN THE INTERVAL that opens up between these two preformed judgments, we're forced back on an intriguing question: Why is that, in order to respond to students who seem to embody *academic unfreedom*, the public should so consistently fall back on the prejudices of *unacademic freedom*? By *unacademic freedom* I mean preformed judgments about freedom that, far from applying to specifically academic discourse, are to the contrary belated arrivals on the scene of academic discourse. I have in mind, in particular, the tradition of thinking about academic freedom that begins with Justice Oliver Wendell Holmes Jr.'s dissent in *Abrams v. United States* (1919), a case involving an anarchist protest against the U.S.'s intervention in the Russian Revolution.

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas. . . . The best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.¹⁷

This argument, which derives from J. S. Mill's argument about free speech in chapter two of "On Liberty," would achieve paradigmatic form in *Keyishian v. Board of Regents* (1967), where Justice Holmes's Millian claim about the "free trade in ideas" would become rephrased as the "marketplace of ideas."¹⁸ And with this decision we see the first appearance within American constitutional law of the preformed judgment that has come to dominate discussion of academic freedom today: to speak of academic freedom is to speak only of the line that leads from Mill to *Abrams* and *Keyishian* and thence to the marketplace of ideas.

Judges, however, are not always close readers, and the juridification of Mill in academic freedom jurisprudence is case in point. Mill's argument about freedom of speech in "On Liberty" is but one moment in a larger and more intricate argument, one that opens by attempting to clarify the limits of coercion in liberal societies. In chapter one of "On Liberty," where Mill outlines that argument, he does not make the claim that certain contemporary readers propose to find in his text, namely, that coercion applied to speech always and necessarily is, in every case, noxious. What Mill actually says is that not only *coercion* (which he subdivides into two categories, legal and moral) but also *despotism* (in the cases of "barbarians" and "races of nonage") are indispensable conditions for any liberal society.¹⁹ The dilemma Mill considers, in other words, is not whether coercion is *necessary*, but under what conditions coercion can be *warranted*.

Mill's answer to this question is that coercion is warranted only under conditions where it can "prevent harm to others."²⁰ This is his famous "harm principle." But, as numerous scholars have shown, so far is it from being the case that the "harm principle" rigorously *rules out* coercion in cases where speech can be harmful, that this same principle also can *require* restrictions on speech of this sort.²¹ Stated differently: the harm principle can just as much authorize *an expansively libertarian position on academic discourse* ("even the most hateful speech should be allowed on campus") as it can *an ethically restrictive position on academic discourse* ("because hate speech does harm, hate speech should not be allowed on campus"). Far from being the straightforward doctrine some of its contemporary proponents suppose it to be, in other words, Millian thought is structured around a latent contradiction that cannot bear the weight contemporary critics place upon it. In particular, it cannot provide decisive answers to questions of academic freedom.

What it does do is constrain debate on those questions to the problem of defining the limits of harm itself, and most especially to the problem

of defining the threshold where speech becomes action (or a “performative”). Debates so constrained, however, are not without their own performative effects. The more the problem of academic freedom becomes reduced to the problem of defining the performatives that produce harm, the more academic freedom fades from an active question into an administrative problem: performatives that produce harm, after all, are a matter of the health and safety of academic communities, a difficulty to be resolved by lawyers, provosts, and deans.²² And while health and safety are no doubt indispensable conditions for any meaningful academic life, a pivotal set of questions is suppressed when these conditions displace academic life itself. What is an academy, such that its health and safety should come to matter? What desires allow an academic community to come into being in the first place? And what purpose does it serve anyway?

Today’s preformed judgment about academic freedom gives us a ready reply to these questions: an academic community is a free marketplace of ideas, a place where truth emerges from the clash of competing opinions. As such, an academy is a place where the widest possible array of opinions should be considered: academic freedom and freedom of speech are one and the same thing. But here too, *here above all*, we see an unacademic concept of freedom displace the question of what constitutes specifically academic discourse. “Under the First Amendment,” as one famous judgment has it, “there is no such thing as a false idea.”²³ Superstition and mysticism, hallucination, most forms of hearsay and rumor, absent-minded humming, most forms of lying, numerology, and incomprehensible babble all are constitutionally protected speech.

It therefore should be apparent why the protocols that regulate unacademic speech can’t be conflated with those that regulate academic speech. The First Amendment stipulates only that the government does not have the right to suppress speech. It doesn’t imply that any and all limitations on speech are necessarily, because limitations, unconstitutional; and it does not impose an obligation on all institutions of higher learning to use their limited resources to support any and all protected speech. An English professor has a First Amendment right to say that Toni Morrison’s *Beloved* makes no mention of slavery, is the source from which Homer’s *Iliad* is derived, and is the paradigmatic *Urtext* for all medieval lyric, just as a professor of astronomy has a First Amendment right to say that the earth is flat, that the sun revolves around the earth, and that the moon is made of green cheese, and a mathematics professor has a First Amendment right to say that one plus one equals three, that the number eight has mystical

powers, and that prime numbers do not exist.²⁴ But it is a mistake to suppose that any First Amendment claim could persuade any court to compel any academic institution to hire or retain any professor who proposed to transmit any of these claims, as truth, in the classroom.

Here too, therefore, to the extent we defend academic freedom only or even primarily on the basis of concepts of unacademic freedom, we lose the capacity to say what is specifically academic about academic discourse. The logical conclusion of this incapacity should be clear: in the absence of any ability to say what academic discourse is or ought to be, the academy will become merely one among many places where equally valid opinions are freely exchanged. Stated more strongly: the academy will not be qualitatively different from any other discursive site in a digitized post-truth society, whether that be the street corner, the coffee shop, the Manhattan broadcast studios of Fox News, or the everywhere-nowhere of Facebook or Twitter.

And the consequence of this indifference should be equally clear: when asked why academic discourse is different from any other discourse, or why it should be the case that academic discourse is deserving of special protections under the law, academics will have no reply. When asked why it should be the case that a professor should not be allowed to teach students that feminism is cancer, that climate change is caused by clouds, that Islam is a uniquely violent religion, they also will have no answer. Are these not, after all, valid opinions? And if today's students are to be able to debate them, shouldn't they be exposed to these views on campus? Isn't a campus a marketplace of ideas? Isn't it a place where competing views should be presented in their full clash, so that we can see which one wins? That some students should prefer white supremacy, and others should prefer racial equality—aren't these simply differing opinions, and isn't the best test of the truth its power to get itself accepted in the competition of the marketplace of ideas? Don't we do a disservice to one and all when we fail to teach both sides of every debate?

It is, actually, an irony of history that right-wing critics of higher education today should regard this provocation as one of the sharpest arrows in their quiver. William F. Buckley Jr. took the opposite position: the problem, in his view, was a *laissez-faire* education that was indifferent to distinctions of truth and falsity, and whose only absolute was that there are no absolutes.²⁵ For Buckley, more exactly, the university *does* quietly subscribe to orthodox political values (he names democracy and antiracism in particular²⁶), yet it is hypocritically unwilling to assume responsibility

for those values (because its fidelity to the doctrine of academic freedom requires it to disavow any and all indoctrination, orthodoxies, or political values). In the wake of racist violence at Charlottesville in August 2017, it was possible to find left-leaning academics searching for conceptual materials that would allow them to make that same argument.²⁷ But as Buckley already had seen, no such claim is possible under conditions where the market has become the metalanguage for academic freedom.

Seen in a certain light, Buckley's criticism is not so different from more recent criticism of the "neoliberalization" of higher education. Beginning at least with Friedrich Hayek, the neoliberal claim has been that any attempt to centrally plan an economy will take place on the basis of incomplete knowledge about that economy, and hence will entail not only arbitrariness but also (to suppress resistance to that arbitrariness) authoritarianism or even totalitarianism. Translated to the terms of academic discourse by thinkers like Michael Polanyi, this claim requires us to call "authoritarian" or "totalitarian" anyone who proposes to set limits on the free exchange of opinion within the academy.

The doctrine of the marketplace of ideas, however, is only one among many ideas about how ideas should be created, debated, and conveyed. The more this doctrine monopolizes our thinking, the more it fails on its own terms, all while also authorizing a profound academic irresponsibility in its adherents: rather than ask what our responsibility for what academic discourse can or should be, we simply let the market decide instead. The truth of the doctrine of the marketplace of ideas is that it excludes any truth except the laws of the marketplace itself.

4.

HERE IS A minimal definition of specifically academic discourse: academic discourse is speech in which one voluntarily subjects one's own speech to the rules of some sort of "truth procedure."²⁸ This self-restraint not only distinguishes one's speech from the sort of speech that is possible under the doctrine of the marketplace of ideas (inasmuch as it sets limits on the ideas that one can and should debate); it is also a prior condition for the emergence of the doctrine of the marketplace of ideas (inasmuch as the monopoly held by that doctrine limits and restrains us from debating other models of academic freedom).

A definition of this sort recently has been proposed by two very different legal thinkers, Robert Post and Stanley Fish.²⁹ They argue that

specifically academic discourse is discourse defined by the will and the skill to internalize the rules and methods of established academic disciplines. For Post and Fish, both of whom seek to disaggregate academic freedom from the First Amendment and the marketplace of ideas, professional expertise is the sufficient condition for specifically academic speech. On these terms, we might say, free inquiry in academia is predicated on voluntarily assumed forms of unfreedom that are unique to the academy.³⁰ The biologist is not free to speak as though evolution were not the decisive premise for the study of life on earth. The climate scientist is not free to pretend that climate change is not human-caused. The historian is not free to pretend that slave labor does not account for the genesis and basis of American culture, society, and politics. The poet or novelist, who uniquely embodies the right to say anything, is nevertheless unfree to stay silent when a poem or novel rings false.

Study turns one into a student, which is to say, someone whose desire is structured by the voluntary assumption of limits on the sayable and the thinkable, limits that entail distinctions of true and false. Mastery of these modes of unfreedom, which is at one and the same time a certain mastery of self, is what confers upon the academic not only the right but also the responsibility to determine what can and cannot be said in an academic setting. These limits, these self-restraints on speech, are not *antithetical* to the need for discovery—for new knowledge—that courts protect under the rubric of the First Amendment. They are the *precondition* for that discovery, especially for those discoveries that require challenges to or alterations of those limits. It's far from clear that these modes of academic unfreedom can be adequately described, much less protected, by models of unacademic freedom. More likely is that the imposition of the latter upon the former will just turn crises into disasters.

What would it mean to begin to see a certain form of *academic unfreedom* not as a bad habit to publicly disavow, but as the counterintuitive name for an unusual responsibility, one that is desirable to affirm and assume? “Academic unfreedom” here would be a name for the ways in which the responsibility to pursue truth turns out to be insatiable and interminable, producing forms of fidelity that are so excessive that they ultimately are incompletable by any single mortal being, instead requiring communities and continuities between the living and the dead for their preservation and transmission, necessitating forms of governance that fit uneasily, when they fit at all, with the familiar forms of modern liberal politics and economics. Above all, it would be a name for the responsi-

bility to say that there are some falsehoods that do not contribute to the pursuit of truth, and that therefore should not be debated in any academy worthy of the name.³¹

For those who conflate academic freedom and the First Amendment, the very mention of this sort of responsibility is anathema. For these thinkers—who, to be clear, are constrained by their own form of unfreedom, the unfreedom to think outside of the logic of the marketplace of ideas—it is the epitome of authoritarianism or totalitarianism even to try to assume the responsibility of saying what sort of errors are desirable to include on campus. But the campus is not an infinite space, students and professors do not have infinite time, and the material resources of institutions of higher learning are becoming more finite by the hour. The professor of English who claims that Toni Morrison’s *Beloved* makes no mention of slavery, the professor of astronomy who claims that the moon is made of green cheese, and the mathematics professor who claims that the number eight has mystical powers are speaking falsehoods the refutation of which, on Millian terms, is always worthwhile.³² But even the most libertarian, laissez-faire academic would be hard pressed to say that limited academic resources should be spent on the refutation of a limitless series of falsehoods; scarcity, after all, is central to the truth procedures of free market economics. Even these most libertarian academics thus operate on the basis of a distinction, however submerged or disavowed, between *the pursuit of truth*, on the one hand, and *the unfettered exchange of opinions*, on the other, between the sort of falsehoods that are valuable to refute and the sort that are not. But if even those academics who are unfree to think outside of market logic obey procedures that allow them to reach conclusions about the sort of falsehoods that are worth debating, then the decisive question is not *whether* to set limits on academic discourse, but only how *explicitly* and *thoroughly* one assumes the responsibility of setting those limits.

Since Plato founded the very first academy, the courage to tell the truth has required judgments that distinguish *doxa* from *episteme*, opinion from knowledge. That judgments to this effect cannot be achieved perfectly or completely, with certainty or without error, does not also mean that the attempt can or should be abandoned. Education, wrote Freud at the end of his life, is one of those “‘impossible’ vocations, in which one can be sure beforehand of achieving unsatisfying results.”³³ But that a vocation is impossible does not also mean that it is not necessary. Quite the opposite. Whatever else it is, “academy” is a name for the untimely

place where the impossible desire to tell the truth abides under conditions inimical to that desire's survival.

5.

THANKFULLY, THE MARKETPLACE of ideas is not the only model at our disposal for thinking through the crisis of academic freedom today. In *The Development of Academic Freedom in the United States*, published a year after Arendt published "The Crisis in Education," Richard Hofstadter and Walter Metzger identify not one but four origins for academic freedom. The first is derived from *modern science*, defined as the continuing search for new truths, fostered by freedom of inquiry, verified by objective processes, and judged by those who are competent. This, in broad terms, is the model favored by Post and Fish. The second is *commerce*, defined as the competitive marketplace of ideas. The third is the *liberal state*, defined in terms of free speech and the free press and by the appreciation of the multitude of perspectives in a pluralistic society. And the fourth—which is both the most difficult to think, the most neglected in scholarship on academic freedom, and the one most at issue today—is *religious tolerance*, defined as the taming of sectarian animus on the basis of toleration and religious liberty, and the weakening of dogmatism and the will to persecute. Religious tolerance, Hofstadter and Metzger write, was the "historical matrix" that allowed for the emergence of intellectual freedom within traditionally religious universities.³⁴

This last origin of academic freedom, which in the United States is also the first and most originary, also happens to be the least discussed today. Post, for example, is silent on the Weberian problem of the "calling" or "vocation," preferring instead to characterize the specificity of academic speech in terms of "competence": the academic is not a disciple but an expert trained in a discipline.³⁵ Fish, meanwhile, is well aware that the secularization of the academy is incomplete, and prefers a version of academic freedom that takes secularization to its logical conclusion: he proposes to "deflate" the notion that higher education is a vocation or holy calling.³⁶ But here, as elsewhere, the fully enlightened earth radiates disaster triumphant. The very concept of the "professor" derives from a speech act—professing—that in turn cannot be separated from "declarations of faith" or from the vicissitudes of secularization.³⁷ In this respect, Fish is correct that professors who no longer profess would not be professors at all, but merely (in his stirring phrase) "providers of

services.” But in another respect, Fish is wildly off the mark—or rather, he is wildly optimistic, for he seems to assume that the logical conclusion of secularization will produce results that are also, taken on their own terms, logical in form. But full secularization of the profession would not so much deflate its pretensions as impose upon it an altogether different sort of pretense—the fantasy that a fully coherent or consistent doctrine of academic freedom is even possible at all.

A glance at the history of higher education in the United States reveals just how paradoxical the secularization process actually is. In the United States, institutions of higher learning were founded and administered mainly by Protestant denominations.³⁸ Most of these institutions were secularized during the period between 1870 and 1915, which Louis Menand has characterized as the “big bang of American higher education.”³⁹ It was then that the model of the German research university was transplanted to the United States and propagated under conditions of rapidly industrializing capitalism, westward colonial expansion, the end of Reconstruction, and the onset of Jim Crow. Many of the academic discourses, practices, and institutions that today seem self-evidently and obviously “secular”—ranging from academic disciplines and professional associations to land-grant universities and historically black universities—owe their genesis to, and are highly compacted sedimentations of, the contingencies of this particular moment.

The doctrine of academic freedom is no exception. In its earliest formulation, the 1915 General Report of the Committee on Academic Freedom and Academic Tenure, the doctrine was predicated on a sharp distinction between, on the one hand, “proprietary institutions designed for the propagation of specific doctrines,” and, on the other, “ordinary institutions of learning.”⁴⁰ The former are “used as an instrument of propaganda in the interests of the religious faith professed by the church or denomination creating it,” whereas the latter constitute a “public trust,” serving “the general public,” not just a single sect within that public. In these institutions alone would it be possible to translate the Humboldtian couplet of *Lehrfreiheit* and *Lehrfreiheit* into the specifically American lexicon of manifest destiny, consolidating the obviousness of the academic endeavor by construing it in colonial terms: the university (as AAUP co-founder Arthur Lovejoy put it) “is the outpost of the intellectual life of a civilized society, the institution set up on the frontier of human knowledge to widen the dominion of man’s mind.”⁴¹ Even so, as John Dewey himself said in 1902 (and as the 1915 General Report reiterated),⁴² the transition

from the ecclesiastical institution to the “university proper” remained incomplete.⁴³ Academic freedom, in short, depends for its genesis on a distinction between sacred and secular institutions — where “secular,” again, is not the name of an unshakable bedrock of enlightened universality, but merely a nickname for the conceptual deposits left behind by the dominant historical forces of the late nineteenth and early twentieth century. And, from the beginning, that distinction was always shaky at best.⁴⁴

This same instability structured the way in which the emergent doctrine of academic freedom would allow its advocates to retrofit older texts to its newer purposes. For those who, writing after 1915, would seek to support their concept of academic freedom with quotations from chapter two of Mill’s “On Liberty,” *infallibility* would become the sharpest edge of the most cutting criticism. Because no human being is infallible, no human being can lay claim to the authority to decide questions of truth for all of humanity, and opinions that seem absolutely false must be protected against presumptions of absolute certainty. Because no one’s discourse is free from errors, so the argument concludes, the pursuit of truth requires discourse itself to remain absolutely free.⁴⁵ Particularly when reduced to these terms, however, Mill’s argument about infallibility is itself far from infallible. Read on its own terms, that argument is better understood as an explicit answer to an implicit question, one that goes mostly unposed in Mill’s theory of public debate, and that is especially easy to misrecognize when Mill is read retroactively as an anticipatory justification of the tradition of academic freedom set into motion by the 1915 General Report. Prior to Mill’s systematization of fallibilism into a theory of public debate, fallibilism first was part of a shift in the ways and means of religious conversion, from persecution to persuasion.⁴⁶ Mill too—Mill above all—wrote in the shadow of this shift, and throughout “On Liberty” he remains quite aware that he is thinking in an age of secularization (which he describes as “at once destitute of faith and terrified at skepticism”⁴⁷). That criticism, which is part of an extended argument about the necessity for religious tolerance in a secular liberal society, culminates in a manifestly anti-Catholic argument about the way religious tolerance operates in a Protestant country. “Papal infallibility” is a Roman Catholic doctrine, and in “On Liberty” Mill will call the Roman Catholic Church “the most intolerant of churches[.]”⁴⁸ In this, of course, he rested on precedent. For example, the same author who famously argued for free speech and tolerance of opinion in his 1644 *Areopagitica* (“Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?”) also explained

intolerance toward Catholics on the grounds of papal infallibility in his 1659 *Treatise of Civil Power* (“Chiefly for this cause do all true protestants account the pope Antichrist, for that he assumes to himself this infallibility over both the conscience and the Scripture”).⁴⁹ John Locke’s famous 1689 “Letter Concerning Toleration” likewise excluded not only atheists but also “heretics”—Catholics—from toleration.⁵⁰

The examples could be multiplied; the point should be clear. Whether or not contemporary critics know it, their confident quotations of Mill on infallibility are not as infallible as they might suppose: the logic at work in these quotations, which precedes Mill, is the secularized trace of a long line of Protestant polemics against Catholic absolutism.

And those polemics are, in turn, paradoxical to the core. Mill’s claim about infallibility, after all, is not only that *liberal societies are societies that are tolerant of religious difference*; it is also that *liberal societies must be intolerant of intolerance*. Stated differently, liberal societies are societies that must be intolerant of (Catholic) claims to infallibility: only on the prior condition that these societies abandon (Catholic) claims to infallibility is it *then* possible for them to embrace a diversity of clashing thought and opinion based on the premise of fallibilism. The latter is therefore downstream from a more basic problem. *The tolerant must be intolerant of the intolerant*: this paradoxical axiom has served as one of the fragile foundations for all societies that inherit the traditions of English liberalism, and with it the conceptual scar tissue of theological civil war. In the twentieth century, its contradictoriness would be criticized not only by thinkers on the right (Leo Strauss as well as Buckley), but also by thinkers to the left (such as Herbert Marcuse and Wendy Brown).⁵¹ The paradox, in any case, is inescapable: to be loyal to the principle of tolerance, one must at some point be disloyal to that same principle, because protecting tolerance from its opposite (intolerance) requires one occasionally to have recourse to that very opposite (the tolerant cannot but be intolerant of intolerance).

Academic freedom is exposed to this paradox. Like every other secularized discourse on tolerance, it never will not be contradictory. For academic freedom too, for academic freedom especially, the question therefore will not be *whether or not* the tolerant must at some point be intolerant of intolerance but only *when* that point will arrive. To assume academic responsibility for academic freedom is to assume responsibility for this chronic contradictoriness. Just as one cannot not draw some sort of line between the debates that move students from opinion to knowledge and the debates that do not, so too we cannot not draw some sort of line be-

tween speech that is tolerable and speech that is intolerable. Here too, the impossibility of the task in no way removes its necessity. We find ourselves forced back upon questions that are at once unavoidable and unsolvable. These questions pertain not only to the problem of *where* one draws the lines around the tolerable and the falsifiable, and how *felicitously* or *infelicitously*—with what degree and kind of *performative force*—one draws them. They also pertain to how wisely or unwisely one responds to those who, invariably and rightly, will point out that no such line can be entirely free of arbitrariness or contradictoriness, of unreason and untruth. The more one pushes the secularization of the profession to its logical conclusion, the more one's conclusions will come to bear a certain illogic, one that neither can be disavowed nor fully resolved.

NOTES

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¹Hannah Arendt, "Crisis in Education," in *Between Past and Future: Six Exercises in Political Thought* (Cleveland, OH: Meridian, 1963), 174.

²Diogenes Laertius, *Lives of Eminent Philosophers, Book 1*, trans. R. D. Hicks (Cambridge, MA: Harvard University Press, 1925), 281.

³Alexis de Tocqueville, *Democracy in America*, trans. Arthur Goldhammer (New York: Library of America, 2004), 292–95.

⁴"Thinkery" is one English translation for *phrontisterion*, the term Aristophanes uses in *The Clouds* to designate the school of Socrates. See Aristophanes, "The Clouds," in *Aristophanes*, trans. Benjamin Bickley Rogers (Cambridge, MA: Harvard University Press, 1932), 273 (l.i.93). In *The Apology of Socrates*, Plato implies that Aristophanes is one of Socrates's accusers. See Plato, "The Apology of Socrates," in *Plato: Euthyphro, Apology, Crito, Phaedo, Phaedrus*, trans. Harold North Fowler (Cambridge, MA: Harvard University Press, 1953), 75 (19c).

⁵Hannah Arendt, *Denktagebuch, Zweiter Band*, ed. Ursula Ludz and Ingeborg Nordmann (München/Berlin/Zürich: Piper, 2016), 710.

⁶George Marsden, "The Ambiguities of Academic Freedom," *Church History* 62, no. 2 (June 1993), 223–24.

⁷See, generally, Steven J. Novak, *The Rights of Youth: American Colleges and Student Revolt, 1798–1815* (Cambridge, MA: Harvard University Press, 1977).

⁸Novak, *The Rights of Youth*, 38–57.

⁹In addition to Novak, *Rights of Youth*, see also Leon Yakely, "The Development of Higher Education in the Jacksonian Period, 1825–1840," *The Historian* 3, no.1 (Autumn 1940), 37–51; Wheaton Lane, *Pictorial History of Princeton* (Princeton: Princeton University Press, 1947), 130–37; Frederick Rudolph, *The American College and University: A History* (Athens: University of Georgia Press 1962), 97–98;

Lawrence Veysey, *The Emergence of the American University* (Chicago: University of Chicago Press, 1965), 277; Lewis S. Feuer, "Student Unrest in the United States," *The Annals of the American Academy of Political and Social Science* 404 (November 1972), 170–82.

¹⁰See, for example, Andrew Sullivan, "Is Intersectionality a Religion?," *New York* magazine (March 10, 2017), online at <http://nymag.com/daily/intelligence/2017/03/is-intersectionality-a-religion.html> (last checked September 11, 2017). Sullivan writes as though "priestly piety" were not one of the central sources for American intellectual life from the very beginning. But cf. Richard Hofstadter, *Anti-Intellectualism in American Life* (New York: Vintage Books, 1962), 28, 32–33.

¹¹Plato, "The Apology of Socrates," 91 (24b–28a) ("Socrates is a wrongdoer [*adikein*] because he corrupts the youth and does not believe in the gods the polis believes in, but in other new spiritual beings.")

¹²See William F. Buckley, *God and Man at Yale* (Chicago: Henry Regnery Company, 1951), 43.

¹³Powell, "Confidential Memorandum: Attack on American Free Enterprise System," August 23, 1971, Series 2, Box 28, USCOC, 13.

¹⁴*Ibid.*, 15.

¹⁵Thomas Jefferson, quoted in Novak, *The Rights of Youth*, 164.

¹⁶See, for example, John Chamberlain, "Introduction," *God and Man at Yale*, viii.

¹⁷*Abrams v. United States*, 250 U.S. 616 (1919).

¹⁸See, on this point, Akeel Bilgrami, "Truth, Balance, and Freedom," in *Who's Afraid of Academic Freedom?*, ed. Jonathan Cole and Akeel Bilgrami (New York: Columbia University Press, 2015), 12, 25n1.

¹⁹J. S. Mill, "On Liberty," in *'On Liberty' and Other Writings*, ed. Stefan Collini (Cambridge: Cambridge University Press, 1989), 13–14. Cf. Herbert Marcuse, "Repressive Tolerance" (1965), in *A Critique of Pure Tolerance* (Boston: Beacon Press, 1969), 86.

²⁰Mill, "On Liberty," 13.

²¹See, for example, L. W. Sumner, "Should Hate Speech Be Free Speech?: John Stuart Mill and the Limits of Tolerance," in *Liberal Democracy and the Limits of Tolerance: Essays in Honor and Memory of Yitzhak Rabin*, ed. Raphael Cohen-Almagor (Ann Arbor: University of Michigan Press, 2000), 133–50; David Brink, "Millian Principles, Freedom of Expression, and Hate Speech," *Legal Theory* 7 (2001), 119–57; Chara Bakalis, "Regulating Hate Crime in the Digital Age," *The Globalization of Hate: Internationalizing Hate Crime?*, ed. Jennifer Schweppe and Mark Austin Walters (Oxford: Oxford University Press, 2016), 264.

²²On the health and safety of students as the domain of academic administration, see William A. Kaplin and Barbara A. Lee, *The Law of Higher Education* (Hoboken, NJ: John Wiley & Sons, 2014), 63.

²³*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

²⁴See, on this general point, Robert Post, "Academic Freedom and the Constitution," in *Who's Afraid of Academic Freedom?*, 128.

²⁵Buckley, *God and Man at Yale*, 25, 139, 143, 156–57, 174, 182, esp. 194.

²⁶*Ibid.*, 148, 155, 159, 212.

²⁷See, for example, Chad Wellmon, "For Moral Clarity, Don't Look to Universities," *Chronicle of Higher Education* 64, no.1 (September 1, 2017) (online at <http://>

www.chronicle.com/article/For-Moral-Clarity-Dont-Look/240921) (last checked September 12, 2017); James Keenan, "As UVa's Leaders Equivocate, Professors Shine an Ethical Light," *Chronicle of Higher Education* (August 16, 2017) (online at <http://www.chronicle.com/article/As-UVa-s-Leaders-Equivocate/240944>) (last checked September 12, 2017).

²⁸This term is taken from Alain Badiou, *Manifesto for Philosophy*, trans. Norman Madarasz (New York: SUNY Press, 2010), 35–57.

²⁹Robert Post, *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State* (New Haven, CT: Yale University Press, 2013); Stanley Fish, *Versions of Academic Freedom: From Professionalism to Revolution* (Chicago: University of Chicago Press, 2014).

³⁰See the argument in Albion W. Small, "Academic Freedom" (1899), in *The American Concept of Academic Freedom in Formation: A Collection of Essays and Reports*, ed. Walter P. Metzger (New York: Arno Press, 1977), 465 ("The scientist is not free to talk as he might if there had been no Bacon, and Newton, and Darwin. The philosopher is not free to think as he might if certain work had not been done for him by Plato and Descartes and Kant. The economist is not free to speculate as he might if Adam Smith and Ricardo and Mill had not thought through some things in advance.") To be clear, Small's claim here is about *intramural* discourse and not *extramural* discourse. But what I am here, after Small, calling "academic unfreedom" does help explain why extramural utterances are such a vexed issue within the American doctrine of academic freedom: it's because the academic is the one who is *not* free to say anything and everything *intramurally*, or indeed because the academic is in an important sense *voluntarily unfree*, that academic freedom sits so uneasily with the First Amendment protections that remove government constraints on all citizens' free speech (up to and including the extramural speech of the professor, this oddly liminal speech in which a professor speaks without also professing, and in so doing releases him- or herself from the specific form of unfreedom that characterizes specifically academic discourse).

³¹For a more extended version of this argument, see Michele Moody-Adams, "What's So Special About Academic Freedom?" in *Who's Afraid of Academic Freedom?*, 97–122.

³²Mill, "On Liberty," 47–55.

³³Sigmund Freud, "Analysis Terminable and Interminable" (1937), in *The Standard Edition of the Complete Psychological Works of Sigmund Freud, Volume XXIII*, ed. and trans. James E. Strachey (London: Hogarth Press, 1981), 248. The other two 'impossible' professions, Freud says, are law and psychoanalysis.

³⁴Richard Hofstadter and Walter P. Metzger, *The Development of Academic Freedom in the United States* (New York: Columbia University Press, 1955), 61–62.

³⁵Post, *Democracy, Expertise, and Academic Freedom*, 90.

³⁶Fish, *Versions of Academic Freedom*, 10.

³⁷Jacques Derrida, "The Future of the Profession or the University without Condition (Thanks to the 'Humanities', What Could Take Place Tomorrow)," in *Derrida and the Humanities: A Critical Reader*, ed. Tom Cohen (Cambridge: Cambridge University Press, 2002), 24–57.

³⁸Jefferson's University of Virginia is the most prominent exception to this norm, and also the most symptomatic one as well. See George Marsden, *The Soul of the American University: From Protestant Establishment to Established Nonbelief*

(Bridgewater, NJ: Replica Books, 2000), 68–78.

³⁹Louis Menand, *Marketplace of Ideas: Reform and Resistance in the American University* (New York: W. W. Norton, 2010), 97.

⁴⁰See “General Report of the Committee on Academic Freedom and Academic Tenure,” in *The American Concept of Academic Freedom in Formation*, 20–21.

⁴¹Arthur Lovejoy, “Academic Freedom” (1930), in *The American Concept of Academic Freedom in Formation*, 384.

⁴²“General Report,” 23.

⁴³John Dewey, “Academic Freedom” (1902), in *The American Concept of Academic Freedom in Formation*, 1–2.

⁴⁴William F. Buckley Jr. knew where to strike when he argued that Yale’s denial of orthodoxy was itself predicated on an unstated orthodoxy. What this reversal accomplished, albeit at the cost of reintroducing into Buckley’s argumentation a quotient of the same relativism he proposed to reject, was more than just the return of religion into the secular; it was a strategic destabilization of the distinction, foundational to the 1915 General Report, between private ecclesiastical organizations and universities. It is not an accident that certain responses to Buckley would amount to ad hominem attacks on his Roman Catholicism. See, on this point, Marsden, *The Soul of the American University*, 13–14.

⁴⁵Mill, “On Liberty,” 21.

⁴⁶Hofstadter and Metzger, *Development of Academic Freedom in the United States*, 65–66.

⁴⁷Mill, “On Liberty,” 25.

⁴⁸*Ibid.*, “On Liberty,” 24.

⁴⁹John Milton, “Areopagitica,” in *The Complete Poetry and Essential Prose of John Milton*, ed. William Kerrigan, John Rumrich, and Stephen M. Fallon (New York: Modern Library, 2007), 961; John Milton, “A Treatise of Civil Power,” in *The Prose Works of John Milton* (London: Westley and Davis, 1836), 414. See also, generally, *Milton and Toleration*, ed. Sharon Achinstein and Elizabeth Sauer (Oxford: Oxford University Press, 2009).

⁵⁰John Locke, “A Letter Concerning Toleration,” in *Two Treatises of Government and A Letter Concerning Toleration*, Ed. Ian Shapiro (New Haven, CT: Yale University Press, 2003), 244–6.

⁵¹See William F. Buckley Jr., “Introduction to the Twenty-Fifth Anniversary Edition,” in *God and Man at Yale: Fiftieth Anniversary Edition* (Washington, DC: Regnery Publishing, 2002), xlvi (“Question: What is the (1) ethical, (2) philosophical, or (3) epistemological argument for *requiring* continued tolerance of ideas whose discrediting it is the purpose of education to effect?”); Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953), 5–6 (“Liberal relativism has its roots in the natural right tradition of tolerance...but in itself it is a seminary of intolerance”); Marcuse, “Repressive Tolerance” 81–123, esp. 98 (“The tolerance expressed in such impartiality [i.e., “when a newscaster reports the torture and murder of civil rights workers in the same unemotional tone he uses to describe the stockmarket or the weather”] serves to minimize or even absolve prevailing intolerance and suppression”); Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton, NJ: Princeton University Press 2009).