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Defending Academic Freedom and Free Inquiry

A CRITICAL INFLECTION POINT IN THE HISTORY OF MODERN UNIVERSITIES came in January 1933. What rapidly followed Hitler's rise to power was a disaster for Germany and its university system—one from which its research universities still have not fully recovered—and an enormously valuable, if unwanted, gift to the increasingly strong, but still not preeminent, American research universities searching for leadership. That great intellectual migration created a chemistry at these leading academic institutions where the horizontally mobile, highly distinguished professors from Europe were combined with an increasing number of young, exceptionally talented, scholars and scientists (many of whom were Jewish) who were vertically mobile in the United States. It was the beginning of the rise of the American research university to preeminence. Alvin Johnson at the New School and people like Lord Rutherford in England did much to provide safe havens for many of these fleeing intellectuals, and the New School's role in that deliverance is worthy of our continued deep respect and celebration.

In this paper, however, I want to focus attention on a few principles that I believe guide great universities and to discuss and elaborate several propositions. My remarks will not attend to the particulars of the history of that great migration and its impact on the United States. A far more extended discussion of the consequences of that journey for American universities and the nation can be found elsewhere and in my forthcoming book, *The Great American University* (Cole 2010). Here I want to suggest that my country has not distinguished itself particularly well

in preventing episodes of repression and attempts to silence dissent at universities, nor has it produced an extraordinary number of courageous leaders over the past 75 years who have come forward to defend the principles of academic freedom. We have never reached the level of repression that Germany felt in the 1930s, nor that which was felt by Soviet geneticists at roughly the same time during the Lysenko years, but we have done significant damage to our system of higher learning because we have failed to understand fully the role that academic freedom and free inquiry play in creating the knowledge that societies depend on for their social and economic, as well as humanistic, progress.

The American research university today is the engine of discovery and innovation that is at the center of the nation's effort to create better lives for its citizens. And my emphasis will be on George W. Bush's presidential years, when we once again had to deal with significant threats to the core value of academic freedom and free inquiry—from both the government and organized interest groups as well as from within the belly of the academic community. Barack Obama's election in 2008 produced great hope on American college and universities campuses that a new enlightenment is at hand. Based on his action to open up stem cell research, to demand of his executive offices a respect for the integrity of science, and from his remarks to the National Academy of Sciences on the role that our great universities play in the process of discovery and economic innovation, there is a growing sense that President Obama understands the necessity of academic freedom and free inquiry, and that a new day has dawned. However, such a day cannot be created by the White House alone, I'm afraid, and we should not assume that even a heavy majority of Democrats in Congress, or in state governments will see the world as the president apparently does.

At the outset, I want to assert what I believe to be true about great universities. They are designed to be unsettling. Great universities will, as the University of Chicago's famous 1967 Kalven Committee report said, "provide enduring challenges to social values, policies, practices, and institutions. . . . [I]t is the institution which creates discontent with the existing social arrangements and proposes new ones" (Kalven Committee). So distinguished universities must entertain and not suppress the most

radical thoughts—whether they are from scientists who challenge the longstanding belief that only bacteria and viruses cause disease, or social scientists and humanists who attack the foreign policy of the United States. This is not an easy thing to do, as Justice Oliver Wendell Holmes, Jr. reminded us in his memorable dissent in the 1919 *Abrams* case:

> Persecution for the expressions of opinions," he said, "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 of ideas—that 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 (259 U.S. 616 [1919]).

The encouragement of radical thinking is accompanied by another strongly held value at our best institutions of higher learning—the value of skepticism about claims to truth or fact. Juxtaposed with the tolerance of radical thought, this conservative bias by design creates an essential tension within the university. The liberality of its intellectual life and the conservatism of its methodological demands allow great universities to challenge the prince, or other orthodoxies, while maintaining its commitment to the role of evidence as judged by experts in establishing facts.

Now I want to make another strong claim: it is impossible to create or sustain a truly great university system without a society's deep appreciation and commitment to the idea of academic freedom and free inquiry. Show me a counterexample. Remember as well that "academic freedom" is not another term for "free speech" and the concept is not even principally built on defense of free expression—

although its abuses are most often discussed in terms of the right to free and unfettered speech. It is not simply a replacement at universities for individual rights to free speech. It also is *not* a bonus for employees of academic rather than financial institutions or a philosophical luxury without which universities would be no worse off. As Louis Menand has aptly said: "It is the key legitimizing concept of the entire enterprise. Virtually every practice of academic life that we take for granted . . . derives from it. The alternative is a political free-for-all" (Menand 1996: 4). In its most fundamental form, academic freedom leaves the structure of decision making about what constitutes quality thought and work, quality research and teaching, and the quality of potential up to a set of academic peers. It wrests control for such decision away from government, presidents and trustees, and boards of regents, and places them in the hands of those who have the background, training, and judgment to evaluate quality in specific areas of expertise.

Before turning to the actual threats to this core value in the United States from 2001 to 2008—threats that some of us very much hope that President Obama will get around to attenuating after he has fixed the world's economy and financial systems, let me place my observations in one particular context.

My remarks on the threats to academic freedom in the United States may appear as a joke, or as naïve, for most academics working in the overwhelming majority of nations in the world. The people who teach, do research, or are enrolled as students at those places only wish that they could be guaranteed the freedom to pursue their own scholarly and scientific interests, the right to dissent and criticize their government's policies, as we have *even* during times of relative repression. When we think of levels of academic freedom throughout the world's universities, of course, even in troubled times American academics have relatively high levels of freedom. That said, I am concerned here with academic freedom in systems of higher education that either have been or aspire to be the most distinguished in the world, particularly in the United States.

Let me begin by simply noting, without expansion, the periods when the United States has experienced unusual and unfortunate interference with our universities' relatively high level of autonomy.

Repression of speech, thought, and scholarship were abundantly evident in the United States during the period surrounding the American entrance into World War I and during the Cold War and the McCarthy period. Hardly a generation has gone by without efforts by the government to muzzle, and even prosecute, those at universities who were believed to be subversive or who associated with alleged subversives. In the historic tension between national security and civil liberties, more often than not national security has won out—much to our later embarrassment. And so it has been since the attacks on the United States on September 11, 2001.

I want to enumerate the forms that the most recent repression has taken in the United States. I note some of the external threats in part I, while I suggest in part II that the virus that causes attacks on academic freedom continues to be found within the academy itself. Taken together, they threaten the continued preeminence of our research universities. Finally, in part III, I offer a few thoughts about how we might begin to rethink and extend the principles of academic freedom, which have not changed much since the declaration of principles in 1915.

PART I: THREATS TO PREEMINENCE RELATED TO ACADEMIC FREEDOM

The preeminence of the American research university was not built overnight; it will not deteriorate overnight.[1] But when the government tries to censor scientists, and in the face of scientific consensus tries to create contrary scientific facts, tries to intimidate scholars, and unleashes other politically motivated advocacy groups to target individuals and specific universities, then we are going down a path that could lead over time to killing the goose that laid the golden eggs. The attacks that I focus on here are on the core values, on the structures and prerogatives, and on the faculty members at our centers of academic excellence.

In broad brushstrokes, the policies have had the following effects: social scientists and public health specialists conducting research on prevention of HIV supported by the National Institutes of Health (NIH) and its peer review system have been subjected to congressional inqui-

ries. Members of Congress have threatened to rescind peer-reviewed and -approved research grants through congressional legislation and have required the director of the National Institutes of Health to explain why these grants were funded. The White House and political appointees at NASA have tried to censor scientific reports and muzzle scientists from speaking about their scientific findings about global warming.

Federal employees at the Centers for Disease Control (CDC) have been ordered to alter information on the CDC website that focuses on the prevention of sexually transmitted diseases—alterations that eliminates the best knowledge we have about prevention in light of political sensitivities about its content. The changes, which produced erroneous information, were made. At variance with what they know are facts, CDC researchers are told, for example, to emphasize sexual abstinence and to eliminate or downplay information about the use of condoms in preventing spread of HIV. The scientists at CDC objected, but complied.

Universities are being asked to discriminate against students on irrelevant criteria; to restrict their search for the best talent in the world; to alter laboratory work and potentially to restrict publication of ideas; to accept increased surveillance on campus by federal law enforcement personnel in the name of national security; to accept a government role in defining what is "good" or "bad" science; to allow the government to review the content of curricula; to limit research in areas with great potential for scientific and technological discovery; and to acquiesce to appeals from the government to fire faculty members who pose no threat to the safety of the nation. And, in its effort to justify its policy decisions, the Bush administration tried, to an extent unheard of in recent American history, to "reshape" scientific and technical facts on which there exists virtual scientific consensus. The federal government reconstructed scientific knowledge to fit its political decisions rather than base decisions on informed scientific knowledge. Censoring science and going after scientists for political purposes has triggered other individuals and nongovernmental organizations with their own axes to grind to attempt to influence the content of ideas expressed and pursued at our great universities. That, as we know from history, is a dangerous path to go down—for the universities and the larger society.

It is cause for concern among those at universities and among those in the wider public who depend on what they produce.

Let me elaborate on these threats with more specific examples of tensions between government policies and the transcendent values that we are discussing here. I have written about many recent efforts in the United States to harass and censor, fail to promote, and expel those who offended the powers that be through their speech. I am well aware of the organized efforts to defrock professors who publicly offer challenges to dominant ideological opinions and beliefs. Here, I will not consider the affronts to academic freedom illustrated in the well-publicized attacks on Palestinian and other Arab scholars—many of exceptional quality—for criticizing Israeli government policies. Whether the challenges to Israeli policies are made by renowned scholars like Columbia's Edward Said, New York University's Tony Judt, or prominent scholars such as Chicago's and Harvard's John Mearsheimer and Stephen Walt, and Columbia's Rashid Khalidi, or lesser known but highly respected scholars like Joseph Massed, you can be sure that any public (and increasingly private) statement of criticism, however well argued and reasoned, will bring forth the wrath and demands for their sanctioning by government representatives, university alumni, trustees, faculty, students, and private advocacy groups. And there is no reason to believe that this kind of assault will not continue during the Obama administration, regardless of his personal views about such attacks.

Almost all of these prior cases focus our attention on the boundaries of academic freedom and free expression. I want to concentrate principally on the "mutated" forms of the insidious virus that produce attacks on research, which you did not see even in the McCarthy period, because they are less visible, but in some ways at least as destructive to the body of great universities.

State Intrusion into University Affairs

Scientists who work to discover the causes and possible cures for highly infectious diseases often work with what are called "select agents," which are bacteria, toxins, and viruses that can produce the disease. Long before 9/11, biologists feared that these agents could

cause pandemics and that there was a national need to increase our research that focused on these lethal bacteria and viruses. After 9/11 many people were concerned that these agents might get into the hands of terrorists who could use them as biological weapons. Hence, the use and movement of these agents, even for potentially beneficial research, became cause for legitimate heightened concern and greater control. Two post-9/11 pieces of American legislation were designed, in part, to restrict use of these agents: the U.S.A. Patriot Act, and the Public Health and Bioterrorism Preparedness and Response Act (2003). A number of the provisions of these acts are important for university research and study. First, the Patriot Act allowed federal agents to enter university libraries and computer systems and explore the behavior of students and faculty members without warrants and without any evidence there was a credible threat from those under surveillance. Moreover, the act stipulated that university officials, like librarians, were prohibited under threat of indictment from informing the targets of surveillance that their records were being investigated by the FBI or other government officials. Other features of these acts included: a prohibition on faculty members from having anyone who came from one of roughly 25 nations suspected of supporting terrorism, including graduate and postgraduate students, physically enter a laboratory that used select agents for biological research. So, for example, no Iranian student could work in a laboratory that did research on a vaccine for plague. Faculty members who violated this provision were subject to arrest and indictment. Federal agencies, including the FBI, had to be informed of any movement of certain research materials on the list of "select agents." All of these provisions are still on the books, even after the reauthorization of the Patriot Act in 2006. They are being acted upon, and there seems to be little inclination in Congress to change them.

Fear among scientists that caused many of them to abandon work on select agents was reinforced by the highly visible case within the scientific community of one of the nation's leading microbiologists, Professor Thomas C. Butler, of Texas Tech University. Those restrictions on transporting pathogens, such as plague bacteria, which Butler stud-

ied, had grown even greater since the new war on terrorism and the passage of the U.S.A. Patriot Act, as Dr. Butler was about to find out.

> On 15 January [2003], 2 days after reporting that 30 vials of plague bacteria were missing from his lab, Butler was [arrested by the FBI,] shackled and thrown into a Lubbock jail, charged with lying to federal agents about the fate of the [30] vials [of plague bacteria that he reported missing] and illegally importing the Tanzanian samples into the country. . . . Seven months after his arrest, the government indicted Butler on 69 charges (Enserink and Malakoff 2003: 2054).

Butler was apparently following practices that he had used before 9/11 and the new anti-terrorism laws were passed. When Butler arrived at the Dallas airport he failed to declare plague bacteria samples as "commercial merchandise" for U.S. Customs.

To grossly truncate this story, while the FBI was investigating possible violations of antiterrorism legislation, they were also investigating other aspects of Butler's scientific life at Texas Tech. They combed over materials related to Dr. Butler's grants and his other activities at the university while others reviewed his tax returns. Ultimately, the indictment was expanded to include 54 unrelated charges of embezzlement, tax evasion, and mail fraud. He was accused of defrauding the university on clinical trial fees and cheating on his taxes. At the end of the day, at age 62 and at the peak of his career after 30 years of research and "on the verge of becoming the United States' hottest plague scientist," Thomas Butler was placed on trial facing a 69-count indictment (54 of which had nothing to do with violations of the Patriot Act) "that carried a maximum of 469 years in jail and $17 million in fines" (Enserink and Malakoff 2003: 2062). To add to his reversal of fortune, Texas Tech placed Butler on a paid leave, denied him access to his laboratory, and began proceedings to fire him (Chang, 2003: 32). On December 1, 2003 the jury convicted Dr. Thomas Butler of 47 of the 69 counts against him. He faced up to 240 years in jail and millions of dollars in fines. However, none of

the 47 convictions were directly related to the original incident. These convictions, with the notable exception of his failure to obtain transport permits, had nothing to do with his plague research in Tanzania. After the verdict and facing dismissal from Texas Tech, Butler resigned from his position, repaid the university more than $250,000, and lost his medical license. Butler appealed the verdict, lost his appeal and his request for a certificate of certiorari by the Supreme Court, and faced nine years in jail. At the end of the day, Butler was sentenced to two years in jail.[2]

The actions of scientists working with select agents speak louder than their words. "Let me give you an interesting example from Cornell," Nobel Prize winner Robert C. Richardson recently said.

> At Cornell, we had something like 76 faculty members who had projects on lethal pathogens and something like 38 working specifically on select agents. . . . So what is the situation now? We went from 38 people who could work on select agents to 2. We've got a lot less people working on interventions to vaccinate against smallpox, West Nile virus, anthrax and any of 30 other scourges (Dreifus 2004: D2).

These scientists simply abandoned this type of research given the conditions that they had to meet under the act.

Restricting the Flow of Talent to American Universities: Restrictive Visa Policies

Over the past 50 years, thousands of the most able students and scholars have yearned to come to the United States to be trained. Remarkably high proportions of those intellectual migrants have taken positions at our great universities and have remained among the most productive people in American society. Higher education, particularly at the graduate level, has been among the few American industries with a heavy favorable balance of trade. Many science, engineering, and professional school students have returned to their countries with exceptionally favorable impressions of the United States and have taken up leadership

positions in their home society. In fact, we have become increasingly dependent on this exceptional talent for work in science and engineering. Disruptions in the flow of talent will have many unfortunate consequences for the United States. If a presidential administration could do more harm to cut into this pipeline of talent, it is hard to imagine one improving on the Bush administration in the post-9/11 years. At least until the end of the Bush administration, the government targeted foreign scholars and students as potential security risks, almost invariably without a scintilla of evidence that they in fact are threats.[3] It has become far more difficult to receive student visas and travel visas for scholars then it had been in the past, and many cases exist where visas are being denied with without reasons provided. For scholars invited to participate in conferences or teach at American universities, the content of their ideas, not whether they are security risks, seems to influence the probability of their obtaining visas.[4]

The Value of Open Communication versus National Security

Open communication is essential for the growth of knowledge and remains one of the fundamental values at distinguished universities. The results of research at universities should promptly enter the public domain. Open communication allows results of experiments and assertions of fact to be critiqued. Only through publication, with the accompanying detailed description of techniques and methods, can work be replicated or falsified. An absence of detailed description of how experiments were conducted prevents the growth of knowledge since it limits scientists' understanding of the basis of claims of novel discoveries and it impedes the process of building on the work of others. Consequently, withholding discussions of methods or tools used in experiments undermines the value of the scientific contribution. During the Bush years the government tried to impose prior restraint rules on publication of scientific papers (mostly in the biological sciences that have used lethal viruses and bacteria, that is "select agents," noted above) that it argued could fall into the hands of terrorists who were trying to create biological weapons. Of course, the government and the scientific community have legitimate interests in knowing where certain dangerous bacterial

agents and toxins are stored and who is working with them. While bioterrorism must be taken very seriously as a threat to national security, the real question is whether the censorship desired fit the size and nature of the problem identified. At least according to the conclusions of the National Academy of Sciences Fink Committee, the specific cases that led the government to threaten passing legislation that would censor scientific publications would not have prevented "enemies" from obtaining the information censored, nor was it likely to have done them any good. Responding to what might prove disastrous for scientific communication, and trying to forestall the legislation, editors of leading science journals set up their own review system. For biologists, more specifically, the problem is how they should handle "sensitive research" results and who should decide whether their results represent a security threat.[5] But the answer does not lie in government censorship.

The Integrity of Scientific Facts

I could provide scores of detailed illustrations of the ways that scientific inquiry was compromised during the Bush administration. Scientific integrity was under assault on many fronts. Some of the cases illustrative of these violations are better known than others.

The most visible one has been corrected by President Obama: the unnecessary restriction on the development of new lines of embryonic stem cells that could be used to study a plethora of ailments and diseases. While this is a moral issue for many Americans, roughly 60 to 70 percent of the public believes in the potential value of embryonic stem cell research and wants to see more of it. In fact, the embryos that were to be used for research would have come from those that were being stored and were going to be discarded with the consent of the donors. The Bush administration had limited federal funding support for work on the 20 lines already in existence when Bush took office. Early action by President Obama has opened this field, but only after other nations had already taken the lead in this potentially critical area of biological research.

One of the more pernicious assaults on scientific integrity resulted from efforts by President Bush's political appointees to warp, distort,

and censor scientific facts. As noted above, there are important but relatively obscure efforts by the administration to shape people's thinking about reproductive health, birth control, and the use of condoms rather than abstinence as a birth control method.

Another example of an egregious effort to politicize science came when NASA tried to control the content of James Hansen's speeches and scientific talks and publications about the human influence on global warming. If there are better climatologists in the world than Jim Hansen, who works for the Goddard Space Center run by NASA and Columbia University's Earth Institute, you would be hard pressed to find them. Hansen has studied the processes of global climate change for decades and has been one of the most respected voices in assessing models of this change. He was a close adviser on the subject to Vice President Albert Gore. When he, like almost all respected scientists, concluded that the data overwhelmingly supported the conclusion that global warming was rapidly altering our environment and that strong international intervention was necessary, that conclusion conflicted with official Bush policy. Efforts were made to have Hansen's speeches and talks edited prior to presentation by political appointees and on occasions edits were made in his work without his consent. Hansen was not about to cave to such political pressure and went public. The administration backed away from this censorship, denying that it represented a flagrant attempt to have science comply with ideology. But the evidence overwhelmingly suggests that ideology was the basis for the efforts to muzzle James Hansen. When scientific facts become "negotiable," then the academic and scientific communities are in deep trouble.

The efforts to shape academic research reached into the social and behavioral sciences as well. When it came to light in the Republican-controlled Congress during the height of the Republican's assault on free inquiry that the NIH had funded through its peer review process a project in San Francisco that looked at the transmission of the HIV/AIDS virus through sex workers, staff members of powerful congressmen called NIH Director Elias Zerhouni on the carpet. They asked for explanations why the NIH had funded this and other projects that offended

the political right of the party, and suggested that the funding should be withdrawn and the researchers forced to provide federal authorities with the names of the sex workers who were participating in the study and, according to a committee staffer, were committing "crimes."

The national peer review system and the longstanding belief, supported by Supreme Court decisions, to grant autonomy to universities to shape their own curricula, also were under attack. The Bush administration and Congress during the seven years following 2001 tried to shape the outcomes of government oversight panels and peer review efforts by adding political appointees to these committees. From the committee studying ethical questions associated with stem cell and other forms of biological research, the administration tried to add people to national committees whose ideological beliefs were consistent with its own, and, correlatively, tried to prevent highly qualified scientists from joining the committees after being recommended by members. The basis was simple: Were their stated positions consistent with the administration's policy positions? When Title VI National Resource Center Programs, which support areas studies programs at major universities, came under attack from conservative interest groups and their leaders, like Daniel Pipes and David Horowitz, Congress tried to pass legislation embedded in the reauthorization of the higher education act that would have external, nonacademic, monitors of the curricula of these programs to ensure that they did not have an anti-American bias. In short, the government began meddling into the content of the curriculum of area studies programs. After a tremendous amount of protest from the universities, the provision was watered down to eliminate monitors in the classroom, but it did not entirely remove some oversight of these programs by individuals who were hardly qualified to do so.[6]

One might conclude from this description that the Bush administration policies were aberrational. They were the unfortunate outcome of a misguided political administration that was in power for eight years. All of that should change, one might think, now that there has been a change in administration. I have no doubt that President Obama and the science advisers that he has appointed will try to right many of

the wrongs that took place over the past eight years. However, it will take more than Obama and his advisers to make meaningful change. And it is anything but clear that the huge Democratic majority in the 2009 Congress is inclined to reverse many of the most insidious and dangerous policies that were put into place after 9/11. Thus far, few changes in the Patriot Act or the Bioterrorism Defense Acts have been entertained, much less embodied in new legislation. The jury remains out on whether the Obama administration can persuade members of Obama's own party that these policies are damaging academic freedom and free inquiry at our universities—and that this damage disrupts the most significant engine of scientific and technological discovery and innovation that our nation possesses.

PART II: THE HERD OF INDEPENDENT MINDS: THE TENDENCY TOWARD INTELLECTUAL ORTHODOXY AS A THREAT TO ACADEMIC FREEDOM

Academic freedom and tenure combat the tendency of professors and students to sit on their hands and remain mum when they believe that their ideas and research may offend those who adhere to an ideologically "correct" way of thinking. But there is huge pressure toward ideological conformity within universities, as elsewhere, and universities, like other institutions, tend not to be tolerant of those in their midst who are courageous enough to challenge prevailing systems of thought. If the essence of a university is to be tolerant of all points of view that can be supported by evidence, then the most basic beliefs must be open to questioning within the academy. Yet they often are not. The limits placed on free inquiry within the academy threaten the realization of that ideal as much as threats from beyond the university campus.

In truth, there is both intellectual and personal risk involved in challenging the presumptions of the group. The weight of the community on the individual scholar is found in the way those who challenge "groupthink" are treated. More often than not, it's the faculty, not administrators, who define and enforce dominant orthodoxies. Sometimes a scholar harboring an unorthodox view may not be able to obtain a position at a major research university as easily as one with

a more orthodox outlook, regardless of the quality of his or her mind and evidence.

The tendency toward orthodoxy is also felt in campus life and in the treatment of students. At universities it has become difficult even to discuss certain topics or to suggest ideas that offend some significant part of the academic community. What academic leaders not looking for a good fight would tell "Take Back the Night" students, who were marching to protest the failure of the administration to show greater concern with sexual assaults and to toughen up its sanctions in the university's sexual harassment policies, that they question the validity of the group's data on the percentage of young women who were victims of date rape? When any group of students asserts that the university is not sufficiently protective of its rights, to say nothing of its feelings, most administrators think first about how to redress the grievance rather than to investigate whether there is a basis for grievance. Bad things do happen at universities, which are no more immune from the malicious and unsavory behavior of some of its community members, than is the larger society. Rather than viewing the unconventional thinking as an appropriate challenge to received wisdom and ideology, those being challenged often become defensive, and these questions, even if posed in the most neutral of forms, get people into trouble.

The remarkable thing about these retreats from the ideal of freedom of expression and inquiry is that liberals have been as responsible for them as conservatives. In the 1990s, there were cases involving opprobrious speech by students on campus that led to the adoption of speech codes, sensitivity training, and pro forma statements of moral outrage from deans, university presidents, and provosts, to say nothing of faculty members. They all tended to lose sight of the principles of academic freedom and protected speech. One case at Yale Law School followed the rape of a white female law student by two black men in New Haven. Following the incident, according to one account, "ten black law students found in their mailboxes a note about the incident which ended with the sentence: 'Now do you know why we call you NIGGERS?'"[7] The author of this letter was not identified. The law school

faculty surely did the right thing by expressing its sympathy for the affected students and condemning the content of the letter. But the dean of the law school went further, linking the incident to the racism of the institutions in which we live and therefore suggesting that all of the Yale Law School community was implicated in this despicable act—transforming the situation of an unknown individual letter writer to collective guilt.

When asked what ought to be done to the letter writer, the dean replied, "For myself, I am convinced that there is no place in this school for such vicious cowards." Some 300 students subsequently signed a petition to the same effect. At the time, the question of sanctions was put to Yale's president, Benno Schmidt, himself a former dean of the Columbia School of Law, who aptly responded: "Freedom of speech protects cowards, too." I use this illustration not only to convey the power of collective thinking in subverting the principles of free speech, but also to point out its coercive effects on dissenting views. Schmidt may have been right, but I am sure he was not a popular man at Yale for his comment. And what about the rush to judge and expel three lacrosse students at Duke University in 2006 who attended a stripper party and were accused by one of the strippers of rape? The North Carolina attorney general later dropped the charges against them, finding that the allegations were false, and the media exposed a series of missteps by law enforcement authorities in the case.

The diversification of the university community that was brought about by opening its doors to talent and by special legislation, often opposed—ironically—by liberal professors in the 1950s and 1960s who wanted nothing of affirmative efforts to diversify the university student bodies and professoriate, produced dogma about privileged knowledge. This knowledge was not privileged because of the depth of one's research and expertise, but on the basis of social status and group identities. The diversification of student bodies and faculties should have led to a more interesting collaboration in problem solving and collective thought, but for a good deal of time it has discouraged debate. As the Yale literary scholar David Bromwich, puts it,

> One response to the new demographics of universities is to pay constant attention to the different beginnings of the new students and use the university as a place for diversified social reinforcement. What it says the students are, on their race-class-gender chart, they will now learn themselves to be—but more proudly and resourcefully than before. A different response would be to treat the students as equally enlisting in an intellectual life and varying unpredictably in what they make of that life: they are taken to be equals in this above all. To raise the second view is I think to bring out the strangeness of the first: how socially oriented it is—always to a social result and a sociable feeling—and by the same token how anti-intellectual (Bromwich 1994: 41).

It is, in fact, far easier for student and faculty to be part of group thinking than to question the prevailing wisdom. At universities, scholars, scientists, and their students must be free to break away from the "herd of independent minds" as the art historian Harold Rosenberg put it—to take risks, without fear of formal or informal sanctions. The aim should not be institutional compassion, but truth seeking.

The academy's success at opening doors to students and faculty with different identities deserves praise of course—although it still far from achieving a true meritocracy. But in its fear of offending any of these groups, and in its resolution to reinforce distinct identities rather than to make a common effort to pursue truth that incorporates varying perspectives without privileging any identity, the university has often hindered open debate. The consequences of privileging groups on campus, according to Bromwich, is to restrict freedom of inquiry and thought:

> If academic life in America becomes less free in the near future, one way it may happen is by a series of concessions to the sensitivities of the advocacy groups. Divided by sex, race, class, or geography, these groups have little to say to each other: an educational address by Louis Farrakhan, solicited and admired by one group, will prove to be not

> what the others had in mind at all. But communication is not what they seek in any case. Beneficiaries of institutional compassion, they want to control the scene of education to assure that nothing wrong, or strange, or possibly injurious to the group-esteem of their members, gets said in the public forum of the classroom or the quad. Success on their terms means that the liberal ideal of tolerance, which drew no comparable limits around permissible speech, will have been exposed as part of the imperial ethic of the West. The defeat of the latter entity will have been worth the sacrifice. But that is to look far ahead. In the meantime, sects like these in their present state can weaken the resources that make for uncoerced discussion at a university. For they naturally defend against one kind of knowledge—the kind that challenges the protective instinct of group identity (Bromwich 1994: 45-50).

Bromwich was criticized for these comments by the powerful majority in the academy, despite the fact that he was simply enjoining us to risk giving up our primary identities and privileges for the possibility of gaining through knowledge generated by truly free discussion.

Tenure does provide limited protection from formal sanctions for scholars taking on generally ideologically prohibited subjects. But it does not secure those same scholars from contempt from their colleagues. Take the example of the topic of female circumcision, or female genital-cutting. There are strong ideological forces both inside and outside of the academy that conclude, without much evidence, that this widespread practice among African cultural groups is repugnant, morally despicable, and clearly an example of the oppression and coercion of women in those cultures. Nonetheless, Richard Shweder, a University of Chicago anthropologist, and others have had the intellectual courage to confront the prevailing ideology that attacks this custom without much evidence about local culture. Shweder has raised serious questions about this cultural practice, speculating about why millions of African women not only accept but also embrace it. Why

have we passed laws against the female-circumcision practices engaged in by some subcultural groups, such as Somali immigrants, in America, despite the fact that we fully accept male circumcision? Regardless of whether Shweder and his colleagues are right, or whether you accept or reject his evidence, he is right to raise the questions and to expect that we will consider examining the evidence, trying to overcome whatever biases and presuppositions we brought with us to the discussion in order to understand his viewpoint and that of the African cultures engaging in the practice. But without tenure, I'm not sure that even a person with his intellectual courage would have made this project his first as a junior faculty member.

In fact, academic rank may have less to do with the willingness to take personal as well as intellectual risks than sheer intellectual courage. And intellectual courage, which is needed in abundance within the academy, is, unfortunately, in short supply these days. It takes a great deal of such courage for individuals within the academy to stand their ground and make their arguments, no matter how brilliant these arguments may be, in the face of overwhelming group pressure. And it takes personal and intellectual courage as well to come to the defense of those who raise such questions (even if you disagree with them), especially among academic leaders who may be able to use the opportunity presented by the situation to reinforce the value of free inquiry.

All of this suggests that despite the ideal of free inquiry at universities, there are numerous social pressures acting to limit or subvert it. Over the past decades we have witnessed a growing intolerance of tolerance itself. Part of this seems to be an impulse to construct a protective shield around our undergraduate students—*in loco parentis* carried to the extreme. The task of a committed and useful teacher is to force his or her students to recognize "inconvenient facts," as the brilliant sociologist Max Weber put it. The aim is not to offer a "balanced" view, or to present materials in such a way that no one is offended by the content, but to speak truth as the professor, as an expert in the field, knows it. It would be paternalistic, patronizing, and even insulting to treat very bright students to a benign presen-

tation of difficult subjects—an insult to their ability to distinguish arguments that are nothing more than assertions of fact, poorly formulated hypotheses, or theories without evidence from ones that are grounded in logic and supported by evidence. Education is a hard thing to obtain; so is an independent point of view that relies on higher levels of critical reasoning and analytic skills. But it does not come more easily in an atmosphere that refuses to challenge students and their prior beliefs about what must be true or factual. As a former president of the University of California once said, "The university is not engaged in making ideas safe for students. It is engaged in making students safe for ideas." Harvard's former president, Derek Bok, asked the rhetorical question, "Whom will we trust to censor communications and decide which ones are 'too offensive' or 'too inflammatory' or too devoid of intellectual content?" (Bok 1985: 4, 6) The answer, of course, is that no one can be trusted to do this. Instead, there must be an open dialogue, with each person weighing the arguments against the evidence for him or herself.

If universities coddled their students and other community members and prohibited expressions or displays that could be taken as offenses, or as affronts to someone's self-esteem, much would be lost in the academy. Limits on expression have found their way into a host of codes designed to prohibit offensive speech on campus. None of these codes at public universities have stood up to judicial scrutiny, and for good reason: they prohibit speech that would be protected for any citizen of the country.[8] Moreover, the idea that people have a right to self-respect and self-esteem, as Ronald Dworkin has pointed out, is absurd (1996: 196-197).

Harvard's literary scholar and public intellectual Henry Louis Gates, Jr., head of the W. E. B. Du Bois Institute at Harvard, has exposed the absurdity of some of the speech codes that have found their way into some of our greatest universities. Gates offered an example to demonstrate that prescribed limits on "hate speech" fail to address the real problems of stigmatization. He asked readers to contrast the following two statements addressed to a black freshman at Stanford (which, like the University of Michigan, had a speech code):

A. LeVon, if you find yourself struggling in your classes here, you should realize it isn't your fault. It's simply that you're the beneficiary of a disruptive policy of affirmative action that places underqualified, underprepared, and often undertalented black students in demanding educational environments like this one. The policy's egalitarian aims may be well intentioned, but given the fact that aptitude tests place African-Americans almost a full standard deviation below the mean, even controlling for socioeconomic disparities, they are also profoundly misguided. The truth is, you probably don't belong here, and your college experience will be a long downhill slide.

B. Out of my face, jungle bunny.

As Gates said, "Surely there is no doubt which is likely to be more 'wounding' and alienating to its intended audience. Under the Stanford speech regulations, however, the first is protected speech; the second may well not be, a result that makes a mockery of the words-that-wound rationale" (Gates 1996: 146).

All of this is to say that there is today at our great universities an insidious tone to a significant amount of discourse that avoids taking on orthodoxies and prevailing wisdom. In fact, there is false satisfaction in intellectual consensus and conformity that has not been earned. Conformity may sometimes occur because people are afraid to confront politically correct thinking; other times, it may be a calculated form of careerism, a way of pulling one's intellectual punches when one holds evidence to question beliefs that most in the academy take for granted. But either way, the result is a perversion of the ideal of a great university.

The growth of knowledge, insight, and understanding is better served through the contest between ideas than through the blind acceptance of dominant ideologies and the silencing of criticism. In fact, without those contests we cannot easily distinguish between truth and falsity. Truth rests less in product than in process. Great universities need to create a culture in which the brilliant intellectual maverick

or iconoclast, who supports ideas with evidence, is not apt to be a social isolate, if not vilified for questioning those "facts" and "truths" that are believed to be beyond doubt.

The trend toward ideological conformity and "group thinking" at the great universities has other disturbing consequences for the open discourse that we need and have come to expect. There is no room today for arguments and evidence that support, for example, that unequal representation of various groups (from their demographic proportions) in occupations is acceptable. To suggest that some groups are more likely to choose to be lawyers and doctors rather than scientists results from factors other than gender discrimination places the author of those ideas at risk. To suggest that affirmative action policies in university admissions is double-edged with a downside for minorities as well as an upside, places the proponent of such an idea at risk. To suggest that Israeli government policies toward the Palestinians is morally repugnant and that those policies do not, in fact, further American interests in the region, will almost inevitably lead to the author of such a position, regardless of the evidence, being skewered within the university as well as in the media. He or she is apt to be intellectually ostracized and possible vilified by colleagues, students, and certainly by external advocacy groups, funding agencies, and local and national political leaders. If you are a renowned critic you are apt to survive such blunt attacks, but if you are a junior faculty member without tenure, you probably have put your career at risk.

All of this group pressure to conform to the ideological fashions of the day, what is typically referred to as "political correctness," has a chilling effect on free discourse and the development of truth based on analysis, evidence, and argument. These contemporary patterns of behavior at even the greatest universities threaten the norm of academic freedom and the testing of ideas in the marketplace.

PART III: RETURNING TO FUNDAMENTALS

A remarkable aspect of the principles of academic freedom and free inquiry is how little these have changed since their original formu-

lation in 1915 and then their updating in the 1940s. Almost 70 years have passed since we took a serious look at these principles and asked whether they stood the test of time or were in need of serious revision given the changes that have taken place in the role of universities in our society.

Most university faculty members closely link academic freedom with free expression. Yet, as Robert Post and others have repeatedly told us, academic freedom was formulated not so much as a free speech issue as an effort to change the employment arrangements between faculty members and their employers (Post 2006). At the time of their framing, during the so-called Lockner Age (Lockner v. New York 198 U.S. 45 [1905]), employers held virtually absolute power to hire and fire faculty members, and the causes for dismissal could be as simple as trustees finding a faculty member's ideas opprobrious. The aim was to fix this and to bring the faculty into the normative process of evaluation in hiring, promotion, and firing. While not initially very successful, over time the balance of university power shifted toward faculty governance and control of key decision-making. While these labor relations were linked to free expression, Post reminds us that we should not think of First Amendment jurisprudence and academic freedom doctrine as synonymous. Yet, as much as First Amendment doctrine has had a dynamic history since 1915, academic freedom doctrine has hardly evolved at all. And, if you follow Post, you would conclude that the normative structure for peer assessments of quality does not require any serious modification. In a very serious critique of Post's position, Judith Butler has raised questions about the very foundations of the traditional ideas about academic freedom and expert knowledge (Butler 2006). Are the norms that govern peer review and decision making open to criticism and revisions themselves? How far can we go in questioning the very bases of competence and judgments about quality? I will return to these questions momentarily.

Academic freedom can be defended on intrinsic as well as pragmatic grounds. Many commentators on academic freedom see its value in the freedom to pursue ideas, theories, concepts, or whims that educa-

tors are interested in and that this is an essential part of the discovery and teaching process. Those who defend this point of view are less interested in the consequences of discovery and radical thinking than those who are particularly interested in the role that discovery and universities play in the national system of innovation. The more pragmatic defense rests on arguments about the good things that universities do for society. These defenders of academic freedom believe that the innovative process depends on this freedom and that the role that distinguished universities play in the production of social, economic, and scientific discoveries that transform our lives depends on defending that freedom. While I have argued elsewhere for the intrinsic value of academic freedom, I am particularly concerned how its abridgment can lead to a breakdown in the engine of change that universities represent.

In this sense, I think it may be time for us to move beyond the idea of academic freedom as attached principally to individuals, and from the relational concept of employer and employee rights, privileges, and obligations. We should consider academic freedom (and free inquiry) in broader sociological terms as an institutional and structural concept—one that is defined more precisely by what the profound philosopher and historian of ideas, Isaiah Berlin, called "negative liberty." Given the strides that we have made over the past 75 years in wresting decision-making control away from regents, presidents, and trustees and handing it over to competent faculty judges, we can use that as a point of departure. The role of the faculty in determining the contours of the curriculum, the standards of quality, the evaluation of candidates for jobs and tenure, is now firmly established in American universities. But what have not been well defined are the terms of the social compact between universities and the government and larger public, under which these external and often noncompetent judges stay out of the way of university decision-making. There is a good deal of acknowledgement by the courts, including the Supreme Court, and others of the importance of protecting the independence of universities from external intrusion, but a clear set of boundaries has never been articulated. On the contrary, as governments, both federal and

state, have expanded their role in financing higher education they have taken it for granted that they may intrude on the university's freedom and business in a whole manner of policy and regulatory ways.

Not all of these intrusions are harmful for universities, such as legal efforts to increase equal employment opportunities, and of course, institutions of higher learning must be accountable not only to the sources of their food but to the larger public that expects this institution to deliver the goods in terms of the transmission and creation of new knowledge. But when the government or nongovernment interest groups that influence government are able to intrude excessively in the running of universities, the seats of higher learning will be damaged, as will the process of innovation. This is precisely what Vannevar Bush feared in his post-World War II design for government support of university-based research through the use of taxpayer money to foster the growth of fundamental knowledge. His design called for a National Research Foundation (which eventually morphed into the National Science Foundation after the Congress got through with the proposals Bush put forth in *Science: The Endless Frontier*) that was freed from direct presidential control and congressional intrusion. Of course, at the end of the day, neither the executive nor legislative branches were about to permit such autonomy. But the question remains an open one: What should the rules of engagement be between universities who require this negative freedom and the powers that be? And who should decide on those rules?

This takes me back to Judith Butler's point. What happens to universities when their fundamental norms are themselves under assault and weakened—norms such as who is qualified to judge scholarship? Should we encourage such questioning of these norms from within the belly of the university, and is there any way of preventing it without ironically violating our own value of academic freedom? However, when the core values of the university are themselves challenged in ways that breakdown consensus, as they have been periodically in the visible humanities disciplines for the past 20 years or so, the robustness of the institution diminishes and the institutional commit-

ments to certain values and norms, like the norms that guide the application of the rules of academic freedom and free inquiry, can become attenuated and broad support for the norms can waver. The core itself begins to be questioned. At such moments, the university can seem in disarray and it becomes more vulnerable to external intrusions and abuses. The prince is more apt to prey on the weak than the strong here too. If it is an appropriate thing not to take fundamental values and norms for granted, are we risking the welfare of the institution both by not engaging in appropriate self-criticism about our governing rules and by accepting the consequences of self-criticism?

This dilemma is the subject of an interesting essay on academic freedom by Richard Rorty, who spent a good deal of his philosophical career questioning the nature of objective truth and consequently the essential norms that gave rise to the modern university—the enlightenment ideals about truth and objectivity (Rorty, 1996). But suppose those in strategic positions of power construct the "truth" and they control as well the peer-review system that metes out the rewards and recognition in the academic community. Who then are the qualified experts into whose hands we place tenure decisions, the future of the disciplines, and indeed the future of the university? And if there is no "there out there," why shouldn't those external to the university decide what constitutes facts, truth, and qualifications for tenure as well as those who have been certified to do so by their powerful professions? But it is clear, even for Rorty, that

> one of the things that accumulated experience has taught us is that universities are unlikely to remain healthy and free once people outside the universities take a hand in redrawing this line [between academic politics and the disinterested pursuit of truth]. The one thing that has proved worse than letting the university order its own affairs—letting its members quarrel constantly and indecisively about what shall count as science or as scholarship—is letting somebody else order those affairs (1996: 28-29).

Rorty also accepted the idea that at crunch time, one had better get behind the idea of academic freedom. "Dewey, I think," says Rorty, "would say that if it should ever come down to a choice between the practices and traditions which make up academic freedom and antirepresentionalist theories of truth and knowledge, we should go for academic freedom. We should put first things first." Rorty agrees with this, saying: "Nothing, including the nature of truth and knowledge, is worth worrying about if this worry will make no difference to practice." Then he goes on to say that one way of making a difference is to change what Wittgenstein called "the pictures that hold us captive" (1996: 35-36). I agree with this because in the history of our universities, this slow, often laborious process, of changing the "pictures" actually works. Fields are transformed; power is relinquished; new ideas, concepts, and theories take hold; new vitality is injected into the system. Yet turning away from the very tough challenges to the legitimacy of those who are anointed as the "competent" leaves one with a sense of copping out—of not being willing to be appropriately critical of our own enterprise and how it operates as a social system. This remains, then, an open question within the academy, but how to address such complex epistemological questions is not the central threat to academic freedom today. That threat lies elsewhere—in the power of the prince to subjugate those in our universities and undermine their search for original ideas that offend those in power.

If academic freedom is a necessary condition for true creativity, originality, and innovation, what limits should we place on government or other intrusions on our institutional freedom? The definition of those limits is, it seems to me, an important project that requires the engagement of those both inside and outside the academy. For if we are going to set such limits we will need those who are not insiders to recognize the critical nature of the decision: the very continued vitality of our great universities may depend on it.

NOTES

1. Here I assume the reader is familiar with the various rankings of the standing of the world's universities. Studies suggest that as of 2009 the

United States has roughly 80 percent of the world's top 20, 75 percent of the top 50, and about 55 percent of the world's top 100 research universities. Recognition for research accomplishments by the faculty at these universities, which weighs heavily discoveries and recognition for them, tends to place greater emphasis on the sciences and engineering than on the social and behavioral sciences and humanities. Germany, which dominated the set of the very best until that fateful day that Hitler came to power in January 1933, no longer can boast one in the top fifty. Other indicators of our world leadership and preeminence are receipt of honorific awards, such as Nobel Prizes, which we continue to dominate; or the proportion of the most highly cited research papers in most academic fields. In short, the United States today is the envy of the world in higher education and, in a world that increasingly recognizes that in the twenty-first century knowledge will determine economic welfare and growth through discovery and innovation, this leadership is of the greatest societal value.

2. Another case worthy of note is the saga of Dr. Steven J. Hatfill, whom Attorney General John Ashcroft labeled as a "person of interest" in the FBI investigation of the anthrax mail attacks in the fall of 2001, which caused the death of five people and illness in others. You may recall that several letters containing anthrax were sent to members of the media and to Senators Thomas A. Daschle and Patrick J. Leahy. The FBI interviewed hundreds of scientists and others who worked in fields related to biological weapons. Hatfill never had worked with anthrax and willingly cooperated with the FBI. He volunteered to take a lie detector test—which he passed, according to the examiner, suggesting that he had nothing to do with the anthrax attack. Nonetheless, in the months that followed, the attorney general focused the public's attention on Hatfill as if he were a suspect. Hatfill was fired from his job at Louisiana State University when its chancellor, with some prompting from the Justice Department, said,

> After careful thought and consideration, I have decided that it is in the best interest of Louisiana State University

> to terminate its relationship with Dr. Steven Hatfill. . . . In taking this action, the university is making no judgment as to Dr. Hatfill's guilt or innocence regarding the FBI investigation. Our ultimate concerns are the ability of the university to fulfill its role and mission as a land-grant university, to fulfill its contractual obligations to funding agencies and to maintain academic integrity. In considering all of these objectives, I have concluded that it is clearly in the best interest of LSU to terminate this relationship (Louisiana State 2002).

The chancellor's statement makes one wonder what the role and mission of LSU actually is, if it is not to defend principles of freedom of inquiry and attacks on a member of its faculty or research staff against whom no charges have been made. The university seems to have succumbed to the pressure placed on it by the Justice Department to terminate Hatfill's employment. His career in ruins, Hatfill sued the government and eventually settled the suit for over $5 million.

3. Here I refer to the "Enhanced Border Security and Visa Reform Act of 2002" and the USA Patriot Act. The Bush administration also used immigration policy without legislation in its attempts to limit access to American universities for people who came from a set of countries that it designated as supportive of terrorism, but it also included countries such as China and India.
4. The Bush administration restricted active participation of foreign scholars in the American academic community through its embargo on trade with countries allegedly linked to terrorist activities. One example will give you the idea of the absurdity of some measures taken.

   Thousands of Iranian scholars, scientists, and engineers have studied over the past four or five decades at American universities. They have become members of the international community—and this is particularly so among engineers. When Iranian engineers attempted to publish their scholarly papers in an American journal,

the government refused to allow the editors to make any comments, suggestions for revisions, or changes in the manuscripts submitted for publication. This constituted an offense to the embargo on providing these suspect nations with technology and information that could aid them in their support of terrorism. The conditions were so restrictive that the editors of the journal refused to allow Iranian authors to submit papers for publication until this restriction was lifted. An Iranian engineering community, which held highly positive views about the United States, was being systematically alienated.

5. Not since the Cold War and the work by nuclear physicists during that era has the tension between national security and the rights of scientists to publish freely been so dramatic. During the early phases of developing nuclear fission and the atomic bomb, American physicists faced the dilemma of whether they should publish results of experiments that were important and clearly of use to German scientists. The great physicist Leo Szilard and his colleagues debated this issue. There were significant differences of opinion among the physicists whether their results could, in fact, be kept secret and whether scientists ought to be censoring the reports of their discoveries. The government clearly wanted to restrict the release of the important discoveries that were being made at the universities. At the end of the day, the small band of extraordinary physicists decided to restrict access to some of the knowledge that they had developed.
6. The assault by the government and private interest groups on the peer review system was not limited only to government-sponsored research. The pressure to conform to the political agenda of conservative organizations influenced the work of private foundations as well. One stark example was an attempt to shape the grant policies of the Ford and Rockefeller Foundations because of their alleged support of a Palestinian group that purportedly was linked to terrorist activities. Without any substantive evidence, a claim appeared in a Jewish weekly publication that the Ford Foundation had supported groups that had been highly critical of Israeli government policies. This activated some members of Congress, particularly those who had large Jewish constituencies in New York and elsewhere, to threaten legis-

lative hearings regarding the policies of nonprofit foundations. As a result of blatant pressure, Ford publicly offered a mea culpa and ordered its grants officers to require all recipients of Ford grants to sign a statement that no funds (not limited to Ford funds) were passing from the university to any group that could be considered by the government as associated, either directly or indirectly, with terrorist activities. The policy was deeply offensive to the Ivy League institutions, whose provosts negotiated a limitation of this policy for grants awarded to their universities. But the policy remained in place and suggested that Ford had simply caved into the political pressures of the day—pressures from sources that covered a wide ground of political territory. Of course, no institution need accept Ford Foundation funding, but creating a policy that brazenly affronts the basic idea of free inquiry and academic freedom does as much harm to the foundation as it does to the universities who refuse to comply with Ford's wishes. For a much more detailed discussion of this incident and its effects on academic freedom, see Cole (2010, forthcoming).

7. Here I follow closely the description of the case in David Bromwich (1994: 33–34).
8. When we deal with the First Amendment in academic settings, we must remember that state and private universities are subject to very different constraints. Private universities are not regarded as "state actors," and consequently, constitutional constraints on free speech are not applicable to them in the legal sense. Public universities are subject to the same free-speech doctrine that any citizen or legislative body must uphold. Thus we have few rulings on speech codes enacted at private universities. Of course, the moral or ethical dimensions of First Amendment doctrine for speech codes at private universities are reasonable subjects for discussion. I do not see the argument for distinguishing public and private universities as outweighing the value of applying First Amendment doctrine to private institutions. An example of the constraints placed on expression at a public institution can be seen in the policy on Discrimination and Discriminatory Harassment at the University of Michigan in 1989. It subjected people to discipline if,

in educational and academic centers, they engaged in: (1) Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that a) involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or b) has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or person safety; or c) creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities (Greenawalt 1995: 72).

REFERENCES

Bok, Derek. "Reflections on Free Speech: An Open Letter to the Harvard Community." *Educational Record* (Winter 1985).

Bromwich, David. *Politics by Other Means: Higher Education and Group Thinking,* (New Haven: Yale University Press, 1994).

Butler, Judith. "Academic Norms, Contemporary Challenges: A Reply to Robert Post on Academic Freedom." *Academic Freedom after September 11* (New York: Zone Books, 2006).

Chang, Kenneth. "30 Plague Vials Put Career on Line." *The New York Times,* October 19, 2003: 32.

Cole, Jonathan R. *The Great American University: Its Rise to Preeminence; Its Indispensable National Role; Why It Must Be Protected* (New York: Public Affairs, forthcoming 2010).

Dreifus, Claudia. "The Chilling of American Science: A Conversation with Robert C. Richardson." *The New York Times,* July 6, 2004: D2.

Dworkin, Ronald. "A New Interpretation of Academic Freedom." *The Future of Academic Freedom.* Ed. Louis Menand. Chicago: University of Chicago Press, 1996.

Enserink, Martin and David Malakoff. "The Trials of Thomas Butler." *Science* 302:5653 (December 19, 2003).

Gates Jr., Henry Louis. "Critical Race Theory and Free Speech." *The Future of Academic Freedom*. Ed. Louis Menand. Chicago: University of Chicago Press, 1996.

Greenawalt, Kent. *Fighting Words: Individuals, Communities, and Liberties of Speech.* Princeton: Princeton University Press, 1995.

Kalven Committee. Report on the University's Role in Political and Social Action: Report of a Faculty Committee, under the Chairmanship of Harry Kalven, Jr. Published in the *Record* 1:1 (November 11, 1967).

Louisiana State University, Office of University Relations, "Chancellor Announces Decision to Terminate Steven J. Hatfill," September 3, 2002.

Menand, Louis. "The Limits of Academic Freedom." *The Future of Academic Freedom.* Ed. Louis Menand. Chicago: University of Chicago Press, 1996.

Post, Robert. "The Structure of Academic Freedom." *Academic Freedom after September 11.* Ed. Behara Doumani. New York: Zone Books, 2006.

Rorty, Richard. "Does Academic Freedom Have Philosophical Presuppositions?" *The Future of Academic Freedom*. Ed. Louis Menand. Chicago: University of Chicago Press, 1996.