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ACADEMIC FREEDOM

LARRY ALEXANDER*

The subject I am here to discuss is academic freedom.¹ We are well aware of many of the events that have spurred renewed interest in this topic, some of which have involved this very university. I hope what I have to say will stimulate further thought on the topic. Indeed, I hope that it stimulates, not merely further thought, but thoughtful reforms of practices that are all too common across higher education, as well as here in Boulder.

I do not have any special credentials to bring to bear on academic freedom. Although I have written occasionally on the topics that I shall take up in a moment, most of my scholarship has been in the areas of constitutional theory, criminal law theory, and legal philosophy. Only the first—constitutional theory—has even the slightest relevance to academic freedom through its inclusion of freedom of speech. Indeed, I have written extensively on freedom of speech.² Nonetheless, the relation between freedom of speech (and belief) and academic freedom is not, I believe, where the action is, or at least should be. Accordingly, let me spend a moment explaining why the topic of academic freedom should be separated from that of freedom of speech.

To begin with, the rights of private colleges and universities to express their views of the world—through the content of their curricula and concomitantly through their hiring and tenuring criteria—necessarily means that professors at such schools may not express contrary views without fear of adverse job implications. Put more simply, freedom of speech for private school employers means no freedom of speech for their employees while acting within the scope of their employment. Pri-

* Warren Distinguished Professor, University of San Diego School of Law. I wish to thank the organizers of the conference “Horowitz, Churchill, Columbia—What Next for Academic Freedom?,” Richard Collins and David Mapel; the commentators on my paper, Paul Campos and Sienho Lee; and the other participants and members of the audience. I particularly wish to thank David Mapel, Robert Nagel, and Steve Smith for their very helpful suggestions. Finally, I wish to thank my research assistants, Rebecca Byrne and Mark Rackers, and the editors of the *University of Colorado Law Review*.

1. Professor Alexander’s article specifically targets the academic legal audience. He feels this audience, which shares a similar background to himself, will understand the material he discusses without need for extensive references. Thus, he elected to refrain from footnoting this article in great detail.

2. See, e.g., LARRY ALEXANDER, *IS THERE A RIGHT TO FREEDOM OF EXPRESSION?* (2005).

vately-funded Marxist University may refuse to hire those who oppose Marxism, refuse to promote or tenure those who write anti-Marxist scholarship, and require adhering to a strict Marxist line in course content.

Freedom of speech for professors at public universities is a more muddled subject. Sometimes the Supreme Court appears to treat public universities as just ordinary public fora, like streets and parks, where all views must be allowed to be expressed.³ At other times, the Court seems to think that government may speak through the institutions that it funds, implying that if it wishes, a public university may act like private Marxist University in dealing with what its professors teach and write, or at least write for purposes of promotion and tenure.⁴

I have written about the Janus-faced nature of First Amendment jurisprudence when it comes to publicly-subsidized speech, and I have no fresh insights on the topic.⁵ I will assume here that freedom of speech is not going to provide any legal support for academic freedom. In any event, because we tend to believe that academic freedom has a place in private universities, we need to look beyond free speech to get a grip on its meaning.

If academic freedom is not some legal right derived from the First Amendment, what is it, and what is its importance? To put it succinctly, academic freedom is that freedom from fear of job reprisals that is necessary for academics to function as academics. As such, it is a privilege of academics that carries with it a responsibility, namely, to act as academics.

What is it then to act as an academic? It is, first and foremost, to follow arguments and evidence where they lead without regard to whether they will support one's political goals or enhance one's popularity or reputation. The true academic is an advocate only for his arguments and evidence. He is the antithesis of those who know the conclusions they wish to reach and cast about for only those arguments and that evidence that can be marshalled in support of those conclusions.

Across a multitude of disciplines today, political polemics and advocates—wearing only the lingerie of scholarly dress—are passed off as worthy of hiring, promotion, and tenure. If academics are functioning not as academics but as political advocates, then they do not merit academic freedom. If politics is the game, then politicians representing the public have every right to enter it and call the shots. Of course, that would spell doom for the ideal of a university. However, such an ideal is

3. See, e.g., *Rosenburger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

4. See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991).

5. See ALEXANDER, *supra* note 2, at 78, 176.

already doomed if academics are not acting as academics. There is no university worthy of saving from the war of who is more politically correct than whom.

Let me be more specific. Most disciplines worthy of being called disciplines and represented in universities are concerned with claims that fall into one of three large categories. The largest category is that of descriptive claims—claims about the past, the present, and the future. Descriptive claims in the hard sciences come in all three varieties. In the social sciences, historians in history, political science, sociology, and economics departments make claims about the past. Sociologists, political scientists, and economists make claims about the present and provide models for predicting the future. There are well-established criteria for determining whether their evidence and arguments satisfy disciplinary standards. (If there are not, then the discipline is not in fact a discipline.) Natural and social scientific claims should be assessable with respect to whether they meet appropriate standards of argument and evidence without regard to the assessor's political sympathies.

There are other disciplines within the university whose knowledge claims are not descriptive of the past, present, or future. Normative claims are a branch of philosophy, and there are well-established disciplinary standards for assessing such claims that do not depend on one's normative commitments, or at least not on one's superficial normative commitments. John Rawls and Robert Nozick were both fine normative philosophers, worthy of their Harvard appointments, but they disagreed considerably over what is just.⁶ Nonetheless, despite those disagreements, each could recognize the other's academic merits.

Finally, there are conceptual knowledge claims that make up a considerable amount of what philosophers do and are the staple of logicians and mathematicians. The descriptive claims about past, present, and future; normative claims, and conceptual claims make up the vast bulk of the claims that academics make and for which academic freedom—the freedom to investigate such claims and follow the arguments and evidence wherever they lead—is of overwhelming importance. Also, as I said, there are available nonpolitical standards for assessing such claims and the adequacy of their supporting evidence and arguments. So long as those standards are being applied to determine who is a scholar and teacher worthy of hiring, promoting, and tenuring, the academics and their departments are fulfilling their academic responsibilities, and aca-

6. Compare JOHN RAWLS, *A THEORY OF JUSTICE* (1971), with ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

democratic freedom is their due. They should be left alone by politicians and university administrators.

However, as I have said, too many academics are not fulfilling their responsibilities as academics. They are basing judgments on political rather than academic criteria. Those in the hard sciences are largely exempt from this indictment, though not entirely, as events at Harvard last year and the Jensen/Shockley controversy a few years ago illustrate.⁷ As far as I am aware, most of philosophy and all of mathematics are in good shape, as is economics within the social sciences. Further, there are many working within history, sociology, political science, and law who are hard-nosed academics and who are maintaining academic standards in their disciplines as much as they are able.

Still, there has been increasing politicization and the concomitant de-academification of most of the social sciences and humanities. Showing one's political sympathies increasingly passes muster as scholarship, and crude political propagandizing increasingly counts as acceptable teaching. In law—my field—the necessities of professional training and the inclusion of large numbers of courses on business and commercial law in the curriculum tend to limit the politicization of the discipline, but in public and family law, a lot of the same politicization occurs that one finds in the social sciences and humanities.

What is an example of politicized scholarship? I have a huge file of actual examples, but I will illustrate the class of politicized scholarship with a hypothetical example. Consider a paper that decries the excessive power of white males. If the paper is an example of scholarship rather

7. Larry Summers, the president of Harvard, created significant controversy at a January 2005 conference on the under-representation of women and minorities in science and engineering. Summers suggested that women were under-represented because their math and science aptitude test scores reveal less variance than men's scores, a difference with a possible biological basis. He also argued that women are, on average, unwilling to make the same sacrifice of time to career that men are willing to do. Less controversially, he suggested a third reason might be discrimination. Lawrence H. Summers, Remarks at NBER Conference on Diversifying the Science and Engineering Workforce (Jan. 14, 2005), available at <http://president.harvard.edu/speeches/2005/nber.html>.

Others have created similar controversy by arguing that there is a direct link between IQ and race. RICHARD PEARSON & WILLIAM SHOCKLEY, SHOCKLEY ON EUGENICS AND RACE: THE APPLICATION OF SCIENCE TO THE SOLUTION OF HUMAN PROBLEMS (1992). See also Arthur R. Jensen, *Preface* to RICHARD PEARSON & WILLIAM SHOCKLEY, SHOCKLEY ON EUGENICS AND RACE: THE APPLICATION OF SCIENCE TO THE SOLUTION OF HUMAN PROBLEMS 1-13 (1992).

Paul Campos, in his commentary on this essay, suggests that I have been far too kind to the hard sciences and medicine, which he finds unduly susceptible to blinding ideologies. Paul Campos, *Three Kinds of Nonsense*, 77 U. COLO. L. REV. 901 (2006). He may be right. Nonetheless, however bad things are in the hard sciences, things are worse elsewhere in the academy.

than political polemics, it would have to deal with the following issues. What is the definition of power? How is such power measured? What do those measurements reveal? What is the definition of white male? What does it mean for white males to have power—is it merely the sum of individual white males' power, or is it something held collectively, and if so, how? What is the proper distribution of power of the type identified, and what normative theory established the propriety of that distribution? These questions could continue *ad infinitum*. The questions posed here are only some of the questions with which a scholar who makes such an assertion about white males' power would grapple. Such grappling, however, is the exception, not the rule, for claims of this type. Usually such a paper is pushing a political agenda—or a personal one—and the author feels no need to engage in the kind of precise argumentation and careful marshalling of evidence that exemplify truly academic work.

Why has this politicization of the social sciences and humanities occurred? There are several causes. One is the conflict-averse nature of most academics, which makes them reluctant to stand up to the moral posturing and bullying of more strident politicized forces. Another is general tendency of university administrators to grease squeaky wheels rather than replace them. Yet, two causes worth special citation are, first, the overwhelming political orthodoxy of the academy and, second, the marriage of identity politics with sophomoric post-modernism.

With respect to the academy's political orthodoxy, I am not so concerned with how it got that way as I am with the consequences of that orthodoxy in terms of the politicization of disciplines. It is my observation that some believe that the academy is politically orthodox because it discriminates against the politically heterodox and that others believe it is orthodox because more conservative types tend to elect business or the professions over the contemplative life. I have also observed that others still—usually the orthodox themselves—believe the academy is orthodox because those wise and learned enough to be eligible for academic careers, and virtuous enough to forgo the pursuit of wealth, will naturally tend to arrive at the same political conclusions.⁸

8. My experience has taught me that aside from the fact that those inclined towards liberalism are disproportionately disinclined to go into business and the professions and thus more inclined to become academics, there are reasons in addition to groupthink that explain why academic liberals become more dogmatically liberal and anti-conservative once inside the academy. Foremost among them being the orthodox academic's negative view of the free market.

Now the free market, buttressed by public education, has raised more people out of poverty than all government poverty and redistributive programs together have done. Nonethe-

less, the free market—and the bourgeois values that undergird it—is typically disdained, if not reviled by academics, at least academics outside of economics departments.

For one thing, the free market is disorderly, while the academic mind is attracted to rational planning and control and, thus, to statism. The academic looks at the free market and sees gigantic waste—the vast number of businesses that prove unprofitable and fold, and the incalculable misspent hours and dollars people invest in training and educating themselves for occupations that disappear or never materialize.

Further, the free market's rewards and losses do not track people's virtues and vices, and this offends the academic's sense of justice. Talent and effort do affect reward but surely in nowhere near a one-to-one ratio. Brute luck is an ineliminable element, and often the talented and hardworking suffer losses while the untalented and slothful reap gains. Even the gains to the talented and hardworking get extended to their less deserving families and associates as do the losses to the untalented and slothful to their more deserving families and associates. Moreover, the talents of the talented and untalented are arguably traceable to luck in the genetic and familial lotteries; and for some, so are the proclivities to hard work or sloth. In sum, the free market offends the liberal academic's sense that reward should track desert.

Still another shortcoming of the free market in the eyes of the academic liberal is its disruptiveness. It requires greater and greater mobility of both capital and labor. Family generations get dispersed geographically farther and farther from one another—in my generation, across the country, in my children's generation, across the world. Towns and even cities die. Traditional ways of life disappear. Wal-Mart replaces Mom and Pop stores. Cheap Chinese clothes cause the local textile company to fold or move. McDonald's supplants indigenous food purveyors across the globe, and so on.

Finally, liberal academics abhor what they believe to be a market-induced coarsening of tastes. They believe that the market not only breeds crass materialism but that the market also leads to less intrinsically valuable goods and services crowding out the more intrinsically valuable. As liberal academics see it, low culture, not high culture, is what the market begets.

However, on all these counts, liberal academics are suspiciously selective. For example, they do not typically decry their own rewards in the academy as unjust. How many people would love to have a job with lifetime job security, relatively high pay, considerable hourly flexibility, lengthy vacations, and paid sabbaticals, all in a very pleasant environment? Are all academics more virtuous than those who envy the academic's position? Of course not.

Moreover, the typical liberal academic is only too happy to take advantage of the bounty of the market. Not only does the wealth created by the market ultimately pay his salary, but it also provides him with untold amenities with which he would be loath to dispense: personal computers, DVDs, paperback books, cheap flights to Europe, and so on.

Liberal academics also frequently have an unrealistically romantic view of market-wrought disappearing cultural phenomena here and abroad. For example, they often believe that the poor of the third world would prefer the grinding poverty of their traditional economy to the increase of real wealth brought about through globalization of the free market.

As for the coarsening of tastes and crass materialism of the market, liberal academics are surely not immune. They can walk out of a colloquium on "equality of resources" and immediately begin discussing their new SUVs, getting their children into the best private schools, and their latest trip to Tuscany. It is not due to the rarity of the phenomenon that such terms as "limousine liberal" and "parlor socialist" have long been part of our vocabulary.

Indeed, it is the academic liberal, not the free market, who is the supporter of elitism; and it is the free market, not leveling of incomes, that supports the high culture that liberal academics esteem and that makes their own jobs and lifestyles possible. The free market brings the Wal-Marts where the poor shop and the mass-produced goods that the poor buy. The liberals prefer expensive coarse peasant bread sold in pricey grocery stores. The poor prefer the cheaper white bread sold at Safeway.

Ironically, at the same time the free market provides cheaper goods for the poor and thus makes them less poor than they would be were goods more expensive, the market also pro-

My own view is that the truth is probably some combination of discrimination against the politically heterodox and the fact that many conservatives elect careers in the professions. However, I am less interested in the why than in its consequences for the academy. It should be said that the degree of political homogeneity in the academy is mind-boggling.⁹ Usually, it seems to me that the same people who loudly extol the virtues of diversity for the academy draw the line at the rather superficial diversity markers of race, ethnicity, and gender and want to have no truck with the more profound markers of diversity such as politics and religion. The last thing these diversity proponents desire is an actual diversity of views. Rather, they want people of different skin tones who believe what they believe. It is reassuring, I suspect, to believe that those who hold heterodox views suffer from some defect of mind or of character that is disqualifying for a position in the academy. Whatever its cause or causes, the most significant consequence of the academy's political orthodoxy is that the academy becomes blind to politicization of scholarship. If everyone holds similar views, then those views will tend to be asserted dogmatically rather than assessed, criticized, and defended as true scholars would. One of Mill's famous arguments for tolerating the expression of false views is that suppressing

duces a wealthy leisure class that supports investment—and thus future increases in everyone's standard of living—and that also supports the high culture that academic liberals esteem. Were incomes leveled and the means of production governmentally controlled, not only would the average income be far below what the free market would provide, but support for the arts and other aspects of high culture—including much of higher education in the humanities—would undoubtedly decline.

Nonetheless, the academic liberal is typically oblivious to these realities. To him, the free market, with its disorderliness, its apparent waste, its imperviousness to individual desert, its disruptiveness of traditional communities and ways of life, and its catering to low tastes, is the enemy. And if the free market is the enemy, so then must be those who support the market: academic conservatives. (So, too, must be those academic conservatives who support religion, the opiate of the superstitious masses, which helps keep the masses in thrall to capitalism but at the same time threatens the ascendancy of rationalist academics; though curiously, academics' disdain for religion extends only to the Judeo-Christian varieties and not to those of Native-Americans or indigenous peoples elsewhere, the religions of whom are treated much more respectfully, even if condescendingly so.)

Thus, if the academic conservative is on the side of the devil and academic liberals are on the side of the angels, it is an easy next step for academic liberals to demonize academic conservatives as persons. Not only are their views wrong, but they, as people, must be morally deficient even if they are intelligent. Academic conservatives, to academic liberals, are then either too dumb to be hired or too immoral to be. Indeed, if they are smart, they are not only immoral but quite dangerous.

9. See, e.g., Daniel B. Klein & Charlotta Stern, *Political Diversity in Six Disciplines*, ACAD. QUESTIONS, Winter 2004/2005, at 40; Daniel B. Klein & Andrew Weston, *Voter Registration of Berkeley and Stanford Faculty*, ACAD. QUESTIONS, Winter 2004/2005, at 53; John Tierney, *Where Cronies Dwell*, Op-Ed., N.Y. TIMES, Oct. 11, 2005, at A23; John Tierney, *Why Righties Can't Teach*, Op-Ed., N.Y. TIMES, Oct. 15, 2005, at A19.

them would tend to turn true views into empty dogmas and thereby weaken them in confrontations with strong pretenders.

Even worse, as the story of the Emperor's New Clothes reminds us, if the politically orthodox views are incorrect, the fact that they are so widely held can lead those who might otherwise question them instead to see their "correctness" themselves. Indeed, the Emperor's New Clothes is in my experience the most depressingly apt allegory for academic political fashions. Academics are no more immune to the herd mentality than others.¹⁰

The marriage of identity politics—be it of race, ethnicity, gender, sexual orientation, or disability—and silly post-modernism is the other major culprit in the de-academification of the academy. In fact, I think it is the biggest culprit. Painted with a very broad brush, the story goes like this: at some point, the legitimate concern to eliminate racial, ethnic, gender and other similar biases in university employment and admissions—in other words, the concern to make the criteria for academic success truly academic—began to give way to a concern with the representation of various groups in the faculties and student bodies. Those two concerns are, of course, at odds with one another. However, because the former concern enjoys the deserved aura of being beyond question by right-thinking people, the latter concern sought to appropriate that aura for itself and mask its deep antipathy toward the principles of the former by deeming itself a logical extension of the former concern. After all, are not both concerns directed at the progress of certain groups?

The real answer is, of course, that they certainly are not. The former concern is about artificial obstacles to *individuals'* advancement, not about group representation. Nonetheless, the proponents of group representation managed to claim the high ground of civil rights and lay siege to the university under the purloined banner of anti-discrimination.

The problem that the group representation advocates faced in the universities was that traditional criteria for predicting and measuring academic success stood in their path. At first, the argument was that

10. What explains the overwhelming political orthodoxy of academics in departments that have not been politicized, such as those in the hard sciences, economics, and philosophy? Identity politics and sophomoric post-modernism cannot be the explanation, as it can be for other departments. My best guess is that it is some combination of the fact that the academy is generally more attractive to liberals than to conservatives and the fact that when social policy is not your area of expertise, you will likely adopt without much thought the political fashions of those around you—other academics, that is. Whatever the cause, this academic political orthodoxy will have effects across departments. Scientists, for example, will be less likely to feel embarrassed by shoddy polemics coming from those in ethnic studies or anthropology if the conclusions are politically congenial than if they are not. In other words, they are less likely to see a mess that needs to be cleaned up.

I thank David Mapel for pressing me on this point.

these criteria, though valid, should be relaxed somewhat for the sake of group representation. In other words, at first, increasing representation by so-called “under-represented groups” was acknowledged to require holding members of such groups to lower standards than others. The standards were still accepted as valid, however.

This strategy was doomed to failure because it was unrealistic both in terms of public relations and, more importantly, in terms of psychology. The idea that the university was discriminating against both better qualified students and better qualified faculty because of their race, ethnicity, or gender was a dog that would not hunt in terms of the general public. Universities first began to taste the forbidden fruit of wide-scale mendaciousness when it came to covering up how much they were lowering standards for certain groups, and mendaciousness tends to be chronic and metastatic once it takes hold.

Psychologically, the thought was anathema that one held his or her position on a faculty or in a student body despite the university’s verdict that one was less qualified than one’s cohorts of other races and of the opposite gender. One could respond to the psychological threat in two ways: one could resign one’s position, or one could deny that the standards employed in reaching that verdict were the proper standards to employ. For obvious reasons, the latter response proved to be the response of choice.

At this point, a crude form of post-modernism enters the scene to provide a façade of intellectual respectability to the attack on standards. For what if the standards by which to judge academic acumen and accomplishment are not eternal verities? What if instead they are merely culturally-specific and no better or worse—for there are no non-culturally-specific standards for better or worse—than standards that are specific to other “cultures”? Further, what if, say, blacks, Latinos, gays, or women have their own “cultures,” with their own standards for what is academically excellent?

If such relativism is not sufficient to discredit the prevailing “white male” standards, how about bashing the latter by linking them to something sinister-sounding like “white male privilege?” Indeed, why not lay all the evils of the world—colonialism, poverty, and war—to Europhallogocentric culture. (Forget the relativism: black, Latino, and women’s cultures are not only different but *better*—non-relativistically—than white male culture.)

If all criteria for measuring academic merit are “socially constructed”—and, in the case of the criteria I have been touting as the bases of acting as an academic, socially constructed by white heterosexual males to preserve their lion’s share of “power”—then there are no good

reasons for non-white, heterosexual males to accept such criteria. For these are the criteria that either limit their numbers in the academy or that stigmatize them as second-class within it. If the ascendancy of these criteria and the Hobson's choice that they present under-represented groups in the academy can be successfully challenged, no other reason stands in the path to block proportional representation.

That the way the "social construction of standards of merit" is bandied about in today's academic culture is absolute philosophical rubbish is a point about which I hope I can be brief.¹¹ There is, indeed, a quite respectable philosophical argument going back to Kant that our very perceptions of the external world are structured by categories of thought. Kant believed these categories were fixed; whereas after Kant, Hegel and his successors deemed the categories to be products of culture and its linguistic accretions. Kant also believed that behind the constructed phenomenal world lay the noumenal world of things-in-themselves. Kant's continental descendants, however, dispensed with the noumenal world: the socially constructed phenomenal world is all there is. Post-modernism is the heir to this philosophical tradition rejecting foundational claims about the nature of reality and proclaiming reality to be the product of categorization that is socially and historically contingent.

The post-modern view, like all thoroughgoing skeptical views about knowledge, is ultimately self-undermining. Like the claims to knowledge it debunks, it also purports to know something about the world. Moreover, its view that our categories are socially constructed is an "is" from which absolutely no "ought" follows. The post-modern view surely does not entail the claim that we cannot transcend our cultural categories. Rather, it merely entails the claim that, like the rebuilding of Neurath's boat at sea, transcending our cultural categories is something we cannot do all at once and that when we do it, we will be using the tools our culture provides us for its own transcendence. Ultimately, the post-modern emphases on social construction, perspectivalism, and the ubiquity of "interpretation" should be no more paralyzing in the normative, literary, and social scientific domains than in the hard sciences and mathematics. As Thomas Nagel has insightfully argued, although we can never fully

11. See, e.g., Anthony S. Wang, Note and Comment, *Demystifying the Asian American Neo-Conservative: A Strange New Political Animal?*, 5 ASIAN L.J. 213, 230 (1998) (using the phrase "social construction of standards and merit" in his discussion of the role of merit and standards with regard to ethnic background).

attain a “view from nowhere,” we can do better or worse in approaching such a perspective, both in scientific and in normative matters.¹²

The most sophisticated post-modernists, however, realize that nothing substantive, and surely nothing normative, follows from the post-modern point of view. Tell me over and over again that my thought that it is morally wrong to torture children for sadistic pleasure is socially constructed—a product of my time, place, language, or whatever—and you will not make even a dent in my belief that the view is correct. Tell me that the law of gravity is a social construction, and I will still not walk out my fourth floor window. (Nor, I might add, will any post-modernists I know. Neither they nor their insurance companies are post-modernists in their non-philosophic lives, nor could they be. That is my point.) Stanley Fish, an icon for many of the academic post-modernists who believe that the post-modern insight should topple the standards of merit and criticism that I deem definitive of the academic enterprise that merits academic freedom, himself understands that nothing—absolutely nothing—follows from his post-modernism.¹³ He understands, as most of his fellow travelers do not, that in recruiting post-modernism in its battle to dethrone the reigning standards, the identity politics crowd has enlisted an unarmed soldier. In a world where everything is point of view, reducing a position to a point of view cannot be a criticism of it, nor can it be a reason for its holders to abandon it. There is no post-modern escape hatch for the identity politics crowd when it is subjected to ordinary disciplinary standards of evidence and logical argument.¹⁴

12. See generally THOMAS NAGEL, *THE VIEW FROM NOWHERE* (1986) (discussing how to merge a specific person’s subjective viewpoint of the world with an objective viewpoint of the same world, the person and his subjective viewpoint included).

13. See, e.g., Stanley Fish, *Almost Pragmatism: Richard Posner’s Jurisprudence*, 57 U. CHI. L. REV. 1447, 1464–69 (1990). See also Larry Alexander, *What We Do, and Why We Do It*, 45 STAN. L. REV. 1885, 1896–98 (1993).

14. For an excellent philosophical critique of the various argumentative moves that post-modernists typically make, see Nicholas Shackel, *The Vacuity of Postmodernist Methodology*, 36 METAPHILOSOPHY 295 (2005). For a sampling of what post-modernists and the identity politics crowd have wrought at even our most prestigious universities, see Jason Mattered, *The Dirty Dozen: America’s Most Bizarre and Politically Correct College Courses*, Young America’s Foundation Dec. 21, 2005, http://media.yaf.org/latest/12_21_05.cfm. See also Heather MacDonald, *Don’t Fund College Follies*, CITY J., Summer 2005, available at http://www.city-journal.org/html/15_3_college_follies.html.

For an insightful essay on the identity politics crowd’s baleful influence on universities in general and law schools in particular, see David Barnhizer, *Old Revolutionaries, New Dictators: The Politicization of Scholarship in the Modern Law School* (Cleveland-Marshall Legal Studies Paper No. 05-102, 2005), available at <http://ssrn.com/abstract=684246>. See also ALAN SOKAL & JEAN BRICMONT, *FASHIONABLE NONSENSE* (1998); Mark Goldblatt, *Can Humanists Talk to Poststructuralists?*, ACAD. QUESTIONS, Spring 2005, at 57 (2005); Richard Rorty, *The Enlightenment and Postmodernism*, in *WHAT’S LEFT OF ENLIGHTENMENT? A POSTMODERN QUESTION* (Keith M. Baker & Peter H. Reill eds., 2001); Marie-Laure Ryan,

Because post-modernism of the type one finds on campuses today has no practical implications—indeed, it is self-undermining, because if everything is socially constructed, so too is the notion that everything is socially constructed—it turns out that the post-modernists have nothing of significance to say. The telltale sign of that is an “academic” literature characterized by turgid, obfuscatory prose and self-parodying gibberish.¹⁵ Once one picks up the vocabulary and gets a feel for how to string the words together, it becomes easy to produce books and articles. Having nothing to say beyond the usual “it is all socially constructed” riff is liberating. One need not pay heed to intransigent evidence and unyielding laws of logical argumentation. Those, too, after all, are socially constructed. The result is a library full of the types of articles so ripely parodied by Sokal in his famous hoax.¹⁶ Pulling off what Sokal did is, however, rather simple. If none of the literature has anything to say, and says it in the same way, telling the genuine from the spoof *is* impossible.

I close this part of the argument with a lengthy quotation from Princeton philosopher Harry Frankfurt’s recent little book entitled *On Bullshit*.¹⁷ After exploring the nature of bullshit, Frankfurt turns to speculating on why there is so much of it in the culture. After discussing

Truth Without Scare Quotes: Post-Sokalian Genre Theory, 29 NEW LITERARY HIST. 811 (1998).

For a small sampling of the type of post-modern “scholarship” that these authors and I are claiming is vacuous political preening rather than a serious academic attempt to understand what is or what ought to be, see, e.g., ROBERT G. DUNN, *IDENTITY CRISIS: A SOCIAL CRITIQUE OF POSTMODERNITY* (1998); ESTEVA GUSTAVO, *GRASSROOTS POST-MODERNISM: REMAKING THE SOUL OF CULTURES*, 110–151 (1998); Eileen Boris, *On the Importance of Naming: Gender, Race, and the Writing of Policy History*, 17 J. OF POL’Y. HIST. 72 (2005); Jenny H. Edbauer, *Executive Overspill: Affective Bodies, Intensity, and Bush-in-Relation*, POSTMODERN CULTURE, Sept. 2004; Paula Geyh, *Assembling Post-Modernism: Experience, Meaning, and the Space In-Between*, C. LITERATURE, Spring 2003, at 1; Christopher Kocela, *Unmade Men: The Sopranos After Whiteness*, POSTMODERN CULTURE, Jan. 2005.

15. Consider, for example, this sentence from one of the post-modernist/identity politics celebrities, Professor Judith Butler of the University of California at Berkeley:

The move from a structuralist account in which capital is understood to structure social relations in relatively homologous ways to a view of hegemony in which power relations are subject to repetition, convergence, and rearticulation brought the questions of temporality into the thinking of structure, and marked a shift from a form of Althusserian theory that takes structural tonalities as theoretical objects to one in which the insights into the contingent possibility of structure inaugurate a renewed conception of hegemony as bound up with the contingent sites and strategies of the rearticulation of power.

Judith Butler, *Further Reflections on the Conversations of Our Time*, DIACRITICS, Spring 1997, at 13–15.

16. Alan Sokal, *Transgressing the Boundaries: Toward a Transformative Hermeneutics of Quantum Gravity*, SOCIAL TEXT, Spring/Summer 1996, at 217.

17. HARRY G. FRANKFURT, *ON BULLSHIT* (2005).

a number of possible causes, Frankfurt ends the book with the following observation:

The contemporary proliferation of bullshit also has deeper sources, in various forms of skepticism which deny that we can have any reliable access to an objective reality, and which therefore reject the possibility of knowing how things truly are. These “antirealist” doctrines undermine confidence in the value of disinterested efforts to determine what is true and what is false, and even in the intelligibility of the notion of objective inquiry. One response to this loss of confidence has been a retreat from the discipline required by dedication to the ideal of *correctness* to a quite different sort of discipline, which is imposed by pursuit of an alternative ideal of *sincerity*. Rather than seeking primarily to arrive at accurate representations of a common world, the individual turns toward trying to provide honest representations of himself. Convinced that reality has no inherent nature, which he might hope to identify as the truth about things, he devotes himself to being true to his own nature. It is as though he decides that since it makes no sense to try to be true to the facts, he must therefore try instead to be true to himself.

But it is preposterous to imagine that we ourselves are determinate, and hence susceptible both to correct and incorrect descriptions, while supposing that the ascription of determinacy to anything else has been exposed as a mistake. As conscious beings, we exist only in response to other things, and we cannot know ourselves at all without knowing them. Moreover, there is nothing in theory, and certainly nothing in experience, to support the extraordinary judgment that it is the truth about himself that is the easiest for a person to know. Facts about ourselves are not peculiarly solid and resistant to skeptical dissolution. Our natures are, indeed, elusively insubstantial—notoriously less stable and less inherent than the natures of other things. And insofar as this is the case, sincerity itself is bullshit.¹⁸

Identity politics and post-modern “bullshit” have together served to free many academics from the rigors of evidence and logical argumentation. The message is that traditional criteria of academic merit can be replaced by political standards or standards of racial, ethnic, and gender “authenticity,” which turn out to be political as well. Being politically correct and from the right identity groups is all that is required to make it in the academy, so long as you can learn to master the ability to say nothing in the pretentious, self-important style of the day.

18. *Id.* at 64–67.

Where the identity politics/post-modernist crowd gains ascendancy in the university, the case for academic freedom vanishes. If there is no knowledge and if there are no disciplines because there are no standards of evidence and argument, then the reasons for academic freedom have vanished. Indeed, the case for universities and their departments has vanished. If knowledge is political, why not let the duly elected politicians determine what is true?

Of course, merely to state this shows how preposterous the identity politics/post-modern critique is. Nonetheless, its proponents have devastated modern language departments and ethnic studies programs. History, sociology, and anthropology departments are now battle grounds on most campuses, as are some law schools. In the social sciences, only economics and political science seem to have resisted the identity/post-modern assault, as has philosophy within the humanities. The hard sciences, medicine, mathematics, and engineering have largely been spared de-academification, perhaps because not even the identity politics/post-modern crowd wants to be operated on by post-modern surgeons or fly on airplanes designed by racially, ethnically, and gender-balanced committees of post-modernists.

To repeat my basic point: in those university departments where the identity politics and post-modernist assault has undermined traditional academic criteria of evidence and argument, there is no case for the protections of academic freedom.

Now let me turn to an objection to my analysis that I am sure will have occurred to some of you. I have asserted that almost all disciplines within the university deal in descriptive, normative, or conceptual knowledge claims and that there are well-established disciplinary standards for evaluating such claims that truly academic work must meet. Yet have I not neglected knowledge claims that are “aesthetic” or “interpretive?” For example, is an essay purporting to interpret *Moby Dick*, written by someone in an English department making an empirical claim, say, about what Melville actually intended to symbolize by the white whale or Ahab’s pursuit of him? (It is surely not a straightforward normative or conceptual claim.) Although there have been author’s intent schools of literary interpretation, there are surely many who deem literary interpretation to be something quite different. The same goes for criticism in the fine arts.

I shall call this fourth form of knowledge claim that is emblematic of much literary and artistic analysis and criticism an “interpretive” claim. Interpretive claims offer themselves as bases for understanding works of literature and art that are not reducible to straightforward factual claims, like what authors intended, or to straightforward value

claims. Interpretive claims present the literary or artistic work as a window through which to view basic truths about the human condition—its ambitions, foibles, tragedies, glories, virtues, and vices. A good interpretation or analysis guides the audience to the most perspicuous window the interpreted work makes available. Moreover, there is a real discipline involved here. There are real standards for what counts as a good or bad critical analysis. It is not just *de gustibus*.

I accept that there is this fourth type of knowledge that merits inclusion in the university. What, then, explains the hyper-political nature of, say, modern language departments on today's campuses? (I have been told that there are far more Marxists in the Modern Language Association than in those departments that actually study Marx.)

One answer that will not do is that in order to really understand the distinction between good and bad art and literature, one must have to have a combination of training, knowledge, and empathy that will naturally lead to a particular political point of view. Put crudely, only Marxists can truly understand what makes good literature and good art good. Republicans need not apply to be English professors, not because English departments discriminate against Republicans per se, but because it just so happens that no one can hold Republican views and truly understand what makes good literature good.

That story is too pat and convenient, and we shouldn't buy it.¹⁹ I suspect, rather, that the reason literature and art have become so politicized in the university is some combination of the following. First, the general consensus about just what is the human condition and what are human virtues and vices that lay behind "the canon" has broken down. The human condition is no longer seen as universal—trans-historical, trans-cultural, trans-racial, etcetera—but as relative to race, nationality, gender, and so forth. There is no canon because there are no universal truths that the canon reveals. The goodness of literature and art is relative to one's point of view. Authenticity is all that truly matters, and that clears the way for a political faction, once it is ascendant in a literature or fine arts department, to merrily replicate itself. There are no absolute standards that can be invoked against its doing so.

19. Nor should we buy a similarly pat and convenient story that suggests that the university has, as one of its legitimate goals, the making of "good citizens," and good citizens will have the values of—guess who?—the prevailing academic orthodoxy. According to this account, politicization is not antithetical to, but an essential part of, the university's mission. One sometimes hears talk like this from those who staff law schools' quite frequently politicized legal clinics. It should be rejected. The university is not the proper site for the inculcation of virtues other than academic ones.

I owe this point to Bob Nagel.

Second, and a less highfalutin explanation, is that playing politics is for many of the post-60s academics much more satisfying than coming up with one more analysis of *Hamlet* or "The Waste Land." Whichever explanation is correct, they both undermine the justification for treating literature and the arts as academic disciplines meriting inclusion in a university and the protections of academic freedom.

Of course, there are schools of literary and artistic "interpretation" other than the author's intent school and the one just described—psychoanalytic, New Criticism, and others—that I have neither the time nor competence to evaluate here.²⁰ What I will say is that if there are real disciplinary standards that can be applied within these schools of literary and artistic criticism, then they will not result in the kind of politicization and post-modern gibberish that has become so common in literature and arts departments.

There is another possible objection to my analysis that is more general than the one just entertained. That objection goes to the pride of place I have given to traditional disciplinary standards for assessing scholarship. Why, one might ask, should we indulge any presumption in their favor? Perhaps, it might be conceded, in the hard sciences and mathematics, the traditional standards have "delivered the goods" by producing tangible progress. We cure diseases, launch satellites, and build earthquake-proof buildings through research that conforms to disciplinary standards. However, outside the hard sciences, the predictive social and psychological sciences, and mathematics, what successes justify the presumption in favor of the established disciplinary standards?

In response I can do no better than to cite to remarks by the philosopher Judith Jarvis Thomson in a 1990 article.²¹ Thomson noted a common feminist complaint "that institutions of higher education are dominated by male-inspired conceptions of what constitutes good scholarly work."²² Thomson argues, though, that feminists may not simply assert that they have a distinct methodology and that one cannot evaluate their scholarship properly under the prevailing standards for rational dis-

20. My research assistant, Mark Rackers, himself an undergraduate English major at the University of California, has come up with a dozen or so different schools of literary theory beyond the authorial intent school: formalism; structuralism and linguistics/semiotics; psychoanalytic; Marxist; post-structuralist/decon-structionist/post-modernist; feminist; the gender studies/gay and lesbian studies/queer theory schools; historicist; the ethnic, post-colonial, and international studies schools; the cultural studies school; phenomenological/hermeneutical; and reader-response theory schools. Most of these have divisions within them. Rackers, for example, lists several branches of the feminist school of literary theory and of the psychoanalytic school.

21. Judith Jarvis Thomson, *Ideology and Faculty Selection*, 53 LAW & CONTEMP. PROBS. 155 (1990).

22. *Id.*

course. The feminists, says Thomson, have the burden of proving that their standards of evaluation are worthy of inclusion in the academy.²³ Why is that? New ideas should always have the burden of proof, argues Thomson, because a reasonable regard for the teachings of experience demands it.²⁴ Though some of our beliefs based on experience may be mistaken, and none is immune to possible revision, responsible decision-making demands that we rely on such beliefs until given good reasons to revise them. Kuhnian paradigm shifts are not everyday occurrences. Privileging the received disciplinary standards by placing a heavy presumption in their favor and against their rivals is what reason demands. If we do not do so, our universities will be overrun by quackery of every sort, particularly if the quackery is clothed in politically pleasing garments.

Finally, if I have identified a problem—a crisis I would call it—do I have any solutions to offer? I am not sure that I do. One possibility is to urge universities actively to seek political balance in the more politicized departments. Frankly, that policy makes me very uneasy. I am not sure the pools of well-qualified applicants will turn out to be politically balanced due to differences in career preferences between liberals and conservatives. More importantly, I am very leery of “the hair of the dog that bit you” remedies for social problems. My preferred remedy for racial discrimination is always to stop taking race into account, not to take it into account in the opposite direction and discriminate in favor of those formerly discriminated against. Ending racial discrimination will not necessarily or even likely produce racial balance, at least in the short to medium run. However, lack of racial balance is not the evil of racial discrimination. Thwarting the contributions and ambitions of the best qualified individuals is the evil. Similarly, the evil of politicization of academic disciplines is making political views material when they should not be. Reverse political discrimination continues that evil with only a hope and a prayer that a depoliticized academy will ultimately emerge out of consciously constructed political balance.

A second possible solution is to “slash and burn” the academy. Politicized academic departments should have their budgets slashed or be completely defunded. The hope is that after a few such object lessons, the fear of austerity or worse will cause such departments to mend their ways. This solution might indeed work, though it would embroil campuses in bitter divisions, strikes, and so forth with severe spillover effects on good departments, good professors, and students. I can still foresee

23. *Id.* at 160–62.

24. *Id.*

its happening in some public universities because they answer to regents and legislative overseers who might be prepared to accept the costs. At private universities, one would need a really tough president—a John Silber type—and the backing of the trustees to pull off such radical measures.²⁵ My guess is that Larry Summers would have liked to have done some of this at Harvard but lost his nerve.²⁶

The preferred solution—which you might think of as Pollyannish—is for academic departments to reform themselves, specifically, to depoliticize their scholarship, their teaching, and their hiring. Perhaps this idea is the ultimate in wishful thinking, but it should be noted that other professions take great pride in their ability to separate their professional work from even their deepest held political and moral views. Doctors routinely save the lives of people they detest, such as murderers, pedophiles, and foreign despots. Lawyers zealously defend such people in courts. Even more, doctors' and lawyers' professional codes of ethics approve and often demand such actions. Is it impossible for academics to do the same? If the answer is that this separation of the academic from the political is impossible because academic standards are political through and through, then we must be prepared for campuses to become not places of disinterested research and quiet contemplation of the world beyond their ivied walls but places of loud, bitter, and ultimately self-destructive political battles. My guess is that no matter who wins, the universities will lose. Academic freedom will have disappeared—but so too will have its reason for being.

25. John Silber was a tough-minded president of Boston University who did not shy away from confrontations with his faculty but rather appeared to enjoy them.

26. Larry Summers resigned as president of Harvard after several well-publicized events including, among other things, criticizing the "scholarship" of a prominent African-American professor and suggesting that there might be genetic differences between men and women that affect the distribution of aptitude for scientific research. See *supra* note 7.