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Academic Duty and Academic Freedom

Erratum

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Academic Duty and Academic Freedom

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On December 31, 1915, the newly formed American Association of University Professors (AAUP) and its Committee on Academic Freedom and Academic Tenure accepted a set of guidelines designed to shape the organization and its work to protect academics against the termination power of their employer-universities.¹ The “General Declaration of Principles,”² drafted by approximately a dozen educators who were called from universities across the country,³ begins with a decided focus on the rights of individuals within the academy: “The term ‘academic freedom’ has traditionally had two applications,” the language reads at the start, “to the freedom of the teacher and to that of the student”⁴

With that, in a very real way in the United States, academic freedom began. And its very first focus was, not surprisingly, given the authors, on the protection of the teacher.

A century later, on its webpage celebrating 100 years of academic freedom, the AAUP quoted with praise what it called a “foundational statement” from the Declaration, language that helped exemplify what the concept of academic freedom means. “[O]nce appointed,” the seminal language drafted in 1915 and enthusiastically republished in 2015 reads, “the scholar has professional functions to perform in which the appointing authorities have neither competency nor moral right to intervene. The responsibility of the university teacher is primarily to the public itself, and to the judgment of his own profession.”⁵

As its membership consisting mostly of faculty members⁶ recognizes, the AAUP exists in strong part to protect a scholar’s academic pursuits,⁷ and academic freedom,

* Professor of Law, Tulane University Law School. Thanks to Steve Sanders for the invitation to be a part of this symposium and for his inspiring work. Thanks too to the editors of the *Indiana Law Journal* who, after their careful edits, made this piece decidedly better.

1. Comm. on Academic Freedom & Academic Tenure, Am. Ass’n of Univ. Professors, *General Report of the Committee on Academic Freedom and Academic Tenure*, 1 BULL. AM. ASS’N U. PROFESSORS 15 (1915).

2. *Id.* at 20.

3. *Id.* at 17.

4. *Id.* at 20.

5. *100 Years of Defending Academic Freedom*, AM. ASS’N U. PROFESSORS, <http://www.aaup.org/about/centennial/100-years-defending-academic-freedom> [<http://perma.cc/YH3L-6X9K>] (quoting Comm. on Academic Freedom & Academic Tenure, *supra* note 1, at 26).

6. *See Membership*, AM. ASS’N U. PROFESSORS, <http://www.aaup.org/membership> (inviting “faculty members, academic professionals, and graduate students” to join).

7. In addition to strong language regarding the promotion of faculty members’ academic freedom—in a self-description the AAUP maintains, for example, that its first “mission . . . is to advance academic freedom”—the organization also suggests that it encourages “shared governance,” giving faculty members a greater voice on campuses, and the promotion of the “economic security of faculty.” *About the AAUP*, AM. ASS’N U. PROFESSORS, www.aaup.org/about-aaup [<http://perma.cc/8R5J-LVZ9>]. “[T]here are still people who want to control what professors teach and write,” the AAUP website explained in July 2015, suggesting that the organization exists to assist those professors who are fighting such battles. *Id.*

by name, is literally at the very beginning of its principles and, therefore, was at its heart at its very inception. That freedom, put in the context of moral rights a century ago by the AAUP and its Committee on Academic Freedom and Academic Tenure, would some fifty years later be soundly tethered to the Constitution by the United States Supreme Court when the Justices wrote that academic freedom was “a special concern of the First Amendment.”⁸

Today, then, those in academia have certain freedoms sparked by language drafted 100 years ago and embraced in a significant way by the courts and, therefore, necessarily by campuses across the nation. Academic freedom has come to mean, as the drafters of the AAUP report hoped it would, the freedom to research and write without significant restrictions from administrators or outside influences.⁹

What is less noted about the 1915 foundational language, however, is its second part: the suggestion that the responsibility of the university professor is not only to his or her academic peers but also, perhaps somewhat surprisingly, “primarily to the public itself.”¹⁰

This essay considers that language and language like it from the “General Declaration of Principles” within the context of today’s nascent threat to academic freedom that comes from some courts and otherwise. It first explores Declaration language that urges upon scholars a “duty” of public education, language that notes the importance of the public perception of the academy, and language that suggests that academic freedom is tied at least in part to how the public perceives its scholars.¹¹ Second, it collects some example cases that provide some evidence of a judicial shift away from an embrace of scholarly academic freedom, suggesting that, just as the Declaration warned, as colleges and universities became more businesslike, or as the public begins to perceive them in that way, those on the outside of academia became less enamored with academic freedom-based arguments.¹² Finally, it suggests that a small return to forgotten points within the Declaration of Principles through a renewed focus on the service component of the tenure, promotion, and annual review of academic dossiers could provide a larger return to the scholarly community.¹³

This is, it appears, what the authors from a century ago suggested was necessary for the advancement of academic freedom in the United States.

8. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

9. Consider, as just one example, the written policy on academic freedom at Indiana University. There, faculty members are given wide berth inside and outside the classroom: “No limitation shall be placed upon the teacher’s and librarian’s freedom of exposition of the subject in the classroom, or library, or on the expression of it outside,” one of the sentences reads. *Academic Freedom: Policy Statement*, IND. U., <http://policies.iu.edu/policies/categories/academic-faculty-students/conditions-academic-employment/Academic-Freedom.shtml> [<http://perma.cc/7LW9-R5LT>].

10. Comm. on Academic Freedom & Academic Tenure, *supra* note 1, at 26.

11. *See infra* Part I.

12. *See infra* Part II.

13. *See infra* Part III.

I. ACADEMIC FREEDOM COMES WITH A WARNING

In 1915, eleven separate incidents involving perceived infringements of academic freedom arose on United States campuses from the West Coast to the East.¹⁴ Those eleven cases and the apparently wronged academics at their centers helped spark the formation of the American Association of University Professors. That organization, in turn, published its *General Report of the Committee on Academic Freedom and Academic Tenure*, a document drafted by approximately a dozen scholars from colleges and universities across the nation, a document meant to help explain what academic freedom meant, why it was important, and how academics could help further it.¹⁵ A paragraph published as part of the report's preface sums up its overall purpose both succinctly and expectedly:

The safeguarding of a proper measure of academic freedom in American universities requires both a clear understanding of the principles which bear upon the matter, and the adoption by the universities of such arrangements and regulations as may effectually prevent any infringement of that freedom and deprive of plausibility all charges of such infringement.¹⁶

The authors described their report as one that contained both a general declaration of academic freedom principles—"freedom of inquiry and research; freedom of teaching . . . and freedom of extra-mural utterance and action"¹⁷—and what they called "practical proposals," those recommendations that they deemed "necessary" to place American universities upon a "satisfactory footing" to safeguard academic freedom.¹⁸

Not surprisingly, the language that the committee used regarding the principles of academic freedom parallels what many in the academy believe today:¹⁹ that academic freedom means the "advance[ment] [of] knowledge by the unrestricted research and unfettered discussion of impartial investigators."²⁰ As do many modern-day academics who write about academic freedom,²¹ the report lauds "[g]enuine boldness

14. Comm. on Academic Freedom & Academic Tenure, *supra* note 1, at 18.

15. *Id.* at 19.

16. *Id.*

17. *Id.* at 20.

18. *Id.* at 19.

19. See, e.g., Robert Post, *Discipline and Freedom in the Academy*, 65 ARK. L. REV. 203, 205 (2012) ("Properly understood, academic freedom safeguards a scholar's capacity competently to perform her scholarship. It seeks to ensure that faculty will not be penalized for their scholarship, except on grounds of incompetence or material malfeasance. And it also requires that the competence of scholarship must be evaluated by scholars rather than by lay persons.").

20. Comm. on Academic Freedom & Academic Tenure, *supra* note 1, at 22.

21. See, e.g., MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 44 (2009) ("Academic freedom is the price the public must pay in return for the social good of advancing knowledge."); Susan N. Gary, *The Problems with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing*, 85 CHI.-KENT L. REV. 977, 1032 (2010) (suggesting that "[a] university will be unwilling to

and thoroughness of inquiry, and freedom of speech” within the academy, finding that such flourishing intellectual vitality is “scarcely reconcilable” and contrasts markedly with the more restrictive institutions that “prescribe[] inculcation of a particular opinion upon a controverted question.”²²

Education and the academic freedom that is necessary to produce it, the report concludes, are “the corner stone of the structure of society.”²³ That language is not surprising, given the educators who wrote the document, the cases involving academic freedom that were pending at the time, and the organization for which the language was written.

Perhaps somewhat less expectedly, however, additional language within the report, language explored with specificity later in this Part, suggests that academics who are protected by academic freedom in turn owe a duty not just to those within their institutions and those within their particular scholarly fields, but also to members of the general public: as noted earlier, the authors suggest quite specifically that those within academia owe a duty to those decidedly on the outside. In effect, therefore, as it drafted the report, the committee seemed almost as concerned with the public perception of the academy—and, at times, seemingly with academics’ sharing of information with the public in general—as it was with the ideal of academic freedom itself. In that way, and at multiple points within the document, the authors linked the promise of academic freedom protections with the way the public perceives the academy and repeatedly suggested that the academy must recognize the importance of the public perception of its academic work, or academic freedom itself will falter.

As noted in a later Part, this is not an ideal embraced with much fervor on college campuses today.²⁴

Yet, there are multiple examples of a linkage between public duty and academic freedom both explicit and inherent in the 1915 document. One example is the language quoted and credited by the AAUP in 2015—that the responsibility of the professor is “primarily to the public itself.”²⁵ A second example comes later and links the professor’s, and essentially the entire university’s, sharing of information with public accountability: “[I]n the essentials of [the university teacher’s] professional activity,” the report reads, “his duty is to the wider public to which the institution itself is morally amenable.”²⁶ The authors even more explicitly suggest that an academic’s duties include the free sharing of information with those outside the institution’s gates: a professor’s function, the report reads at one point, is “to impart the results of [his] own and of [his] fellow-specialists’ investigations and reflection, both to students and to the general public, without fear or favor.”²⁷

consider donor restrictions that infringe on academic freedom by permitting a donor to make decisions about faculty hiring or curricular development”).

22. Comm. on Academic Freedom & Academic Tenure, *supra* note 1, at 22.

23. *Id.* at 24.

24. *See infra* Part III.

25. AM. ASS’N U. PROFESSORS, *supra* Note 5 (quoting Comm. on Academic Freedom & Academic Tenure, *supra* note 1, at 26).

26. Comm. on Academic Freedom & Academic Tenure, *supra* note 1, at 26.

27. *Id.* at 25.

Later, it describes such sharing of academic work and involvement in public education as key to teaching American citizens in general to be more circumspect and self-critical²⁸ and as a “correlative obligation[.]” linked to the professor’s own academic freedom.²⁹

In addition to language that stresses the academy’s moral obligation to share knowledge more generally, therefore, the report seems to link academic freedom protections with public engagement and the public perception of the academy. Here, it suggests that academic freedom is buoyed by such public interactions and that one falters without the other. Moreover, the report’s authors decidedly warn that if the public begins to doubt the truthfulness of academic information—or, better put, to doubt whether academic teachers and researchers are indeed speaking the truth—that institutions of higher education will be in trouble more generally. Such a trust-based scenario, one in which the public believes in the integrity of its academics, is “highly needful,”³⁰ the report maintains. “[O]ur universities shall be so free,” it argues, “that no fair-minded person shall find any excuse for even a suspicion that the utterances of university teachers are shaped or restricted by the judgment, not of professional scholars, but of inexpert and possibly not wholly disinterested persons outside of their ranks.”³¹

There is even more direct suggestion in the report that, without such sharing and without such trust, academic freedom itself is in peril: “To the degree that professional scholars, in the formation and promulgation of their opinions, are, or by the character of their tenure appear to be, subject to any motive other than their own scientific conscience and a desire for the respect of their fellow-experts,” the report reads, “to that degree the university teaching profession is corrupted; its proper influence upon public opinion is diminished and vitiated; and society at large fails to get from its scholars, in an unadulterated form, the peculiar and necessary service which it is the office of the professional scholar to furnish.”³²

The report, therefore, links two ideals—scholars’ freedom of academic inquiry and the community’s perception of that inquiry—with the flourishing of academic freedom itself.

Finally, and arguably with some prescience, just under the section poetically titled “[t]he nature of the academic calling,”³³ the authors suggest that as universities become more businesslike or are seen by the greater public that way, the reputation of the academy and academic freedom itself will suffer: a “conception of a university as an ordinary business venture, and of academic teaching as a purely private employment, manifests also a radical failure to apprehend the nature of the social function discharged by the professional scholar,” the report reads.³⁴ Instead, the authors believed, it was “to the public interest” that the professoriate maintains its dignity and its independence on campuses free and apart from the universities’ more

28. *Id.* at 32–33.

29. *Id.* at 33.

30. *Id.* at 25.

31. *Id.*

32. *Id.* at 25–26.

33. *Id.* at 24.

34. *Id.*

pecuniary interests.³⁵ Reinforcing the idea of public trust, society must believe, the authors wrote, that scholarly conclusions are, in fact, “the conclusions of men trained for, and dedicated to, the quest for truth,” and not conclusions that merely parrot that of the public or of the university administration or its benefactors.³⁶ And the university’s responsibility “as a whole,” therefore, should not be to its financial interests, but to “the community at large.”³⁷

In other words, the authors suggest that the university-as-a-business model, one in which professors are seen as mouthpieces of the university and its trustees, or of its financial interests, or of industry, threatens the progress of knowledge and, to them, the essentials of civilization.³⁸

But they also suggest that the *perception* of the university as a business is a major threat to the academy and its freedoms as well.

Recall the authors’ initial introductory point that “[t]he safeguarding of a proper measure of academic freedom in American universities requires . . . a clear understanding of the principles which bear upon the matter.”³⁹ One of the principles the authors apparently believed strongly related to the robustness of academic freedom, then, is a free professoriate working within a vibrant university, untethered by outside business-related concerns—but also one with a literal duty, apparently a paramount duty, to share freely and truthfully its expertise with those outside academia’s ivied walls.

II. PUBLIC PERCEPTION AND A NASCENT EROSION OF ACADEMIC FREEDOM

In 2009, Stanley Fish reviewed my book *The Trials of Academe* on the website of the *New York Times*.⁴⁰ The book focused on academic freedom and argued that there had been a dangerous eroding of the public and judicial embrace of the concept, one that could well end familiar protections on which academics and universities rely.⁴¹ The anti-academia responses by the *New York Times* readers were decidedly in line with my thesis:

Academics have cushy jobs they don’t perform.⁴²
They use bait-and-switch tactics to lure students.⁴³

35. *Id.*

36. *Id.* at 25.

37. *Id.* at 29.

38. *Id.* at 24–25.

39. *Id.* at 19.

40. Stanley Fish, *The Rise and Fall of Academic Abstention*, N.Y. TIMES: OPINIONATOR, (Oct. 12, 2009, 9:30 PM), http://opinionator.blogs.nytimes.com/2009/10/12/the-rise-and-fall-of-academic-abstinence/?_r=1 [<http://perma.cc/78VB-FNSQ>].

41. AMY GAJDA, *THE TRIALS OF ACADEME: THE NEW ERA OF CAMPUS LITIGATION* (2009).

42. Stanley Fish, *Academics Under Siege*, N.Y. TIMES: OPINIONATOR, (October 19, 2009, 9:30 PM), http://opinionator.blogs.nytimes.com/2009/10/19/academics-under-siege/?_r=0 [<http://perma.cc/5W7K-E9TG>] (describing the “general sense” of readers’ comments to Fish, *supra* note 40).

43. Melissa, Comment to *The Rise and Fall of Academic Abstention*, N.Y. TIMES: OPINIONATOR, (Oct. 12, 2009, 9:30 PM), <http://opinionator.blogs.nytimes.com/2009/10/12>

Now it's time to move on to doing away with this tenure stupidity.⁴⁴
Used car salespeople have better standards.⁴⁵

Fish described the comments by these *New York Times* readers in the aggregate: “[A]lmost no one had a good thing to say” about academics or academic freedom.⁴⁶

This same negative response to academia and academic freedom can be seen in some judicial opinions and legislative enactments that have come over the course of the last few years; powerful outsiders have started to scrutinize the ivory towers of academia and to reject what academics argue is their freedom to do as they wish on campus and in the classroom. As one veteran university counsel suggested in 2006, “What is new and different today is the aggressiveness with which courts and legislatures intrude in academic decisions as fundamental as the selection of students, the awarding of scholarships, and the determination of curriculum.”⁴⁷ “Ours is the era of judges and legislators who routinely second-guess decisions with which they disagree,” he added, “even if it means substituting their own views for the considered judgments of educational professionals.”⁴⁸

As that description of the current state of higher education–based jurisprudence and legislation implies, such careful scrutiny and rejection of academic decisions is quite different from the way it used to be. In the past, flowery language very much in line with that in the 1915 report protected academia and its academic determinations. A federal court recently compiled various snippets of historic academic deference language (even as the court scrutinized, in a twenty-five page opinion, the merits of a student’s claims springing from his academic dismissal based on poor grades and what the school suggested was the student’s lack of professionalism and interpersonal skills):

Thus “[w]hen judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty’s judgment.” “University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.” “A graduate or professional school is, after all, the best judge of its students’ academic performance and their ability to master the required curriculum.”

/the-rise-and-fall-of-academic-abstinence/comment-page-1/#respond [http://perma.cc/GH8B-UAR8].

44. Victor Edwards, Comment to *The Rise and Fall of Academic Abstinence*, N.Y. TIMES: OPINIONATOR, (Oct. 12, 2009, 9:30 PM), <http://opinionator.blogs.nytimes.com/2009/10/12/the-rise-and-fall-of-academic-abstinence/comment-page-1/> [http://perma.cc/WQS8-7HXX].

45. AI, Comment to *The Rise and Fall of Academic Abstinence*, N.Y. TIMES: OPINIONATOR, (Oct. 12, 2009, 9:30 PM), <http://opinionator.blogs.nytimes.com/2009/10/12/the-rise-and-fall-of-academic-abstinence/comment-page-2/#respond> [http://perma.cc/FGN5-9M45].

46. Fish, *supra* note 42.

47. Lawrence White, *Judicial Threats to Academe’s ‘Four Freedoms’*, CHRON. HIGHER EDUC., Dec. 1, 2006, at B6, B7.

48. *Id.* at B6–B7.

“[C]ourts are reluctant to interfere with academic evaluations, particularly at the higher educational levels.”⁴⁹

It synthesized such precedent as guidance to judges, so that they would know to show “extreme deference” to academia.⁵⁰ All this, the court noted, quoting the United States Supreme Court, because “[c]onsiderations of profound importance counsel restrained judicial review of the substance of academic decisions.”⁵¹

Much of that quoted and paraphrased language from courts, however, including that from the Supreme Court, was written decades before 2014, at a time when the public perception of universities was more in line with that of the professors who had drafted the 1915 report on academic freedom.⁵²

Today, as the veteran university counsel quoted earlier suggests, multiple state and federal courts across the nation have readily scrutinized academic decision making in a way that affects, at least in part, the academic freedom of the institution and its individual professors. Two fairly recent and remarkable examples follow.

After a disagreement at Vanderbilt University, in which a professor convincingly argued that a student had cheated on a test by changing responses on an answer sheet after it had been returned to the student, the federal appellate court hearing the student’s resulting claim rejected the argument that such a determination was an academic matter best left to the university.⁵³ The student, who had maintained

49. *Shah v. Univ. of Tex. Sw. Med. Sch.*, 54 F. Supp. 3d 681, 697 (N.D. Tex. 2014) (alterations in original) (citations omitted).

50. *Id.* at 700.

51. *Id.* at 697 (alteration in original) (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985)).

52. Just after the turn of the twentieth century and, therefore, at the time the AAUP committee authored its report on academic freedom, business, as one example, had decidedly started to embrace the idea of higher education and to require a formal education of potential employees; this was a shift from the late 1800s when many had looked more skeptically at what higher education offered. DAVID O. LEVINE, *THE AMERICAN COLLEGE AND THE CULTURE OF ASPIRATION, 1915–1940*, at 54 (1986). “The businessman of the 1920s believed that higher education provided a perspective that was not only helpful but necessary.” *Id.* Levine noted that the shift came especially after World War I, *id.* at 45, and that more parents, not just upper class parents, especially began to embrace the importance of higher education at that same time, *id.* at 56. By 1921, a survey showed a “progressive dependence” upon higher education. *Id.* (citation omitted) (internal quotation marks omitted). Later, the “golden age” of higher education dawned just after World War II, a time in which higher education was even more decidedly thought to be a “public good” and in which colleges and universities were institutions in the public interest that were destined to better society. Robert Kiener, *Future of Public Universities*, in *ISSUES FOR DEBATE IN AMERICAN PUBLIC POLICY* 197, 211 (14th ed. 2014). It was during this golden age that Supreme Court Justices would celebrate the “essentiality of freedom in the community of American universities” and warn that “our civilization will stagnate and die” without vibrant academic freedom in higher education. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

53. *Atria v. Vanderbilt Univ.*, 142 F. App’x 246, 255 (6th Cir. 2005) (“The district court held that dismissal of Atria’s breach of contract claim was necessary because a federal court is an inappropriate forum in which to challenge academic matters. We disagree with the district court’s characterization of this claim as one challenging academic matters.”).

initially that the form had been accidentally smudged⁵⁴ and then that not he, but a jealous classmate, had altered his answer sheet in the hopes of setting the student up for a misconduct investigation, had sued the professor and the university.⁵⁵ The student argued that by leaving the graded exams accessible to everyone in the class, the professor had acted negligently by creating a situation ripe for scheming misdeed-doers.⁵⁶ Over the university's argument that such inquiry into the professor's academic judgment and into its own internal determination that the student had acted wrongly was inappropriate, the court ruled that, instead, jurors should decide whether the professor's method of handing back exams was reasonable or not.⁵⁷ The federal trial court had initially decided that a courtroom was "an inappropriate forum in which to challenge academic matters,"⁵⁸ but the appeals court very clearly disagreed.⁵⁹

A second striking example involves a Florida medical student who sued his university after it dismissed him for failing a required clinical program because of alleged unprofessional conduct with patients and otherwise.⁶⁰ There, courts repeatedly decided that the student had a valid claim against the university for what was, in effect, breach of contract based upon language in a university publication that suggested that a student's studies would continue without interruption. There, the student eventually won millions of dollars from a jury, both for his trouble and for the salary he would have earned had he been awarded the degree that he had been denied.⁶¹ One of the judges hearing one of multiple appeals in the case wrote explicitly that judicial deference to universities was no longer in line with contemporary values and that businesslike motivations of universities were in part to blame for the shift in legal outcome: "[T]he deeply rooted . . . judicial deference to

54. *Id.* at 249–50.

55. *Id.* at 250.

56. *Id.* at 251.

57. *Id.* at 251–52.

58. *Id.* at 255.

59. *Id.*

60. *Sharick v. Se. Univ. of the Health Scis., Inc.*, 780 So. 2d 142, 146 n.4 (Fla. Dist. Ct. App. 2001) (Levy, J., dissenting in denial of reh'g) ("Sharick's inappropriate conduct that led to his dismissal is a factor that the jury should consider when determining whether Sharick would have become employed and in what capacity. Specifically, the record indicates that Sharick was dismissed because he: (1) 'was apparently unable to identify very fundamental signs and symptoms of diabetes mellitus'; (2) 'failed to examine the abdomen and suprapubic area of a woman complaining of lower abdominal pain and presenting with symptoms of a urinary tract infection'; (3) 'raised the skirt of a female patient without informing her that [he was] going to do so'; and (4) 'consistently failed to review charts properly prior to interacting with these patients.'").

61. There are multiple decisions arising from the dispute, including claims brought by the student against his university, by the student against his original attorney, and by the university after the decision awarding the student future earnings. *See, e.g.*, *Nova Se. Univ. of the Health Scis., Inc. v. Sharick*, 21 So. 3d 41 (Fla. Dist. Ct. App. 2009); *Sharick v. Se. Univ. of the Health Scis., Inc.*, 891 So. 2d 562 (Fla. Dist. Ct. App. 2004); *Sharick v. Se. Univ. of the Health Scis., Inc.*, 780 So. 2d 136 (Fla. Dist. Ct. App. 2000).

university conduct toward students becomes increasingly less defensible as bottom-line, commercial concerns motivate university actions”⁶²

Such financially driven behavior by academic institutions, the judge suggested, decidedly conflicted with what had been longstanding judicial deference to academia and academic decisions—and made a university’s academic freedom-based arguments increasingly groundless.⁶³ Today, the judge suggested, “higher education is both a product and a relationship that begs for external review.”⁶⁴

There are additional examples that suggest that courts are considerably less accommodating to academia today. A federal trial court in Washington, D.C., in 2012, for example, noted as it refused to dismiss a student’s case based on grades and performance that a school’s determination that academic standards have not been met is usually given deference, but not always.⁶⁵ A Wisconsin appeals court similarly rejected a university’s academic deference argument in a case involving a student’s dismissal from dental school based in part on poor grades.⁶⁶ The school had argued that it had made the decision to dismiss the student “honestly and with integrity,” but the court was unpersuaded.⁶⁷ And a federal court in New Jersey ruled that a student’s claim for negligence involving an alleged grade point average miscalculation should continue, noting that earlier courts had only condemned “day to day” review of grading decisions and that “outside of that limited context,” universities could still be found negligent for failing to follow their own grading procedures.⁶⁸

Even when courts have ultimately decided in favor of professors and their universities in grading disputes and otherwise, the analysis at times is far deeper than instantly deferential. A federal trial court in Oklahoma, for example, ordered a law school to produce all students’ exam answers from a law school course so that the plaintiff-student could compare her fellow students’ answers with her own in an effort to prove that she had been given an unfair grade by her professor.⁶⁹ Meanwhile, a court in Alabama wrote a pithy sentence in response to a student’s grading complaint—that “[h]ow teachers grade . . . is one of those pedagogical concerns that are at the heart of the teaching profession”⁷⁰—in a case that the court described as “an effort by a student to get judicial review of her academic performance,”⁷¹ but that breezily dismissive comment was on page ten of a thirteen-page opinion. And a

62. *Sharick v. Se. Univ. of the Health Scis., Inc.*, 780 So. 2d 142, 145 (Fla. Dist. Ct. App. 2001) (Ramirez, J., concurring in denial of reh’g) (quoting Hazel Glenn Beh, *Student Versus University: The University’s Implied Obligation of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 196 (2000)).

63. *Id.*

64. *Id.* (quoting Beh, *supra* note 62, at 194).

65. *Paulin v. George Washington Univ. Sch. of Med. & Health Scis.*, 878 F. Supp. 2d 241, 246–47 (D.D.C. 2012).

66. *Amir v. Marquette Univ.*, 727 N.W.2d 63, 69 (Wis. Ct. App. 2006).

67. *Id.*

68. *Moe v. Seton Hall Univ.*, No. CIVA 2:09-01424, 2010 WL 1609680, at *6 (D.N.J. Apr. 20, 2010) (emphasis omitted) (citation omitted) (internal quotation marks omitted).

69. *Doe v. Okla. City Univ.*, 406 F. App’x 248, 250 (10th Cir. 2010) (noting that the exams had been destroyed and the student unsuccessfully sought sanctions against the school).

70. *Heenan v. Rhodes*, 757 F. Supp. 2d 1229, 1241 (M.D. Ala. 2010).

71. *Id.* at 1240.

federal trial court in Indiana ultimately dismissed a student's discrimination claim based on a grade that the student had received in an English composition course, but not before undertaking a comparison of the various projects the professor at issue had assigned, the class syllabus and its precise language, the grades the professor had given other students, and the student's own grades and attendance record.⁷²

Indeed, in 2012, when the Ninth Circuit heard a discrimination case brought by a PhD student against her university after her dissertation advisor withdrew from any advising capacity, the worry by some on the bench about an erosion of academic freedom and its impact on universities was striking.⁷³ The appellate panel had allowed the student's discrimination claim to go forward on what was described as "no evidence"⁷⁴ and the plaintiff's own "vague description of what someone else said during a conversation with a third party,"⁷⁵ and, in response, seven of the Ninth Circuit judges in a dissent from a denial of en banc review suggested that academic freedom was clearly at stake in the case.⁷⁶ The decision to move the student's claim forward, the dissenting judges wrote, "jeopardizes academic freedom by making it far too easy for students to bring retaliation claims against their professors,"⁷⁷ a situation they described as a "very, very bad result [and a] major misapplication of long-standing legal principles to the sensitive area of academia."⁷⁸ The dissenters continued: "If this ill-considered precedent stands, professors will have to think twice before giving honest evaluations of their students for fear that disgruntled students may haul them into court. This is a loss for professors and students and for society, which depends on their creative ferment."⁷⁹

The Ninth Circuit, the seven dissenting judges argued, had suddenly made it far too easy for students to sue their professors when, in fact, in the dissenting judges' minds, the pleading standards should be "highest" or most protective of the defendant academic in such cases to protect academia and the good that it does for society.⁸⁰

As a final example, in 2013, when a federal trial court in New Jersey preliminarily upheld a claim by Widener University School of Law graduates that the school's employment statistics had misled them about the viability of their law degrees in violation of the New Jersey Consumer Fraud Act (NJCFA),⁸¹ the court again put the student-institution relationship in decidedly economic terms. "Here," the court wrote in finding the potential for consumer fraud and in rejecting

72. *Faloona v. Riecken*, No. 2:07-CV-270-PRC, 2008 WL 3896751, at *5-6 (N.D. Ind. Aug. 18, 2008).

73. *Emeldi v. Univ. of Or.*, 698 F.3d 715, 719-21 (9th Cir. 2012) (Kozinski, J., dissenting).

74. *Id.* at 719.

75. *Id.* at 720.

76. *Id.* at 719, 721.

77. *Id.* at 719.

78. *Id.* at 721.

79. *Id.*

80. *Id.*

81. *Harnish v. Widener Univ. Sch. of Law*, 931 F. Supp. 2d 641 (D.N.J. 2013).

decisions from other states that had refused to do so,⁸² “[p]laintiffs made a purchase from [the law school], an enterprise in the business of providing a legal education. . . . [and] charging significant sums to teach [p]laintiffs the practice of law.”⁸³

Consider that language, describing higher education as a business precisely like a corner store and its students as consumers buying the product of education, against the language used in 1915 to describe academia: a place unlike any other, and certainly not a business, with the goal of advancing societal knowledge through unfettered discussion,⁸⁴ “the corner stone of the structure of society,” with a unique and dignified quest for truth and knowledge.⁸⁵ Consider, too, how different the conception of higher education as a commodity is from the Supreme Court’s language from half a century before that referred to the “essentiality of freedom in the community of American universities” and maintained that academic freedom was an “area[] in which government should be extremely reticent to tread” because of the “vital role in a democracy that is played by those who guide and train our youth.”⁸⁶

What is different today, at least in part, then, as suggested by university counsel and judges both implicitly and explicitly, is the decidedly business focus of universities. For good or ill, it is easy to see why, especially to outsiders, today’s universities seem increasingly like a corner store or, perhaps more aptly put, a major corporation.

The numbers seem to suggest the latter, especially with regard to university-affiliated business ventures. Consider, for example, product development, admittedly one way in which universities ultimately share research with the public, albeit often covertly. In 2009 alone, for example, universities licensed more than 600 new products and started nearly 600 new companies—most, of course, the products of faculty members and their research interests.⁸⁷ More recently, in 2013, universities reportedly had filed more than 24,000 individual new patent applications, up 11% from the previous year,⁸⁸ and in 2014, the head of a national university licensing organization suggested that there had been a “phenomenal . . . one-year jump in the number of new commercial products” introduced by universities: 965 new items were introduced that year, a jump of 34% from a year

82. *Id.* at 649–50 (rejecting the court’s decision that a law school’s disclosures were not materially deceptive or misleading in *Gomez-Jimenez v. N.Y. Law Sch.*, 943 N.Y.S.2d 834 (Sup. Ct.) *aff’d*, 956 N.Y.S.2d 54 (App. Div. 2012)).

83. *Id.* at 650–51.

84. Comm. on Academic Freedom & Academic Tenure, *supra* note 1, at 22.

85. *Id.* at 24.

86. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

87. ASS’N OF AM. UNIVS., UNIVERSITY RESEARCH: THE ROLE OF FEDERAL FUNDING (2011), available at <https://www.aau.edu/WorkArea/DownloadAsset.aspx?id=11588> [<http://perma.cc/4BFT-TQQQ>].

88. AUTM Licensing Activity Survey: FY2013, ASS’N OF UNIV. TECH. MANAGERS, <http://www.autm.net/resources-surveys/research-reports-databases/licensing-surveys/fy-2013-licensing-survey/> [<http://perma.cc/MF89-KLEJ>].

before.⁸⁹ The sales revenue from such products in 2014 was put at \$28 billion.⁹⁰ Meantime, government money received by universities for research projects was said to be \$25 billion, with \$76 billion of federal money spent on higher education overall.⁹¹ Such income, in addition to significant support from the private sector, helped to put many colleges on what, to an outsider, would seem to be solid financial footing. In 2015, the forty wealthiest colleges were reported to have endowments and cash of more than \$6 billion each, while the rest had a median of \$273 million.⁹² During this same period, the AAUP warned that universities had suddenly become interested in ownership of copyrights awarded to individual faculty members, calling this increasing interest in intellectual property a “sea change” based upon universities’ businesslike interests.⁹³ Such a shift, the AAUP suggested, had made faculty members “no different from those working in for-profit corporations that exist for the benefit of investors.”⁹⁴

At the same time that this new money was flowing in, tuition costs for students generally continued to rise. According to the National Center for Education Statistics, the cost of attending a college or university rose considerably in a ten-year period:

For the 2012–13 academic year, annual current dollar prices for undergraduate tuition, room, and board were estimated to be \$15,022 at public institutions, \$39,173 at private nonprofit institutions, and \$23,158 at private for-profit institutions. Between 2002–03 and 2012–13, prices for undergraduate tuition, room, and board at public institutions rose 39 percent, and prices at private nonprofit institutions rose 27 percent, after adjustment for inflation.⁹⁵

During this same period, and of interest to students and those paying tuition dollars to send students to college, the number of tenured or tenure-track professors within colleges and universities—those professors thought to be most able to teach

89. *Highlights of FY2014 Licensing Survey Now Available*, ASS’N OF UNIV. TECH. MANAGERS (Sept. 9, 2015), <http://www.autm.net/advocacy-topics/newsroom/highlights-of-fy2014-licensing-survey-now-availabl/> [<http://perma.cc/ZY6C-QLLD>].

90. *Id.*

91. Kellie Woodhouse, *Impact of Pell Surge*, INSIDE HIGHER EDUC. (June 12, 2015), <https://www.insidehighered.com/news/2015/06/12/study-us-higher-education-receives-more-federal-state-governments> [<http://perma.cc/NHT7-SNKQ>].

92. Kellie Woodhouse, *Widening Wealth Gap*, INSIDE HIGHER EDUC. (May 21, 2015), <https://www.insidehighered.com/news/2015/05/21/rich-universities-get-richer-are-poor-students-being-left-behind> [<http://perma.cc/HQ2U-GDZ4>].

93. Comm. A on Academic Freedom and Tenure, Am. Ass’n of Univ. Professors, *Defending the Freedom to Innovate: Faculty Intellectual Property Rights after Stanford v. Roche*, 100 BULL. AM. ASS’N U. PROFESSORS 38, 38 (2014), available at http://www.aaup.org/sites/default/files/files/Bulletin_AcademeJulyAugust14full.pdf [<http://perma.cc/YHU2-WT36>].

94. *Id.*

95. Nat’l Ctr. for Educ. Statistics, U.S. Dep’t of Educ., *Tuition Costs of Colleges and Universities*, NAT’L CTR. FOR EDUC. STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=76> [<http://perma.cc/8GVP-T4EN>].

effectively⁹⁶—had fallen from nearly 80% in 1969 to 33% in 2009.⁹⁷ “By 2007,” the AAUP reported, “almost 70 percent of faculty members were employed off the tenure track,” as adjuncts or other, often part-time, contingent positions.⁹⁸ Such non-tenured faculty “generally work at significantly lower wages, often without health coverage and other benefits,” the AAUP reported, and often must hold down teaching jobs at more than one individual institution; the organization called such a situation “subprofessional.”⁹⁹ In a 2013 article, the *New York Times* noted directly the curious circumstance that a potential for subpar performance in the classroom was occurring at a time when tuition costs were rising:

Adjuncts have also wondered how to rally support from parents, who might not have considered how faculty working conditions affect students’ learning conditions, or that their huge tuition bills were paying for instructors who commute among several universities, have no offices and may earn so little that they qualify for food stamps.¹⁰⁰

That language reflects, at least in part, the results of two Pew Research Center studies captured in the Center’s 2012 report titled *The Future Impact of the Internet on Higher Education*.¹⁰¹ The studies showed that 60% of American adults believed that higher education institutions had had a positive impact on the United States (which, of course, suggests that at least a somewhat significant percentage believed that the institutions had not), that 75% found the cost of going to college too expensive for most, and that 57% believed that “the higher education system in the U.S. fails to provide students with good value for the money they and their families spend.”¹⁰²

Even more relevant here, a 2010 survey done by the National Center for Public Policy and Higher Education and Public Agenda showed that 60% of Americans increasingly believe that colleges and universities care less about students today than

96. Adrianna Kezar & Daniel Maxey, *The Changing Academic Workforce*, TRUSTEESHIP MAG., May/June 2013, at 15, 19, available at <http://agb.org/trusteeship/2013/5/changing-academic-workforce> [<http://perma.cc/FBB4-FS4B>] (“Indeed, several recent studies suggest that the rising numbers of non-tenure-track faculty in higher education are negatively affecting student success. Individual faculty members, particularly part-timers, are sometimes blamed—even though it may be apparent that poor working conditions and a lack of support diminish an instructor’s capacity to engage students and provide an excellent learning environment.”).

97. *Id.* at 15.

98. COMM. ON CONTINGENCY AND THE PROFESSION, AM. ASS’N OF UNIV. PROFESSORS, TENURE AND TEACHING-INTENSIVE APPOINTMENTS (2010), available at <http://www.aaup.org/report/tenure-and-teaching-intensive-appointments> [<http://perma.cc/QTC8-RS8F>].

99. *Id.*

100. Tamar Lewin, *More College Adjuncts See Strength in Union Numbers*, N.Y. TIMES, Dec. 4, 2013, http://www.nytimes.com/2013/12/04/us/more-college-adjuncts-see-strength-in-union-numbers.html?_r=0 [<http://perma.cc/4XWH-68AU>].

101. JANNA QUITNEY ANDERSON, JAN LAUREN BOYLES & LEE RAINIE, PEW RESEARCH CENTER, THE FUTURE IMPACT OF THE INTERNET ON HIGHER EDUCATION (2012), available at http://www.pewinternet.org/files/old-media/Files/Reports/2012/PIP_Future_of_Higher_Ed.pdf [<http://perma.cc/B974-CNVQ>].

102. *Id.* at 2.

they did before and that colleges and universities conduct themselves like businesses more than ever today; that result marked an increase of eight percentage points in dissatisfaction from just three years before.¹⁰³ Responders, the report suggests, felt that colleges and universities were “focused more on the bottom line than on the educational experience of students.”¹⁰⁴ Surveyors had asked respondents this precise question: “Which comes closer to your view—colleges today care mainly about education and making sure students have a good educational experience, or colleges today are like most businesses and care mainly about the bottom line?”¹⁰⁵ Only 32% answered that they felt that the statement that “colleges today care mainly about education and making sure students have a good educational experience” came closest to their view.¹⁰⁶

A website that reports on higher education issues suggested that such overall survey numbers showed “public ambivalence about higher education,”¹⁰⁷ though the latter report seems to indicate that, for most, emotions on the topic run deeper.

There is, then, at the very least, some measurable sense of public dissatisfaction with higher education, proved by language used by courts in recent decisions that reject academic freedom-based arguments and in poll numbers that show at least skepticism about higher education’s institutional goals. At a time when academic freedom as the 1915 Principles envisioned it seems to be eroding in courtrooms, many members of the public also seem to be questioning higher education’s commitment to education.

Perhaps, as the authors of the 1915 report suggested one hundred years ago in language seemingly linking vibrant academic freedom protections with professors’ public interactions, there is some connection between these two negative circumstances. The question for colleges and universities and the individual academics within them is what to do about it.

III. A SMALL SUGGESTION FOR A SMALL RETURN TO FIRST PRINCIPLES

If one is a professor on the tenure track today, one has three main concerns in the often seven-year push toward the promise of a lifetime job, otherwise known as tenure. In decidedly descending order, they are publishing, teaching, and service.

That tiered result, certainly of little surprise to most academics, was confirmed in a 2009 national survey of political science departments. The study showed that “research remains dominant” in tenure considerations generally and, more specifically, that “poor teaching may be tolerated at doctoral-granting

103. JOHN IMMERWAHR & JEAN JOHNSON WITH AMBER OTT & JONATHAN ROCHKIND, THE NAT’L CTR. FOR PUB. POLICY AND HIGHER EDUC. & PUB. AGENDA, SQUEEZE PLAY 2010: CONTINUED PUBLIC ANXIETY ON COST, HARSHER JUDGMENTS ON HOW COLLEGES ARE RUN 2 (2010), available at http://www.highereducation.org/reports/squeeze_play_10/squeeze_play_10.pdf [http://perma.cc/3534-52RE].

104. *Id.*

105. *Id.*

106. *Id.* at 12.

107. Doug Lederman, *Public Holds Mixed Views of Higher Ed*, INSIDE HIGHER EDUC. (May 16, 2011), <https://www.insidehighered.com/quicktakes/2011/05/16/public-holds-mixed-views-higher-ed> [http://perma.cc/K2HC-WVAR].

universities.”¹⁰⁸ Perhaps not surprisingly, therefore, and likely of little surprise to students, only 3% of doctoral institutions suggested that teaching was the most important factor in a tenure decision, in contrast with the 76% that suggested that research was the key.¹⁰⁹ Service, it was reported in an overall sense, was “clearly a lower priority”¹¹⁰ than either publication or teaching, and only 3% of respondents suggested that publishing, teaching, and service were given equal weight in a tenure determination.¹¹¹

Additional evidence suggests that the same valuation exists not only in political science departments but more generally in most academic departments across colleges and universities. A 2007 report by the Modern Language Association (MLA), for example, found increasing demands on academics for both scholarly publications and for teaching quality and quantity, while “service [as an item valued by the university] showed the lowest percentage increase in importance . . . and the highest decrease in importance.”¹¹² In the meantime, the MLA study showed, “demands for [scholarly] publication . . . have been expanding in kind and increasing in quantity.”¹¹³ The report suggested that valued or tenure-worthy publications included university press books and scholarly articles in refereed journals and very little else.¹¹⁴

In other words, many who are up for tenure in a traditional sense at most research universities must have portfolios that include at the very least one scholarly book, with plans for a second, and several scholarly articles in peer-reviewed journals. Teaching prowess on many campuses is important, but far less valuable in the eyes of a tenure committee than the published word.

Service, meanwhile, the decidedly least valued of the three criteria for tenure¹¹⁵—sometimes described pejoratively at major research universities as a check-the-box category for tenure because no one involved in the tenure outcome will be truly interested in or care about what service was done¹¹⁶—is defined in different ways by different institutions, though it is essentially service to the institution and the greater public. A 1993 book titled *Getting Tenure*¹¹⁷ describes how

108. Scott Jaschik, *What Counts for Tenure*, INSIDE HIGHER EDUC. (July 20, 2009), <https://www.insidehighered.com/news/2009/07/20/polisci> [<http://perma.cc/T9KJ-6ZFX>].

109. *Id.*

110. *Id.*

111. *Id.*

112. Task Force on Evaluating Scholarship for Tenure and Promotion, Modern Language Ass’n of Am., *Report of the MLA Task Force on Evaluating Scholarship for Tenure and Promotion*, PROFESSION, 2007, at 9, 24, available at <http://www.mla.org/pdf/taskforcereport0608.pdf> [<http://perma.cc/VR5V-CMCP>].

113. *Id.* at 10.

114. *Id.* at 10–11.

115. See, e.g., Apryll M. Stalcup, *The Mechanics of Getting Tenure*, 385 ANALYTICAL AND BIOANALYTICAL CHEMISTRY 1, 2 (2006) (“Service is often the least valued component of faculty activities . . .”).

116. See, e.g., Nancy D. Albers-Miller, *Managing the Service Component in Academics: Practical Advice for Scholars*, 15 J. FOR ADVANCEMENT OF MARKETING EDUC. 67, 67 (2009) (“An unknown author once said, ‘Make service your first priority, not success and success will follow.’ There is little doubt that the author never worked in a modern academic institution.”).

117. 8 MARCIA LYNN WHICKER, JENNIE JACOBS KRONENFELD & RUTH ANN STRICKLAND,

a scholar might provide evidence of service outside of committee assignments within a college or university: “[T]ypical service expectations might be the willingness to give presentations on topics of more general public interest related to one’s scholarly field of expertise. . . . Other types of more recent service activities are requests for appearances on radio talk shows or other media settings.”¹¹⁸ But the authors advise budding academics in a way that parallels the national survey results: “Most college faculty members do not consider these [examples of outreach] as constituting important service, although public relations offices on campus are interested in them.”¹¹⁹

What all this means is that the familiar phrase “publish or perish” is quite appropriate advice for those undertaking a career in academia today. That the focus is on research to the decided exclusion of service is also relevant to academia’s future. The Pew Research Center report on the future of higher education, for example, included real concerns about academics’ ability to adapt in the changing world of higher education because these scholarly individuals had been raised within a campus culture that looked, in effect, most significantly to words on paper that would be read by other academics in the same field and not to what happened in the classroom or elsewhere.¹²⁰ Worried expert commentators from campuses across the country told the researchers that they doubted the prospect of any significant change in response to market forces outside the academy anytime soon, in part because of the academy’s decided focus: “[P]rofessors at leading universities are rewarded on research, not teaching”¹²¹ and “[t]he university is . . . filled with academics whose major interests are their own research”¹²² were two of the comments that supported the authors’ contention that “[f]rustration and doubt mark the prospect of change within the academy.”¹²³ Some change seems necessary during times in which the public seems to have an increasing distrust of higher education’s motives such as when a significant majority of Americans believes that academia has its own business interests at heart and not the education of its students.¹²⁴

And yet, service—including public outreach through talks and nonscholarly media publications meant for the general public—continues to have far less value by those assessing the portfolios of untenured scholars in order to decide whether those scholars should stay forever on that particular campus or find employment elsewhere.

It is interesting to consider that conflict in light of the language in the 1915 AAUP *General Report of the Committee on Academic Freedom and Academic Tenure*.¹²⁵ Recall the report’s poetic focus on the “nature of the academic calling,” the “dignity of the scholar’s profession,” and the importance its authors placed upon imparting knowledge beyond the walls of the institution, described within the report as the

SURVIVAL SKILLS FOR SCHOLARS: GETTING TENURE (Mitchell Allen ed., 1993).

118. *Id.* at 117.

119. *Id.*

120. ANDERSON ET AL, *supra* note 101, at 2–3.

121. *Id.* at 25.

122. *Id.*

123. *Id.* at 7.

124. *See supra* text accompanying note 103.

125. Comm. on Academic Freedom & Academic Tenure, *supra* note 1.

scholar's and the university's "duty . . . to the wider public."¹²⁶ Recall, too, the report's contention that if the university looked solely within, either by acting more like a business or by failing to reach out to those beyond its walls, academic freedom itself would suffer.¹²⁷ Such a decidedly outward focus was one of the report's "principles relating to academic freedom."¹²⁸

If those authors are right, perhaps even a slight shift back toward the 1915 report's ideals could help change the public perception of academia and could, therefore, ultimately help to protect academic freedom.

It is true that the academic world has changed markedly in the past century, and that change has made some of the language in the 1915 report quaint and at times awkwardly idealistic. Science has advanced and has become more complex, as have the universities that make scientific research possible. Without a decided focus on the importance of research and academic publication, the sharing of which allows researchers to build upon earlier work, thereby moving knowledge forward, the world would not have advanced as much as it has. In that way, many scholars do indeed share their work with the public. Even the authors of the 1915 report recognized the value of a research focus within a university and the importance of such sharing, lauding the advancement of knowledge made possible only within those institutions of higher learning that encouraged their scholars to flourish in their research.¹²⁹

Nonetheless, it is at least of some note that what was once remarkable judicial deference toward higher education and its decisions—a decidedly hands-off approach in academic-related cases in the name of academic freedom and the advancement of education—has changed as higher education has changed. And it is at least interesting that this is precisely what the drafters of the 1915 report suggested would occur if an increasing segment of the public became disillusioned with higher education: at one point they directly contrasted the dangers of the "university as an ordinary business venture, and . . . academic teaching as a purely private employment" with the vibrant advancement of knowledge and academic flourishing at more typical colleges and universities.¹³⁰ In short, it was the distinction between, in the authors' words, "private proprietorship and a public trust"¹³¹—the distinction between business and academia—and that distinction, to their minds, was decidedly linked with the protections of academic freedom within institutions that were the latter and not the former.

Their suggestion, therefore, that the university and the persons within it must recognize a duty to the public and to public education is worth at least some consideration today.

As one small law-based example of the need for such interaction, today, public understanding about the Constitution has declined markedly. The 2015 State of the First Amendment report by the Newseum Institute suggests that in just one year, from 2014 to 2015, public understanding and knowledge regarding the First

126. *Id.* at 24, 26.

127. *Id.* at 24.

128. *Id.* at 19.

129. *Id.* at 22.

130. *Id.* at 24.

131. *Id.*

Amendment waned in a significant way.¹³² “[T]hose naming freedom of speech [as a part of the First Amendment] decreased from 68 to 57%,” the authors report, and “freedom of religion decreased from 29 to 19%, and freedom of the press declined from 14 to 10%.”¹³³ There is no guarantee, of course, that greater public engagement by law professors who research and write about First Amendment issues could better public understanding of the Constitution’s First Amendment guarantees, but it is at least possible that if tenure committees valued public service—talks to school groups or teacher organizations or publications aimed solely at the general public and not fellow scholars—those numbers would be higher and public recognition of constitutional rights would be greater.

Consider too the value that engaged and impartial scientists, engineers, historians, and other scholars might add to important and interesting issues making news today, and how their voices could inform a public that often learns its lessons from a faction-eager media, one, at times, more interested in conflict than in ferreting out truth.

But this public engagement will not happen (and does not happen in most cases) if a professor’s academic value is basically solely in scholarly publishing and other research unknown to the general public and if tenure review committees see no value in public outreach work. Why would anyone on the tenure track choose to spend time to travel to inform a teachers’ organization about the Constitution? Why would he or she talk with a group of local school children about their legal rights when the number of pages of scholarly writing is what is important for tenure or promotion? Why would anyone leave campus when service can be performed far more easily inside campus walls as a part of committee work?

My proposal is small. It is not that tenure standards be overhauled or even that service be given significantly more weight in tenure decisions in a way that would ultimately trump determinations of research or teaching. Research should, in fact, remain the cornerstone with teaching a close second. Instead, my proposal is simply that tenure committees begin to value public outreach in a way that would meet the approval of the authors of the 1915 report: that service should not be known only as that portion of the tenure dossier most overlooked, but reviewed more critically and methodically by academics who understand that such work ultimately helps support the academic freedom that they themselves enjoy. Service, especially service to the public through public engagement-type activities, should be supported more strongly, both by administrators and by the already-tenured faculty members who make up promotion and tenure committees.

Moreover, as the use of adjunct faculty continues to rise, it seems that colleges and universities might do well to hire individuals for full-time teaching, and also require of these non-tenure-track instructors service in the form of public outreach. This is done in some universities today either more formally or on an ad hoc basis;¹³⁴

132. NEWSEUM INSTITUTE, THE 2015 STATE OF THE FIRST AMENDMENT 2 (2015), *available at* http://www.newseuminstitute.org/wp-content/uploads/2015/07/FAC_SOFA15_report.pdf [<http://perma.cc/4CMT-WTRU>].

133. *Id.*

134. The University of Illinois Extension Service is one example of formal outreach. It is described as providing educational programs “aimed at making life better, healthier, safer and more profitable for individuals and their communities.” *What We Do*, UNIV. OF ILL. EXTENSION,

sometimes the individual identified as a faculty member in media is not a tenured professor at all but an untenured staff member or instructor,¹³⁵ though the public does not know, likely does not care, and values the information either way.

Skeptical campus administrators, meanwhile, should know that a 2014 Gallup poll suggested that 75% of the public believed that the qualifications of the faculty was “very important” in determining the quality of a college or university.¹³⁶ A faculty that is engaged with the public helps ensure that the public knows of its qualifications, thereby lending, at least in theory, greater support for higher education both in terms of tuition dollars and even, perhaps, tax dollars.

It is true that the 1915 Committee’s three short proposals—three procedure-heavy suggestions that come at the end of the report—do not include a direct suggestion that faculty members engage in public outreach. But, as the authors suggest, the three practical proposals necessarily have at their foundation a conception of academia as the committee members described it: that academics have a decided duty to the public to share their research more broadly as part of the public trust.¹³⁷

CONCLUSION

In the 2010 report on higher education funded by The National Center for Public Policy and Higher Education and Public Agenda referenced earlier, the authors suggested that there is a strong disconnect between leaders in higher education and the average American.¹³⁸ The public, the report suggested, would be decidedly

<https://web.extension.illinois.edu/state/whatwedo.cfm> [<http://perma.cc/Y83P-MKFU>].

135. This is perhaps best shown in news coverage of Rachel Dolezal, the woman who infamously self-identified as black, once taught at Eastern Washington University, and was often described as a professor:

“Dolezal was listed as a professor but she was never a professor,” [a university spokesperson] explained. “Either she or one of her staffers listed her inaccurately as a professor.” [The spokesperson said] Dolezal was an “adjunct instructor hired on a quarterly basis.” He added that she has been hired on a quarterly basis since 2010 and that her profile was taken down from the school’s website to “avoid confusion.”

John Nolte, *Spokesperson: ‘Rachel Dolezal No Longer Works for Eastern Washington University,’* BREITBART (June 15, 2015), <http://www.breitbart.com/big-government/2015/06/15/rachel-dolezals-name-removed-from-university-faculty-page/> [<http://perma.cc/7PPC-ZQ8Q>] (quoting David Meany, media relations at Eastern Washington University).

136. GALLUP & LUMINA FOUNDATION, *WHAT AMERICA NEEDS TO KNOW ABOUT HIGHER EDUCATION REDESIGN 6* (2014), available at <http://www.luminafoundation.org/files/resources/2013-gallup-lumina-foundation-report.pdf> [<http://perma.cc/P29G-HENR>].

137. Recall language describing the report’s purpose and, therefore, how the “principle” of academic duty to the public is aligned with the adoption of procedures to protect academic freedom:

The safeguarding of a proper measure of academic freedom in American universities requires both a clear understanding of the principles which bear upon the matter, and the adoption by the universities of such arrangements and regulations as may effectually prevent any infringement of that freedom and deprive of plausibility all charges of such infringement.

Comm. on Academic Freedom & Academic Tenure, *supra* note 1, at 19.

138. IMMERWAHR ET AL., *supra* note 103, at 2.

unmoved by administrators' requests that more tax dollars be shifted toward higher education.¹³⁹ Instead, most Americans believed that colleges could simply increase enrollment without compromising quality of instruction and without raising tuition.¹⁴⁰ If administrators wished to bring the public around to their side in times of economic crisis and alleged underfunding of colleges and universities, the report suggested, something needed to change:

Our findings suggest, in other words, that the public may be poised in a period of ambivalence and perhaps unpredictability toward the financial difficulties of higher education. On the one hand, people believe that higher education is important and necessary. But at the same time, we find no evidence of sympathy for the argument that colleges and universities are starved for financial resources. If higher education leaders want to make the argument for a significant reinvestment in higher education, they may find that their words fall on deaf ears given the public's current state of mind and that they will need to make a more specific and compelling argument to bring more Americans to their side.¹⁴¹

The compelling argument those authors suggest is necessary could be the advancement of knowledge that colleges and universities bring through research. But without full public understanding of the workings of the institution and precisely what knowledge is being generated there by its people—in other words, without professors sharing their work more publically in ways meant to inform those outside academia's walls—there is little for the public to point to when it considers the reasons to value the work that academics do.

Similarly and relatedly, there is little for judges to point to when hearing academic freedom-based arguments that colleges and universities deserve deference and should be treated differently from typical business defendants. After all, today's public perception is that academia cares most about its bottom line to the exclusion of education more generally.

Over a century ago, it appears that the dozen or so academics who helped form and guide the budding organization known as the American Association of University Professors had at least a partial answer to this problem. They suggested that it was part of an academic's duty to share information and knowledge with the general public and that such sharing was decidedly linked with the flourishing and advancement of academic freedom.

The authors of the 1915 report may have been wrong, but perhaps they were right. And the only way to be sure is to begin to value more the idea of service, including in strong part public engagement and outreach, within higher education at the tenure level and otherwise.

139. *See id.* at 7–8.

140. *Id.* at 8.

141. *Id.* at 9.

