

To Follow the Argument Where It Leads:

An Antiquarian View of the Aim of Academic Freedom at the University of Chicago¹

Richard A. Shweder
Harold Higgins Swift Distinguished Service Professor
Department of Comparative Human Development
University of Chicago

Prepared for Who's Afraid of Academic Freedom?, edited by Jonathan Cole, Akeel Bilgrami and Jon Elster

What is academic freedom for? And how is it doing these days at the University of Chicago, which proudly thinks of itself as a Socratic, free thinking and contentious institution, and where I have been a member of the faculty for nearly four decades? If the values and norms associated with academic freedom are fragile (as history has shown) yet central to the intellectual life of any great university (which is a proposition I endorse and therefore will leave to other skeptics to contest) from which threats, external and internal, must it be protected?

With respect to the first question, two constitutional conservatives, both of them famous for their advocacy of judicial restraint, have given about as cogent an answer as one is going to get. The first is United States Supreme Court Justice Felix Frankfurter, whose answer appeared in a 1957 opinion opposing a government led subversive activities inquiry into the content of a lecture at the University of New Hampshire delivered by the Marxist economist Paul Sweezy.² Frankfurter's answer, in sum and in paraphrase, was that the constitutional structure of our way of life protects the ardor and fearlessness of scholars to follow the argument where it leads. That is what academic freedom is for – to make it possible for scholars who are dedicated to the life of the mind to follow the argument where it leads, unfettered of received wisdom and popular views of political

¹ I wish to thank several friends and colleagues (including some who are protagonists in this essay) for their generous, thoughtful, incisive and helpfully critical comments on an earlier draft of the manuscript, especially Jonathan Cole, Arthur Eisenberg, Benjamin Heineman, Jr., Frank Kessel, Ralph Lerner, Steve Raudenbush, Patricia Rosenfield, Geoffrey Stone, Richard Taub and Robert Zimmer.

² *Sweezy v. New Hampshire*, 354 U.S. 234 [1957]

correctness, and regardless of the practical, social or moral implications of their conclusions. Instead of putting Socrates on trial, in a free society we welcome him (or perhaps exile him) to the halls of the academy. For reasons I hope will become more obvious later I will dub Justice Frankfurter's conception the old-fashioned or antiquarian view of academic freedom.

The second voice affirming that antiquarian view is that of Justice Frankfurter's former law clerk Alexander Bickel, who, many years later, while living the disputatious life of a free academic as a constitutional legal scholar at Yale Law School, gave a similar answer to the question "what is academic freedom for?." Bickel addressed the question in a chapter in which he assessed the various threats to academic freedom he managed to perceive in "the furor [student protests] of the campuses in the late 1960s." Of far greater importance than his particular animus towards the protestors (and towards his colleagues who lent them support) is Bickel's general conception of the duties and responsibilities of institutions of higher learning and of the scholars and intellectuals who occupy them. "Knowledge and insight, like art," he argued, "are the products of independent minds following each its own bent, and are not often to be attained otherwise. In universities, professionals of many disciplines can follow lines of inquiry determined by themselves, individually and collectively, and dictated by no one else, on grounds either ideological or practical. While not all universities or colleges pretend to be such places, and other institutions like research institutes can be, only in a university can inquiry and teaching constitute one creative whole³, so that the knowledge and insight of the scholar and the methods by which he gained them are shared with the student; so that the student may be the scholars company, nourishing him, giving as well as taking, in a word, collaborating. To this end, teachers must be free to teach, as free in

³ The hazards and benefits of trying to separate inquiry and teaching at academically free universities has recently become a topic of intense debate at the University of Chicago, where, ironically, in the name of academic freedom, the President, Provost and all the Deans of the university have argued that faculty ruling bodies have jurisdiction and decision making powers (a vote) only over the educational and teaching activities of the university but not over its research activities (including decisions about the creation of research centers and research institutes or the development of new directions of inquiry). I will discuss and try to interpret this irony later in this essay.

their teaching as in their scholarship, and the enterprise – with its twin freedoms of inquiry and of teaching – must be judged by professional criteria and none other.”⁴

Among the many threats Bickel perceived to academic freedom were the demands of committed activists in the late 1960s as they tried to enlist institutions of higher learning in the project of solving immediate social problems or attaining immediate social ends conceived of as moral imperatives.⁵

In sum and in paraphrase, Bickel’s answer to the question was this. What is academic freedom for? Its purpose is to protect “the autonomy of independent minds and the method of reason” against pressures, impulses and temptations of various kinds, whether ideological, moral or practical. In short, Bickel argued, genuine academics, those who are true to the obligations of their role as intellectuals, researchers and scholars at academically free universities, are duty-bound by their professional status to defend the ideal of “thought without action.”⁶ And they should be morally committed to a principle of intellectual neutrality that has the following practical consequences. It fosters critical reason and dispassionate analysis. It encourages deliberative (even if disputatious)

⁴ Alexander M. Bickel (1975) *The Morality of Consent* (New Haven, CT: Yale University Press), p. 127

⁵ In recent decades many leading institutions of higher learning have in fact taken up such projects. One looks forward to reading dispassionate assessments of the effects of an institutional commitment to social problem solving and to the ideological, political and moral assumptions so entailed on academic freedom as defined by Frankfurter and Bickel. This institutional commitment to social problem solving is exemplified, for example, by the development of various kinds of identity politics programs and centers, the creation at my own university of neighborhood charter schools with the aim and hope of eliminating racial and ethnic disparities in educational achievement, and of course affirmative action policies. Concerns about “political correctness” and the chilling effect of accusations of sexism, racism, homophobia, and anti-Semitism on the ardor and fearlessness of scholars arise in the wake of these developments in which the university is far from neutral and commits itself via the programs it creates and policies it pursues to a particular ideological, political or moral stance that is rarely questioned or treated as a topic for academic debate, in part because such social problem solving accords with the ideological, political or moral views of a majority of members of the academic community or members of the Board of Trustees, and in part because the big chill places a premium on silence or acquiescence for members of the community who hold unpopular views.

⁶ Bickel, p. 129

intellectual engagement with others. Academics, if they practice their trade in good faith and are true to their academic mission, will not only apply the method of reason to deepen their knowledge of the world but, in their role as academics, will exercise self-restraint in the face of popular, lucrative, politically expedient, heartfelt or even righteous calls for collective social and political action.⁷

The Professor versus the Attorney General

Bickel's mentor Justice Felix Frankfurter said as much in that 1957 subversive activities case pitting the economist Paul Sweezy against the Attorney General of the State of New Hampshire.⁸ Sweezy, an outspoken Marxist, had been ordered by the courts in the State of New Hampshire to testify in a 1954 legislative hearing (run by the Attorney General) investigating subversive political activity in New Hampshire. After some initial resistance he agreed to show up for the hearing. The attorney general, acting in his legislatively appointed role as inquirer into subversive activities, asked Professor Sweezy a long series of questions, most of which he answered. But when asked "What was the subject of your lecture" [on March 22, 1954] and "Didn't you tell the class at the University of New Hampshire on Monday, March 22, 1954, that socialism was inevitable in this country?", the professor balked, and refused both on principle and as a matter of academic conscience, to be responsive. He was then held in contempt and sanctioned for

⁷ Of course it is not just morally motivated student activists who want to enlist universities to solve social problems or further their own non-academic ends (whether political, moral or commercial). Threats to the academic freedom ideals described by Alexander Bickel can be even more serious and insidious when they come in the form of a Trojan horse of generous gifts or grants from patrons, Board of Trustee members, Foundations, funding agencies, corporations or even foreign governments. A gift becomes a Trojan horse-like threat to academic freedom when it does more than just enable ongoing academic inquiry but rather shifts the balance of influence among faculties or faculty members and shapes the character and direction of the questions asked at a university or the types of appointments that get made. This becomes especially serious when decision making about the character and shape of faculty appointments moves more and more into the hands of administrators who might be tempted to follow the money (rather than the argument) where it leads and can usually find some member of the faculty who is already on that path or is willing to go along for the ride and the possible benefit.

⁸ Sweezy v. New Hampshire, 354 U.S. 234 [1957]

his silence by the State of New Hampshire. His case and his conscience ended up in the Supreme Court of the United States.

Notably, although the legal dispute between Paul Sweezy and the State of New Hampshire had the potential to become consequential with respect to the place of academic freedom within our constitutional tradition, the four most liberal justices on the court at that time (Justices Warren, Brennan, Douglas and Black) assumed a conservative legal posture favoring judicial restraint. While in their joint decision they expressed views acknowledging an undeniable constitutional right to liberties in the area of academic freedom and political expression they ultimately reversed the State of New Hampshire's contempt verdict by basing their legal judgment on narrow procedural due process grounds (the reliance of the State legislature on the Attorney General of the State functioning as its sole information gatherer with too much discretion and overly broad and unlimited inquisitorial powers) that had nothing directly to do with the Constitution's protections, if any, of academic freedom. At least in this case, the liberals on the Supreme Court declined to be First Amendment judicial activists and found a way to avoid grounding their judgment on the constitutional academic freedom questions thrown their way.⁹

Of greater interest was the concurring opinion written by Justice Felix Frankfurter (which was supported by Justice Harlan). This form of government interrogation and intrusion into the internal affairs of the university was just too much (and too deep in its implications for a free society) for the two of them to stomach. They formulated their revulsion (in part) in these terms:

“Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the

⁹ For a discussion of the judicial restraint exercised by the liberal judges see Harry Kalven, Jr. *A Worthy Tradition: Freedom of Speech in America*. Harper and Row, New York. 1988. Pages 494-495.

respective preoccupations of anthropology, economics, law, psychology, sociology, and related areas of scholarship are merely departmentalized dealing...with interpenetrating aspects of holistic perplexities.

For society's good – if understanding be an essential need of society – inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.

These pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor. One need only refer to the address of T.H. Huxley at the opening of Johns Hopkins University, the Annual Reports of President A. Lawrence Lowell of Harvard, the Reports of the University Grants Committee in Great Britain, as illustrative items in a vast body of literature. Suffice it to quote the latest expression on this subject. It is also perhaps the most poignant because its plea on behalf of continuing the free spirit of the open universities of South Africa has gone unheeded.

'In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest.¹⁰ A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates – 'to follow the argument where it leads.' This implies the

¹⁰ One is tempted to interpret "other sectional interests" to include commercial interests or the inducements associated with gifts and financial contributions from patrons and donors, at least to the extent that such interests and inducements are permitted to significantly influence the argument and where it leads.

right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant’.”

Echoes of Frankfurter’s view of the dependence of a free society on academic freedom at universities can be found in two relatively recent Supreme Court decisions both written by Justices associated with the politically conservative wing of the court, namely Sandra Day O’Connor and John Roberts. Writing the majority decision in a 2007 affirmative action case in which the court disallowed race based assignment plans in primary and secondary schools in Seattle, Washington (“Parents Involved in Community Schools v. Seattle School District No. 1 et al”[551 U.S. 701]), Chief Justice Roberts invoked a key sentence and feature of reasoning in Justice O’Connor’s 2003 majority ruling in “Grutter v Bollinger” (the affirmative action decision allowing the University of Michigan Law School to continue with its affirmative action admissions policy) so as to distinguish that earlier University of Michigan case from the Seattle case at hand. Roberts pointed out that in upholding the admissions plan at the University of Michigan Law School “...this Court relied upon considerations unique to institutions of higher education, noting that in the light of ‘the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.’ 539 U.S. at 329.” Justice Frankfurter’s 1957 response to a government appointed investigator asking questions about the content of university lectures suggests that Frankfurter too believed there are “expansive freedoms of speech and thought” uniquely associated with the university environment, which even an advocate of judicial restraint such as himself acting in his capacity as a Justice of the Supreme Court should be concerned to defend.

Although the question of whether the Constitution does in fact provide a strong foundation for the defense of academic freedom may be far less settled than Justices O’Connor and Roberts opine, it is noteworthy (and should be heartening for academics) that the Chief Justice of the Supreme Court is a champion of academic

freedom, at least at institutions of higher learning. It is noteworthy too that academic freedom per se is never explicitly mentioned in the Constitution. And it is far from heartening (for academics) that the answer to the crucial question – does the implicit structure of the Constitution project a penumbra sufficiently spacious to accommodate a special niche for institutions of higher learning? – is still elusive and shadowy in debates among constitutional scholars. Nevertheless and regardless of whether (or not) “the expansive freedoms of speech and thought associated with the university environment” are in fact protected by the Constitution, those who live in the halls of the academy might well value and defend those liberties simply by reference to the virtues associated with their calling.¹¹

¹¹ And they might even exercise those liberties more effectively by actually debating and bringing evidence to bear on the Court’s ready assumption that affirmative action policies at institutions of higher learning truly serve the worthy and prized academic goal of increasing “viewpoint diversity.” Surely that assumption is, and should be, open to skeptical challenges, and a debate on the topic is long overdue on college campuses. Although affirmative action is intuitively appealing to many advocates of social justice on grounds relating to vicious forms of group discrimination (e.g., slavery) the Supreme Court long ago rejected the argument that affirmative action can be constitutionally justified on the grounds of a history of social injustice towards racial or ethnic groups. In the most pertinent judicial decision on the topic of justifications for affirmative action policies, namely *Regents of the University of California v Bakke* [438 U.S. 265 (1978)], the court did however leave open the door for a narrow justification in terms of maintaining a robust free thought environment at institutions of higher learning via admission policies that took race and ethnicity into account (as one among several other factors) so as to increase “viewpoint diversity” on college campuses. It may be a sign of the times that the actual empirical connection between viewpoint diversity and admission policies favoring particular ethnic and racial groups is not well-documented or self-evident and the effects of those policies on the robustness of the free thought environment at universities is asserted far more often than it is scrutinized or even critically discussed. One must at least entertain and engage the alternative viewpoint that on college campuses viewpoint diversity is in fact neither the real aim nor the actual outcome of affirmative action policies; and that the ready equation of racial and ethnic diversity with viewpoint diversity is little more than a politically convenient fiction and a legal loophole that has permitted institutions of higher learning to embrace affirmative action as part of a morally motivated social justice agenda. Protecting the ardor and fearlessness of faculty and student scholars has not been an item on that agenda. The alternative viewpoint on affirmative action policies argues that, quite the contrary, one effect of those policies has been to relax the demands of critical reason and eschew any real debate over the positive or negative effects of such policies on the expansive freedoms of speech and thought of the university environment (for example, the purported heightened sensitivity to, and

On Being True to One's Nature versus Pretending to Be Such a Place

I have begun this essay with a discussion of Frankfurter's and Bickel's conception of academic freedom: as those conditions (legal, customary, institutional) that empower scholars to freely and fearlessly follow the argument where it leads. I have done this because as someone with neo-antiquarian sensibilities¹² Frankfurter's and Bickel's ancient Socratic view about freedom of thought as the ultimate end of the academic life has a familiar and resonant ring which summarizes very well the ideals of the University of Chicago, where I have been a member of the faculty since 1973, and which I have long viewed as occupying a special niche because the University of Chicago is (or was, that is the question) a neo-antiquarian institution. And also because Frankfurter and Bickel's words draw our attention to a contrast between a discourse from out of the dawn of the great American University and an increasingly commonplace contemporary discourse which I associate with its twilight. It is that contrast that is the focus of the remainder of this essay, with special reference to changes at the institution of higher learning to which I am most in love and dedicated, and also know the best.

On October 9, 2009 the University of Chicago held, and celebrated, its 500th convocation.¹³ The event unfolded ceremoniously in our Rockefeller Chapel, a building which by design and mandate is the tallest on campus and also the architectural symbol of a tradition of free and critical inquiry that was explicitly honored on that day. Less than two weeks later, on the Upper West Side of Manhattan, the President of the University of Chicago, Robert Zimmer, explicated and defended that tradition of free

greater sanctioning of, speech that might be offensive or potentially disturbing to various interest groups on campus; self-censuring due to norms of "political correctness" that inhibit the expression of challenges to received wisdom; and a type of balkanization of groups that limits dialogue or debate and results in conversations primarily with those who already share your own ideological or identity politics viewpoint).

¹² I would define a neo-antiquarian as someone who is prepared to see value in the past and to accept that history and change do not necessarily bring us closer to the Age of Truth, Beauty and Goodness.

¹³ The University of Chicago originally opened as an institution of higher learning in 1892. The University holds several convocations each academic year.

inquiry, this time to participants in the Columbia University Heyman Humanities Center Conference addressing the question “What is Academic Freedom For?”¹⁴ I was one of the participants in the conference, and as a professor at the University of Chicago and a member of the sizable audience who heard the lecture, Bob Zimmer’s talk and the ideals it expressed inspired me and made me feel proud.¹⁵ I found myself thinking about the University News coverage I had read about the uplifting ideals feted twelve days earlier in Rockefeller Chapel.¹⁶

There is a story about Rockefeller Chapel that circulates around Hyde Park and dates from the years of Robert Maynard Hutchins, who became President of the University of Chicago in 1929 at the startling age of 30 years old and remained President for a very long time. Many members of the graduate faculty thought it was far too long, but for a variety of good reasons (some directly related to freedoms of speech and thought at universities in the United States) Hutchins remains legendary in the annals of academic history. Rockefeller Chapel used to be open twenty-four hours a day. The notorious (famous and infamous) Hutchins ordered the building closed at night. When asked why, he remarked with characteristic wit, "Unfortunately, more souls have been conceived in Rockefeller Chapel than have been saved there." Inspired by Felix Frankfurter, Alexander Bickel and the idea of a University of Chicago true to its ideals as articulated by its current President I am going to engage in a kind of reflection on the saving of academic souls, in the hope that if we can save enough souls by making some progress figuring out what academic freedom is really for perhaps Bob Zimmer will consider ordering Rockefeller Chapel open again at night.

¹⁴ That conference was a launching point for this volume of essays.

¹⁵ See Robert Zimmer’s essay in this volume.

¹⁶ On the history of academic freedom at the University of Chicago see John Boyer, *Academic Freedom and the Modern University: the Experience of the University of Chicago* (College of the University of Chicago, 2002). For a recent University of Chicago policy statement concerning free expression see http://www.uchicago.edu/about/statement_on_principles_of_free_expression

That our academic soul needs to be saved (or at least reignited) may or may not seem obvious to the reader. Being in the business of conceiving souls is probably more fun than being in the business of trying to save them. In this brief reflection on intellectual life at a university where provocation has long been thought to be a virtue my aim is to stimulate a lively and upbeat conversation about matters of concern while avoiding the hazard of merely adducing a list of complaints or projecting an earnest sense of gloom and doom. Nevertheless I do think there is a need to worry from time to time about our academic souls, and about the aggregate and cumulative effect of the many small compromises of the Socratic ideal that are characteristic of the contemporary American university; and this is true even at proud institutions such as the University of Chicago and Columbia University which define themselves as among the very greatest free and intellectually playful environments in the world.¹⁷

One might, for example, begin the process of resuscitation by juxtaposing and critically pondering the following two official University of Chicago discourses, the first an example of a discourse from out of the dawn of the great American University, and the second an example of the discourse which, as noted, I associate with its twilight.

This straightforward example of the first type of discourse is from the University of Chicago Articles of Incorporation, Bylaws and Statutes (page 44).¹⁸ Simply put: “The basic policies of the University of Chicago include complete freedom of research and the unrestricted dissemination of information.”

¹⁷ It is, of course, one thing to (Madison Avenue-like) market oneself as a free and intellectual playful academic environment and quite another for any university to live up to that ideal. It might be instructive to survey the way the public relations/University News outlets of leading universities publicize the kinds of research and public policy ideas that circulate on campus. To what extent do they play safe and tend to avoid drawing attention to work that is against the current, provocative or upsetting to the general public or to their own alums?

¹⁸ It is ironic that this straightforward declaration of academic freedom is part of the preamble to a statute on patent policy, but it is the type of discourse one finds in several other official university documents.

An example of the second discourse comes from an official communication from the University of Chicago Social and Behavioral Science Institutional Review Board to the faculty sponsor of a personally funded research project (dated September 2005): “We regret to inform you that IRB approval for your research Protocol has expired. Please note that research related activities (including interaction with human subjects, data collection, and/or data analysis) may not continue or be initiated until the IRB has approved the continuation of this research.”¹⁹

Incoherencies in the practice of academic freedom and gratuitous restraints on inquiry of that type (originating in this instance within the walls of the academy and voluntarily overextending the reach of restrictions tied to federal research grants to researchers who don’t have or seek such funds) are just one sign of the twilight. There are many others, although I hasten to add that in our disputatious academic communities not everyone agrees about what is the dawn and what is the twilight.²⁰

¹⁹ The most recent variation of this official Institutional Review Board communication, reminding faculty and students that from the point of view of the university administration faculty and students are not free to engage in inquiry involving the study of human beings until they are given permission to do so by an administrative review board, reads as follows: “IRB Approval for the above-referenced submission will expire on [such and such date]...Please note that the University requires active IRB approval for all research activities involving human subjects, including participant recruitment, data collection, and analysis/write-up of data containing or linked to identifying information about individuals (including, e.g., interview transcripts, audio/video recordings, laboratory or field notes).”

²⁰ Frankfurter’s and Bickel’s conceptions of academic freedom implied the desirability of a separation of things that might be separated from other things – inside from outside, scholarship from politics, perhaps even the ardor and fearlessness of those who follow the argument where it leads from the ardor of those within the University who have more practical concerns such as fund raising or public relations or saving the world. Hence Frankfurter disallowed and Bickel disparaged external interference with the internal affairs of the University or the subordination of Socratic reasoning to either the ends of some moral crusade or the desires of those who are wealthy or politically powerful. They believed in the maintenance of boundaries between the professional duties and responsibilities of a genuine academic and the interests of that same person when he or she assumes the posture of a social activist or a concerned citizen. Presumably they would argue that members of the Board of Trustees of a free university have the same

Consider, for example, this principle, taken from a famous 1972 official University of Chicago Report on Academic appointments (the so-called Shils Report) written by a faculty committee chaired by the sociologist Edward Shils and expressing a certain view of the core values of an academic community, including the exclusive focus on free thinking and scholarly achievement as a condition of membership: “There must be no consideration of sex, ethnic or national characteristics, or political or religious beliefs or affiliations in any decision regarding appointment, promotion, or reappointment at any level of the academic staff.”²¹

Today on many college campuses that principle is viewed as an impediment to moral progress, or as old-fashioned, or as controversial, and it has been set aside or ignored. Yet I suspect some of the faculty members on the committee that prepared that report (which included world-renowned scholars of Asian, African and European descent) might reasonably have argued that the principle is resonant with the legacy of academic freedom; and that we should feel proud, not embarrassed to defend it, and to act on it for the sake of the triumph of character over color, of the intellectually free individual over the ethnic (stereo) type.

professional responsibility - to separate their role as Trustee and guardian of an academic institutional tradition from their interests as social activists or concerned citizens or as non-academic professionals in business, law, medicine, show business, or journalism. The blurring of the boundaries between the world of the academy and the worlds of commerce, politics, celebrity, moral reform (typically in the form of social justice advocacy in the areas of race, gender, sexual orientation and social class), local community or neighborhood development and public relations is increasingly a fact of life at institutions of higher learning in the United States. Not everyone in the academy views the blurring of boundaries or the penetration of the academy by non-academic interests as the twilight of the Great American University or is prepared, even in their role as academics, to place academic freedom above other competing values, such as collective social responsibility or the promotion of educational, occupational, health or income equality.

²¹ Available at this website (click on Appointment and Promotion Criteria [Shil's Report]: <http://facultyhandbook.uchicago.edu/page/academic-appointments>

Or how about this comment by a former President of the University of Chicago, Edward Levi, delivered to the University of Chicago's Citizens Board in 1967? Embracing something like a view expressed by Edward Shils that the primary aim of a great University is "improving the stock of ordered knowledge and rational judgment" – that is what academic freedom is for – the then President of the University of Chicago told the citizen's board that it is not the role of the University to serve the community in which it is embedded or to directly respond to the needs of the broader world of politics and commerce or to be popular with the general public. Noting that we live in a time when "Rational discussion itself is suspect", when "our society is fascinated with the manipulative techniques of persuasion, coercion, and power" and a time when "the sense of injustice, which all must prize, is subject to manipulation" he told the Citizen's Board that first and foremost "the university conceives of itself as dedicated to the power of the intellect. Its commitment is to the way of reason." As noted earlier Robert Maynard Hutchins looms large in the self-consciousness of University of Chicago Presidents and President Levi went on to note that the University of Chicago stands "as Robert Hutchins said, in perpetual agreement with Cardinal Newman that the object of a university is intellectual and not moral." One wonders how much agreement such views would garner among faculties and administrators at Chicago today.

It seems noteworthy in that regard that Edward Levi was also the first member of the faculty of the University of Chicago to occupy the newly created post of Provost in 1962 and his appointment fifty years ago was officially celebrated by current and former university administrators, and others, on September 21, 2012. There is a certain irony in this celebration of his life and work, for in recent decades the antiquarian vision of the mission of the University of Chicago articulated by Edward Levi has truly become something of an antique and has more or less been renounced by our administrative leaders and even many members of the faculty. Quite recently, on June 13, 2012, on the occasion of the 511th Convocation of the University, in an address titled "The Life of the Mind and Social Action" delivered to the graduating class of the college and their guests, the convocation speaker, the sociologist Stephen Raudenbush, essentially (and with no

discernible tears in his eyes) observed that at the University of Chicago Edward Levi's vision of the mission of the university was more or less dead.²²

Professor Raudenbush is a brilliant, prominent, socially concerned and affable member of the faculty. In his convocation address he accurately characterized Levi's general view this way: that the University of Chicago, if it is to remain true to itself, has a singular purpose, in particular, "It exists to increase the intellectual understanding and powers of mankind." There is another way to put this: Edward Levi believed that whatever the unintended consequences (benefits or costs) of a University of Chicago education (and there are costs as well as benefits) those outcomes are not part of our mission statement. As Levi exclaimed, the University of Chicago "...does not exist to train the many technicians needed for our society, nor to develop inventions important for industry." Those and other quotes framed the Raudenbush convocation address, which sounded a bit like a funeral oration for the Levi conception of the *raison d'être* for the existence of the University of Chicago.

With reference to Edward Levi's remark that "The University of Chicago ... does not exist to increase the earning power of its students" the speaker offered this reply: "As an aside to the parents gathered here today, I am not sure the University told you this four years ago!" As an aside of my own, one certainly hopes they did. And, although I am confident that in his heart of hearts Steve Raudenbush hopes so as well, his light-hearted facetious remark (and his convocation speech in general) did put me in an ironic frame of mind. It made me wonder whether the university has reached that point in its abandonment of the Levi vision where students and faculty should now expect the annual Aims of Education speaker to proudly declare that "One of the main purposes of the University of Chicago is to increase the earning power of our students" or expect our admissions officers to be on the lookout for academically qualified students who are likely to respond to that message with applause?.

²² The Raudenbush Convocation address is available at this website:
<http://news.uchicago.edu/article/2012/06/13/511th-convocation-address-039the-life-mind-and-social-action039>

Stephen Raudenbush, who has made major contributions to the quantitative analysis of school outcomes and whose own scholarship and research is in the applied area of school reform, the sociology of education and explanations for the educational achievement gap between racial and ethnic groups, then posed the following question: Given the University of Chicago's historical commitment to something like Edward Levi's vision of the mission of the University how are we to explain the fact that, for example, the University now manages four charter school campuses on the South Side of Chicago and runs a large applied research consortium that evaluates policy options for the Chicago Public Schools? (How indeed are we to explain this shift in academic norms? Again as an aside, individual members of the faculty have always been at liberty to conduct research in school settings or even to hire themselves out as paid or unpaid consultants to the City of Chicago, as long as their consulting business was on the side, not the business of the institution per se or one that carried the weight or imprimatur of the University of Chicago, and was not a central part of a faculty member's calling within the halls of the academy. With the abandonment of the Levi vision this seems to have changed.)

Professor Raudenbush went on to praise the new developments, the spirit of social problem solving, and the blurring of the boundaries between the role of the academic and the role of the morally motivated social activist which is now increasingly embraced by administrators and Trustees at the University of Chicago. Speaking to a graduating class of the college he essentially argued, pace Bickel, Frankfurter, Levi (and Socrates) that the ardor and fearlessness of scholars to follow the argument where it leads and the robustness of the tradition of free thinking within university environments are NOT best protected by separating thought from well-intended social action. Such is the contemporary state of intellectual play at the University of Chicago, which makes the recent celebration of the work and life of Edward Levi quite ironical.

Academic Freedom's Sacred Text: The Kalven Committee Report

Writing as a neo-antiquarian the document that makes me feel most proud to be a professor at the University of Chicago is a short and influential official policy statement

about the institution's conception of academic freedom. It is locally known as the Kalven Committee Report (on the University's Role in Social and Political Action).²³ It is not surprising that Robert Zimmer, the current President of the University, focused his discussion of the ideals of academic freedom at the University of Chicago on the principles in that report, or that both of us treated it as a document of interest in preparing our essays for this volume. The document identifies two fundamental and interconnected qualities of academically free institutions, namely the autonomy of voice of members of the community and institutional neutrality. The Kalven Report has been influential enough to have been the basis for three highly visible refusals of the University of Chicago to engage in social and political action, with regard to the Vietnam War, in the face of calls to divest endowment funds from companies doing business in South Africa during the era of apartheid, and more recently with respect to calls to divest from companies doing business in Darfur during a period of violent conflict in the Sudan.

The Kalven Committee Report was written in 1967 by a faculty committee that included the historian John Hope Franklin, the Nobel Prize economist George Stigler and faculty from all the academic divisions in the university. The committee was chaired by Harry Kalven, Jr., who was at the time a Professor in our Law School. Kalven was a Socratic eminence and a brilliant stylist, who wrote a seminal book called A Worthy Tradition: Freedom of Speech in America, a book I recommend to all readers of this essay.

The Kalven Committee report describes a fundamental aim of the University of Chicago as follows: "A university faithful to its mission will provide enduring challenges to social values, policies, practices, and institutions. By design and by effect, it is the institution which creates discontent with the existing social arrangements and proposes new ones. In brief, a good university, like Socrates, will be upsetting."

In the service of that mission (and of that worthy tradition) the report, quite crucially, points to two sacred (and closely linked) University of Chicago principles, two

²³ The text of the Kalven Committee Report can be found at this web address: <http://www-news.uchicago.edu/releases/07/pdf/kalverpt.pdf>

fundamentalisms for High Brows: “institutional neutrality” and “faculty and student autonomy”. The University as an institution is cautioned against taking any collective or institutional stance on the social and political issues of the day, in part because there is no intellectually defensible process “by which it can reach a collective position without inhibiting the full freedom of dissent on which it thrives.” In other words, the university as an institution refrains from social, political and moral posturing out of respect for the autonomy of its faculty and students, and especially out of respect for those individuals in a disputatious academic community who may embrace an unpopular or politically incorrect point of view.

My former Provost, Geoffrey Stone, who I am sure was quite proud to be for some years the Harry Kalven Jr. Distinguished Service Professor in our Law School (a title well-suited to a legal scholar of the first amendment) and who must be equally proud to now be the Edward Levi Distinguished Service Professor in our Law School, invoked the Kalven Committee Report (and the principles of faculty and student autonomy and institutional neutrality) to defend the University of Chicago’s Darfur decision. He offered that defense despite the fact that as a student he had strong feelings, as did I, during the time of student unrest on college campuses in the late 1960s, about the importance of getting our universities to condemn the war in Vietnam. Geof Stone described the Darfur decision in the following terms: “What the Kalven Report forbids ... are decisions of the University designed expressly or symbolically to proclaim “right” moral, political, or social positions...Lawyers know all about slippery slopes. If the University divests from Darfur, then others will surely insist that the University must divest from corporations that manufacture cigarettes, perform abortions, sell arms to Israel, and pollute the environment. Of course, there are degrees of right and wrong and degrees of evil. But it is not the role of the University to take positions on such questions. Indeed, the University should no more divest on the basis of these sorts of issues than it should prohibit students and faculty from speaking freely on campus in support of tobacco subsidies, the moral legitimacy of murdering abortionists, the right of Palestinians to destroy Israel, or even the morality of genocide.”

Geof Stone goes on to conclude his reflection (which appeared on the University of Chicago Law School Blog on Feb. 9, 2007) by noting: “The role of the University is not to “decide” such questions, but to create and nurture an environment in which we may freely and openly debate them, without fearing that the University has already resolved them on our behalf.” He might just as well have said (in effect, by means of his provocative and indignation arousing examples he did say it): “In brief a good university, like Socrates, will be upsetting.” Yet right here and now while quoting my former Provost, I do wonder: how many members of the faculties of the great universities of the United States (including the University of Chicago) would actively (or even passively) support an institutional environment that protected such debates and conversations?

There is of course much more to be said about autonomy of voice and institutional neutrality. I do research in a Hindu temple town in India. Some years ago, I invited a friend and scholar from that temple community to visit my temple community, the University of Chicago. It was his first trip abroad, so he came to the United States quite fresh. I invited him to attend my section of a Social Science Core Course. He noticed things we take for granted. He noticed that, as I walked into the classroom, the students did not stand up and show their respect for my status. He noticed that males and females were sitting together. He noticed that I encouraged the expression of opinions from my students. All those things went against his notion of what the practice of classroom teaching is about.

Such observations by an "outsider" helped me recognize a fundamental message of the organization of the classroom in our intellectual community. The message has much to do with the autonomy of voice. We participate in the community as individuals, not as social categories. We try to detach our evaluation of the ideas that are voiced from the social identity of the person who voiced them.²⁴

²⁴ I told this story in a 1993 Aims of Education Address titled “Fundamentalism for Highbrows,” which was later published in a collection of essays, viz., R.A. Shweder *Why De Men Barbecue?: Recipes for Cultural Psychology* (Cambridge, MA: Harvard University Press). Some of my thoughts about antiquarian conceptions of academic

There are many ways to lose your voice or to have it taken from you. Laryngitis is the least of them. I can recall losing my voice twice in recent decades, both at academic conferences. On the first occasion one of the main speakers at the conference declined to participate in round-table discussion with the males in the room on the grounds that her only interest in men was as sexual objects. Her gesture may seem outdated today; nevertheless, at the time, it was an astonishing and wickedly witty way of telling a story about the loss of voice. On the second occasion, a speaker denounced the musical "West Side Story" on the grounds that it had been produced by "successful white males" who, she argued, had no authority to represent the Puerto Rican-American experience. When it was pointed out by a wounded female fan of the show that "West Side Story" was, of course, a variation on "Romeo and Juliet," a play created by a successful white male who was neither Italian nor a citizen of Verona, the speaker denounced William Shakespeare as a racist.

“Racist” is an epithet which along with a small and highly disparaging set of other stigmatizing and argument-ending accusations (such as sexist, anti-Semite, homophobic, socialist, self-hating Jew, neo-colonialist and increasingly, neo-liberal and libertarian) have all too often been show stoppers on the stage of academic freedom; out of a fear of the reputational effects of being so labeled, such epithets have, at the very least, inhibited many academic souls from assumption-questioning dialogue and the forthright expression of critical judgments about matters of consequence.

I think there is a message about the authority of voice to be drawn from these examples, and it is this: The authority of a voice has a lot to do with what is said and very little to do with who says it. In other words, you do not have to be a Westerner or a male to articulate a Western or masculine perspective, and most Westerners and most males are not very good at it, anyhow. Authoritative voices ought to have authority not because of their census category or social identity, but because what they say either has in the past or

freedom at the University of Chicago are expressed in that speech and reiterated and expanded here in this essay.

currently binds you to a reality. Indeed, "insiders" are not necessarily the best ones to speak about themselves. That is why some of the best books about social life in the United States have been written by "outsiders" from Asia, Africa, and Europe. It was an observation by a friend from India that got me to realize that in a truly academically free university you never have to sacrifice your ardor, your fearlessness or the autonomy of your voice.

The academic freedom ideals – autonomy of voice and institutional neutrality - defined by Harry Kalven, John Hope Franklin, George Stigler and others are extraordinarily difficult to uphold and defend. There are many powerful forces in our contemporary society (both inside and outside the academy) that threaten the principles of student and faculty autonomy and institutional neutrality at the increasingly timid, cowed and compromised universities and colleges of America; and I don't just have in mind the Patriot Act or attempts to control what is done at Middle Eastern Area Centers.

Those who love Kalven's Report in principle don't always love it in practice; for example, when they want the university (or the Office of the President or the Office of the Provost) to take a collective stance in support of their own favorite social or political cause, or to officially celebrate their own cultural or activist heroes; or to censure the expression of opinions or attitudes they find objectionable or offensive. The principle of institutional neutrality (which, it is useful to remind oneself, is upheld for the sake of protecting the autonomy of thought of faculty and students) makes manifest the antiquarian conception of academic freedom. Reiterating Geof Stone's interpretation, the principle forbids "decisions of the University designed expressly or symbolically to proclaim 'right' moral, political, or social positions."

Although the relevant scope of the definition of the institutional or collective entity "the University" might not be fully transparent, the concept of a "decision of the University" expressly or symbolically proclaiming "right" moral, political or social positions

presumably includes endorsements by the Board of Trustees, by Administrators speaking on behalf of the University or by faculty speaking on behalf of their Division, School, Department, Center, Institute or Program. It would presumably offend the principles of the Kalven Committee Report if the faculty of the Department of Economics voted to have their department endorse a particular candidate for President of the United States; if the Provost of the University, speaking in his capacity as Provost, sent a message to faculty, students and staff calling for the repeal of Roe v Wade; or if the University of Chicago Medical School by means of an official collective action decided to “symbolically” declare the right position to take on a controversial social and political topic such as abortion by creating and managing a “University of Chicago Abortion Clinic.”

Yet the principle of institutional neutrality seems less principled when it is put to very selective use, defending academic freedom by defying the demands of activists to condemn the war in Vietnam or to divest from South Africa during the era of apartheid, yet having no such conviction when it comes to symbolically proclaiming the “right” moral, political or social position by entering into a partnership with the Chicago Public Schools and placing one’s imprimatur as an institution (in contrast to one’s name as an individual faculty member) on some particular educational policy goal; or when the Office of the Provost declares publically in a noble and principled way that the University Administration does not comment on (or take an official position with respect to) the sometimes provocative, upsetting or unsettling views expressed in private or in public by individual members of the faculty yet less openly makes it clear to other administrative officials that the expressed views of individual faculty members upon which it does not comment (but which, precisely because they are provocative or upsetting, may create concerns among administrators and faculty about their unbidden negative reputational effects for the institution) are not only unwelcome but that the faculty member should in some way or another be censured, scolded, sanctioned or marginalized, for example, by suggesting or encouraging the

Chair of his or her department to take steps or make administrative decisions of that sort.²⁵

²⁵ A relevant case in point is the recent national uproar, negative publicity and local institutional angst created by an off-the-cuff comment made by a tenured member of the University of Chicago faculty on his Face Book page in which he asked, based on his own reported personal observations, why physical attractiveness seemed to be in such short supply among female scientists at a large neuroscience meeting he was attending. This was a topic (physical attractiveness) about which he had previously written, engaging in Darwinian speculations. Physical attractiveness is a judgment about a perceived sensory quality (and an interpersonal capacity for those able to elicit the judgment) that some Darwinians think is positively related to success (reproductive and otherwise); and the study of what makes for physical attractiveness, its functions and social benefits, has been a provocative (and popular) topic for research in the frat house like ideological world of evolutionary psychologists, and among journalists who are themselves attracted to Darwinian speculations. Whether one likes it or not it is not hard to imagine a research program in evolutionary psychology designed to systematically document the distribution of physical attractiveness (in women and/or men) across social classes and occupations and across the various disciplines within the academy. At the same time this is a moment in the history of the academy when leading universities are keen to recruit and retain talented and academically accomplished women into the biological and physical sciences; and (for moral, legal and reputational reasons) universities are highly alert to, and sensitive about, accusations of gender discrimination, or of sexual harassment or of intransigence in providing a supportive and welcoming work environment for women.

That comment, a few lines written by a University of Chicago tenured professor reporting (and posing a why question) to his Face Book “friends” about what he perceived to be the relative absence of physical beauty among women who study the brain, was leaked and went viral on the internet (which quickly took the form of an international cyber-stock for transgressors). Almost instantly his comment was judged to be insensitive, stupid, impolitic, glib, puerile, egocentric, arrogant, snide, condescending, mean-spirited, callous, obnoxious, insulting, offensive, or infuriating by many of his colleagues, locally and nationally. Some responders just dismissed him as a jerk. Other responders rushed to a dark and vilifying conclusion and labeled him with the epithet “sexist.” Still others indignantly interpreted his observation as a sign that his only interest in his female colleagues at the conference (and women more generally) was as potential sexual objects. The local uproar and national brouhaha unleashed by his Face Book entry was a perfect storm of disgust and outrage, which included various types of calls from outside and inside the university for his resignation, censure, sanction, punishment or removal from departmental responsibilities.

It is relevant in this discussion of the aim of academic freedom that the evolutionary psychologist’s Face Book comment to his “friends” was not widely judged to be an example of the ardor and fearlessness of a research scholar to follow a Darwinian

argument where it leads regardless of the practical, moral or political consequences or to challenge received pieties and make observations (or hypothesize the existence of facts) that might be embarrassing or even infuriating to some. Those who responded most forcefully did not do so in a spirit of the sort recommended by Geoffrey Stone in his explication of the implications of the Kalven Committee Report, one that is supportive of an academic environment in which one can speak freely about the right of Palestinians to destroy Israel or the moral legitimacy of murdering abortionists or the possibility that beauty and brains might not readily go together in the brainiest of the sciences. His comment was not assessed (critically or otherwise) in terms of its descriptive truth; and most responders steered clear of actually trying to assess the truth or falsity of the (apparently) tabooed (and no doubt callous, impolitic and perhaps deliberately provocative and even taunting) empirical claim addressed by a University of Chicago researcher to the readers of his supposedly private Face Book page.

In some ways the tumultuous response was reminiscent of a far greater furor a few years ago, which precipitated the resignation of Lawrence Summers from the Presidency of Harvard University. President Summers agreed to give a talk to what was supposed to be a private free thinking seminar. He delivered an analysis of what he took to be the most likely explanations for the scarcity of female researchers in the physical sciences at the elite universities in the country. He listed personal preferences first on his list of possible explanations. He suggested that vicious gender discrimination was an overemphasized explanation and probably not the best explanation, at least not at the elite universities of the country (where in recent decades there has been a concerted effort to recruit talented and academically accomplished women into the biological and physical sciences). He left open the possibility that the intellectual capacities that were necessary for success in the physical sciences at the top universities were rare and at the extreme tails of any normal distribution of talents and capacities and that the frequency of such outliers for males and females may not be identical. This is a notion with a lineage that goes back to Darwin; and it is not unusual to hear Darwinians suggest that normally distributed characteristics typically show greater variance for men than for women, which implies that extreme or rare qualities (both good ones and bad ones) tend to be more common in men than in women. In essence Lawrence Summers, the President of Harvard University and himself a somewhat assertive and impolitic member of both the faculty and the administration of that great university, was willing to entertain the possibility that most human beings (nearly all of them, men and women) are not capable of thinking the way top level physical scientists think but that at the extreme tails of the distribution of the requisite rare qualities of mind that make for success in the physical sciences those qualities might be more prevalent among men than women.

The rest is history. One or more of the participants in the seminar judged his comments to be ideologically and morally toxic for the cause of gender equality in the academy and leaked them to the press. Moral judgments and social agendas overwhelmed any academic debate. President Summers was forced to resign.

Other more or less debatable violations of institutional neutrality and faculty and student autonomy do occur and they sometimes do so without much comment or even recognition – for example, when the University of Chicago administration all of a sudden, and completely out of character, sets aside several days around the time of Martin Luther King’s birthday to commend a hero and to celebrate his civil rights activities and officially encourages all members of the University community to attend (the issue turning not on whether there are plenty of citizens of the United States who were inspired by Dr. King and eager to honor him – I myself participated in the March on Washington in the summer of 1963 - but rather whether it is the role of an academically free contentious university committed to debate and criticism and institutional neutrality on social, political and moral issues to have its administrative officers promote this form of piety for any social, political or moral figure). Or when the Dean or the faculty of a university department, school or program refuses to rent their lecture hall to a student organization because he, she or they (the Dean or the faculty of that program) loathe the views of an invited speaker or fear the

Perhaps this is a special case: Lawrence Summers seemed to think that at the drop of a hat he could take off his President’s cap and speak simply as a provocative or contentious member of the Harvard faculty, which may have been a naïve and hazardous assumption; and while his seminar presentation on the gender gap in the physical sciences may have been the most salient and recent event leading to his resignation, discontent with his Presidential interventions and with a confrontational interpersonal style that some experienced as a form of disrespect had been brewing for some time.

Nevertheless, given the current dynamics of identity politics at universities in the United States, those who value academic institutions as assumption-questioning and provocative Socratic institutions and cherish them as homes for debates about controversial topics conducted by fearless untenured junior faculty as well as tenured senior faculty need to ask: What should the principles of academic freedom as expressed in the Kalven Committee Report require of the behavior (on stage and off stage) of administrators up and down the administrative hierarchy in instances such as the two I just described? How staunch and consistent can we count on our administrative leaders being in defense of academic freedom and the expressive liberties of research scholars (even research scholars who are irritating, snide, insensitive or impolitic) when the going gets tough and unpopular for the institution and the offending or offensive scholar becomes a target of ridicule, disparagement and calls for penalties in the context of hot button political, moral or ideological issues?

consequences of international attention to his or her presence in their academic space; or when officials of the university disregard the notions of institutional neutrality and student autonomy and step across the line (wherever that line might be) between sensibly maintaining the civility and respect for persons presupposed by any robust free speech/free thought environment (enforcing a prohibition on shouting down speakers for example) and dubiously imposing a “heckler’s veto” by playing to the gallery and sanctioning students or student organizations because they dramatically said something or did something (often in the form of parody or hyperbole or burlesque) that is politically incorrect or deeply offensive to the beliefs and values of other outspoken students.

In the 1960’s a University of Chicago student organization invited the then head of the American Nazi party to speak on campus. They did this shortly after administrators at Northwestern University cancelled a similar invitation to that campus. They wanted to dramatize the idea of no topics barred open debate at the University of Chicago. The very idea of the head of the American Nazi party receiving an invitation to speak at the University of Chicago seemed vile and was so deeply offensive to some members of the faculty, including some very famous and prominent Jewish scholars such as Leo Strauss, that they wrote a letter to the then Dean of the College, urging him to cancel the invitation. He declined to do so, while standing firmly in defense of the right of the students to invite and debate whosoever on any topic they wanted. The event went forward, apparently without disruption and everyone had a conversation about the nature and limits of academic freedom. I have no way of knowing if the lecture/conversation and questioning and discussion that may have ensued added to the “stock of ordered knowledge and rational judgment.” Those who protested the event were confident that the chance of that happening was zero.

Fast forward to today. Imagine the members of a free speech student organization on campus read Geof Stone's blog (mentioned above) where he notes that among the topics open for debate and protected by the academic freedom principles set forth in the Kalven Committee Report are the moral legitimacy of murdering abortionists, the right of Palestinians to destroy Israel, and the morality of genocide. Imagine the student organization organizes a series of three lectures and invites to campus strong advocates for each of those positions thereby inciting the faculty members of this or that department or program (the Committee on Jewish Studies or the Center for Gender Studies for example) to issue an official statement denouncing the event and anyone who believes that Israel has no right to exist and should be destroyed or that there is ever a moral justification for violence against abortionists, and calling on the University of Chicago administration to cancel the talks. Who has behaved inappropriately here (in the sense of violating the principles of the Kalven Committee Report), the students or the faculty of the Committee on Jewish Studies and the Center for Gender Studies? And how should the Provost, President and Board of Trustees of the university respond, given their principled commitment to institutional neutrality in the case of the Vietnam War, South African apartheid and the violent conflict in Darfur?

No doubt some controversial social, political and moral issues can't be avoided by institutions of higher learning or kept off their radar screen. But is that any less true of the corporate investment decisions of the university than it is of decisions about faculty recruitment or student admissions? When the University of Chicago and its Deans place strict limits on new faculty appointments (or even freeze new appointment lines in some department) yet at the same time create a special fund effectively enabling the unlimited recruitment of faculty from a targeted and small set of particular minority groups (and only those minority groups) in some sense they take the step that Geof Stone (in his defense of the decision not to divest from Darfur) suggests is forbidden: the institution decides a controversial question on behalf of its disputatious faculty and students, declaring what is the right minded and moral thing to do, while increasing the risk that its

institutional action will inhibit the full freedom of debate and dissent on which the institution thrives.

To make matters worse it invites a cynical response from those in the academic community who care about following the argument where it leads and “increasing the stock of ordered knowledge and rational judgment.” Having circumvented the process of robust debate the decision is taken without a rigorous assessment of the actual impact of the affirmative action hiring policy on viewpoint diversity on campus. Not surprisingly, given the particular social justice agenda actually being pursued (out of moral concern over, for example, the legacy of the practice of slavery in the United States), the preferential hiring is implemented incompletely with respect to the logic of genuine viewpoint diversity (a brilliant scholar from an “untouchable” or “scheduled” caste in India would not qualify no matter how different or fascinating that person’s viewpoint). Instead of encouraging the ardor and fearlessness of scholars to follow the argument where it leads the policy is embraced by the institution in such a way that it quickly becomes politically incorrect (or it is viewed as ethically callous) to even point to the neutral appointment principle articulated in other official university policy documents. To wit, and as noted earlier, that “There must be no consideration of sex, ethnic or national characteristics, or political or religious beliefs or affiliations in any decision regarding appointment, promotion, or reappointment at any level of the academic staff.” Despite the admonitions and cautions inherited from Edward Levi and Robert Hutchins (and, as noted earlier, from Cardinal Newman) in this instance the mission of the university appears to have become primary moral and probably not sufficiently intellectual.

And not everyone loves the Kalven Committee Report, even in principle. For example, one finds some members of one’s own academic community arguing (as do some politicians in Washington and bureaucrats in the once revealingly named Office of Compliance - now renamed the Office of Human Research Protections) that conducting research at a place like the University of Chicago is a kind of indulgence (or a favor) and certainly not a fundamental right. In fact there are many in the academy these days who

believe that any student or faculty member who talks to human beings as part of their research in fact should be required to have his or her project approved in advance by an institutional licensing board (the so-called Institutional Review Board), in part to guarantee (especially in the social sciences and humanities, but also in some forms of biomedical research) that no one asks questions that are too upsetting to some.²⁶

Is Faculty Governance a Threat to Academic Freedom?

It may well be a measure of the fragility of academic freedom that it can be threatened on many fronts. In 1957 Justice Frankfurter recognized that academic freedom (the ardor and fearlessness of scholars) is both fragile and indispensable for fruitful academic labor and needs to be protected from Government intervention in the intellectual life of the university. In 1967 the Kalven Committee recognized that academic freedom (the ardor and fearlessness of scholars) is both fragile and indispensable for fruitful intellectual labor and needs to be protected from Institutional or Administrative intervention in the intellectual life of a university. Recently there has been a new development at the University of Chicago in which the administration (the President, Provost and all the Deans, with the support of some members of the faculty) has argued that academic

²⁶ For critical discussions of the regulatory “mission creep” on college campuses and the implications of the ethical review process at American universities for academic freedom see Philip Hamburger *The New Censorship: Institutional Review Boards*, *Supreme Court Review*, 271 (2004); Zachary Schrag, *Ethical Imperialism: Institutional Review Boards and the Social Sciences, 1965-2009* (Johns Hopkins University Press, 2010); Richard A. Shweder, *Protecting Human Subjects and Preserving Academic Freedom: Prospects at the University of Chicago*, *American Ethnologist* 33: 507-518 (2006); also the collection of essays in the “Symposium on Censorship and Institutional Review Boards” published in the *Northwestern University Law Review* (Volume 101, Issue 2, 2006), the University of Illinois Center for Advanced Study white paper “Improving the System for Protecting Human Subjects: Counteracting IRB ‘Mission Creep’”, <http://www.law.uiuc.edu/conferences/whitepaper>) and recent reports issued by the American Academy of University Professors (AAUP) available on-line: for example, <http://www.aaup.org/AAUP/comm/rep/A/humansubs.htm> and <http://www.aaup.org/AAUP/newsroom/2012PRs/irb.htm>

freedom is fragile and indispensable for fruitful academic labor and needs to be protected from Faculty intervention in the intellectual life of the university.

That last threat to academic freedom, whether real or imagined, needs to be examined in more detail. So does the solution offered by those who fear the threat. Their proposed remedy for the threat being that at the University of Chicago faculty ruling bodies should have jurisdiction and decision making powers (a vote) only over the educational and teaching activities of the university; and that the administration and ultimately the Board of Trustees (typically but not necessarily in non-binding consultation with individual faculty or faculty ruling bodies) should have jurisdiction and decision making powers over the research activities of the university (including decisions about the creation of research centers and research institutes and the development of new directions of inquiry).

There is little doubt that from an ultimate corporation point of view the Board of Trustees has final authority over what happens at the university and probably has the legal authority, if the Trustees were so inclined, to close down the current departments and end all student admissions, teaching and degree granting at the University of Chicago and turn the institution into a research institute of applied microbiology, translational medicine, brain science, molecular engineering and school reform. Yet it should be pointed out as well that it is the delegation of authority over the intellectual life of the institution to the faculty and the understandings, values and norms that insulate the faculty from top down management of intellectual life that characterizes the academic culture of the great universities of our land.

On the surface at least it may seem ironic to try to preserve the academic freedom of the faculty by restricting their role in decision making about the evolution of the intellectual life of the University. Recall Alexander Bickel's observation (see above) that "only in a university can inquiry and teaching constitute one creative whole." At the University of Chicago these days the administrative leaders of the University appear to be intent on splitting those functions apart. And the faculty itself (at least those who pay attention to

debates about faculty governance)²⁷ are themselves split apart over how to interpret the meaning of a key faculty governance statute in the Articles of Incorporation of the University of Chicago that establishes or at least articulates a framework for its academic way of life.

During the 2012 academic year the Council of the University Senate (the most centralized Faculty Ruling Body at the University) appointed a faculty committee to examine the jurisdiction and division of powers of the faculty versus the administration in matters of governance; and to examine as well the extent to which (and the topics about which) that most centralized faculty ruling body (the Council of the University Senate) might legitimately exercise authority over the decisions of other more local faculty ruling bodies and their Deans. The President of the University of Chicago Robert Zimmer, who supported the Council decision to appoint a faculty committee to examine jurisdictional issues, then appointed a second faculty committee to examine the same questions. In a letter to the Council (dated January 23, 2012) he explained that the appointment of the second faculty committee was motivated by a concern “that no Ruling Body or office of the University has the prerogative to define its own jurisdiction in a unilateral way given the distribution of authority under the Statutes.”

Special attention was given by the faculty members on both committees to the history and meaning of a particular statute in the Articles of Incorporation, Bylaws and Statutes of the University of Chicago, and its application to decision making about the creation of

²⁷ While the recent debates about faculty governance have been lively and intense among those involved I am struck by the number of my colleagues who are entirely unaware of the Administration’s stance. Despite the fact that every regular faculty member received an e-mail with a link to the reports described below it is astonishing how many faculty members do not realize these documents even exist. In earlier decades the Minutes of the Council of the University Senate were distributed in hard copy. I believe they were read, or at least scanned for significant issues and discussions, by many of my colleagues. The advent of electronic means of distribution may have had the ironic effect of reducing the size of the faculty audience who are true readers of the Minutes of Council meetings. The implications of this type of disengagement for faculty governance should not be underestimated. I much preferred the old hard copy system, and not just because I am a neo-antiquarian.

research institutes and research centers and the development of new research directions. The reports of those faculty committees were made available to all members of the faculty.

Those two reports are impressive and astonishing not just because of the seriousness, thoroughness and intelligence with which the issues are addressed but also because they arrive at such different and consequential conclusions, revealing not only a potential conflict and unfortunate divide in faculty understandings of the formal aspects of university governance, but also the challenges and complexities of governing in such a way that academic freedom actually flourishes in a university environment. I myself came away from reading the two reports hoping (perhaps against hope) that the issue is not forced and does not get settled one way or the other as a matter of principle; and hoping as well that the administration and the faculty carry on mucking through together, as we have in the past, doing whatever seems to best honor our academic freedom traditions with respect to any case at hand. A letter to the Provost co-signed by all the Deans of the University, who in this instance are uncharacteristically and surprisingly uniform in their judgment - namely that teaching and inquiry are separable functions at the University of Chicago and only the former is within the domain of faculty governance - was also part of the record made available to the faculty.²⁸

²⁸ Historically, political pluralism has been a customary feature of governance at the University of Chicago. Perhaps the custom was based on the notion that a robust environment of academic freedom is strengthened by a division of powers, the existence of multiple sovereignties, and a loose and sometimes even baffling federal system of decision making with a fair amount of decentralized authority and enumerated and un-enumerated powers which need to be negotiated over time. As noted earlier the appointment of a second faculty committee to address questions of faculty governance was motivated in part by the President's concern that the interests of local faculty ruling bodies vis-à-vis the more centralized faculty Council of the University Senate be appropriately represented. In practice however the issues are even more complex. According to the Statutes the only local faculty ruling body in my own graduate region of the university is the Division of the Social Sciences, whose head is the Dean of the Social Sciences, a faculty member who serves in the capacity of an Administrator and is appointed by the central administration (after receiving recommendations from an elected faculty nominating committee). Yet that local ruling body - the faculty members in the Division of the Social Sciences - almost never meets; and over the past four decades I can recall only two occasions in which the members of that ruling body have had an issue

The key statute, whose meaning is contested, is Statute 12 of the University of Chicago Articles of Incorporation, Bylaws and Statutes, which defines “The Organization and Powers of the University Senate and the Ruling Bodies.” It states (12.1) “All advisory, legislative, and administrative powers in the University concerning its educational work, except those vested in the President by the Board of Trustees shall be exercised by, or be under the authority of, the Ruling Bodies specified in article 12. (My emphasis) “Local ruling bodies” (for example, the Social Science faculty) are then given authority and jurisdiction over educational work of local (Divisional, College) concern and the Council of the University Senate (an elected faculty body representing the entire university faculty) is given authority and jurisdiction over educational work of relevance to the whole university. Nothing is said about which parts of “the educational work” of the university are of sufficient relevance to the university as a whole to become matters for consideration by the Council of the University Senate.

The most basic question, however, faced by the two faculty committees, was this one: Does the phrase “educational work” encompass “the twin freedoms of inquiry and of teaching” that Alexander Bickel argued constitute one creative whole at great universities (a view supported by some members of the University of Chicago faculty); or, as the

placed before them for a vote (in both cases a vote to dissolve an academic department). Some matters of local concern such as hiring or promoting faculty members are made at the level of departments (which are not recognized as official ruling bodies in the University Statutes) and sent directly to the Dean of the Social Sciences and then on to the Provost and Board of Trustees, while other matters of local concern such as leave policy or the creation of a research center headed by some member of the faculty seem to be decided largely by decisions made by the Dean in consultation with the Chairs of Departments or individual faculty. With regard to the question of who controls the research agenda of the university and the creation of research centers and institutes it thus seems to be an open question whether the structure of decentralized authority at the University of Chicago genuinely favors faculty governance at the local level or tilts in the direction of decision making by local Administrators, namely Deans. Some may argue that seen from this perspective it is not so surprising that all of the Deans at the University of Chicago argue that the “educational work” of the university does not include decision making about research directions. In practice this kind of political pluralism can only really work if there is a sense of trust and a good deal of respectful deference between administrators and faculty, running in all directions.

University Administration and other faculty members who support the administration's point of view have argued, does that statute severely limit the authority of faculty ruling bodies to decision making about "educational work" narrowly construed, namely teaching and course work and requirements for degrees?

Why would the President, the Provost and all the Deans of the University of Chicago want to split the inquiry function from the teaching function when it comes to faculty governance? What problems do university administrators see in the idea of faculty ruling bodies having jurisdiction over the research activities of the university, including decisions about the creation of research centers and research institutes or the development of new directions of inquiry? It is all too easy to be cynical about the Administration's stance on this question, positing, as some faculty do, that this is all about those who want to follow the money where it leads (typically to the practical and applied policy agendas favored by wealthy patrons, members of the Board of Trustees, well-endowed foundations and social problem solving government agencies) not wanting to lose control over their fund raising capacities and not wanting to be constrained by skeptical scholars. It is all too easy as well to simply support the Administrative stance on this question, positing, as some faculty do, that the market for funding (for example, in energy, health, brain science, school reform, economic development) is a good measure of where academic research agendas ought to go and that too many of those intellectual (and financial) benefits will not be pursued and sufficiently realized if disputatious (or change resistant) faculty ruling bodies living in an ideologically divided Ivory Tower are permitted to have a vote or veto over the evolution of the realms of inquiry on campus.

Given the circumstances that gave rise to this debate the perception by the university administration that academic freedom at the University of Chicago needs to be protected from faculty interference in the intellectual life of the university is not entirely hallucinatory. It appears to have been a response to the disgruntlement of significant numbers of faculty who organized a protest against the creation of a particular high profile (and prospectively well-endowed) research institute named after the economist Milton Friedman. The research institute (which was eventually named the Becker-

Friedman Institute for Research in Economics) was approved by the administration and went forward without the vote of any faculty ruling body, on the grounds that research centers and institutes are not part of the “educational work” of the university.

In that instance (one that received national attention) it is not hard to see how the organized disgruntlement might have been seen by the administration (and those faculty involved in the project) as a threat to the core academic values of the university. At the time, I myself, who was not involved in the project, saw it that way.

Milton Friedman was a distinguished former member of the University of Chicago faculty, a Nobel Laureate, and a contentious and influential voice of the Chicago School of Economics who in some ways exemplified the against the current and provocative character of the university in his times. Shortly after he died in 2006 (which was shortly before the meltdown of the US financial system) there was a nation-wide outpouring of affection from his supporters and a desire among some members of the University of Chicago community (especially in the Department of Economics and the Business School) to capitalize on and memorialize his legacy. Within a very short amount of time rumors circulated on campus recounting optimistic, or perhaps even grandiose, estimates of fund raising possibilities (\$100,000,000 has already been pledged, one heard; and \$200,000,000 was said to be easily within reach). Soon there followed a proposal from the Department of Economics and the Dean of the Social Sciences to create a research institute bearing Milton Friedman’s name, which was supported by the President and Provost of the University, presented or “aired” at a meeting of the Council of the University Senate (the most centralized faculty ruling body) and approved by the Board of Trustees, all without a vote by any faculty ruling body.

There was no outpouring of affection however from Milton Friedman’s detractors on the faculty or from faculty critics of the Chicago School of Economics. Instead there was a petition campaign opposing the plan and expressing a range of concerns about the corporatization of the University of Chicago and the erosion of faculty governance and

control over the direction of research currents.²⁹ Ultimately the petition was signed by well over one hundred members of the faculty (many of them from the social sciences and humanities).

I thought the petition campaign was un-collegial and inconsistent with our academic freedom traditions, as I noted in a personal communication responding to an e-mail from a colleague who was quite critical of the creation of a Milton Friedman Institute for Economic Research on campus. The discipline of economics is often described as “the dismal science” even by economists (although the provenance of the label is typically traced to the 19th century historian Thomas Carlyle). Given the nature of viewpoint diversity in the academy there are faculty members at the University of Chicago (and in the humanities and social sciences more widely) who experience the ideas and intellectual agenda of the Chicago School of Economics not only as dismal but also as imperial, as offensive, and perhaps even as a kind of pollution or desecration of the life of the mind. Expressing my thoughts about the proposed Institute and the petition campaign opposing it I responded to the e-mail from a colleague as follows:

“I have a somewhat different view of the Milton Friedman Institute. It seems to me the nature, implications and value of the institutions and logic of capitalism, free markets, private choice and contractual exchange are amongst the core issues that ought to be examined and debated in the academy – and within the academy one ought to expect and encourage the full range of voices along the spectrum from “Gemeinschaft” to “Gesellschaft”.³⁰ Our department of economics tries to push the logic of “Gesellschaft” very far – that is their ideological commitment (and in a sense their claim to fame) but it is a voice that has to be taken seriously, engaged and where appropriate critiqued. Likewise for the voices of “Gemeinschaft.” You have been a major critic but as you well know the debates of relevance here have been going on for a long time and have stretched from Voltaire and Adam Smith to Tonnies, Simmel, Weber, Sahlins and Friedman; and, at least in my view, at a great university all those types of voices should be active and

²⁹ In the air, as well, were controversial administrative initiatives of other sorts, in fashionable and applied areas of research and international outreach.

³⁰ The meanings and uses of the distinction between Gemeinschaft and Gesellschaft in the social science literature are complex but it is used here to connote the distinction between relationships grounded in a sense of duty and obligation to an historical ethical community or collective of some sort (a tribe, a caste, a family, a nation) and relationships based entirely on maximizing one’s contemporary self-interest, the sacred/moral/sacrificial versus the profane/instrumental/hedonistic.

vital. It don't think we would be the great Social Science Division of the University of Chicago without both the sacred and the profane, without the Depts. of Anthropology and Economics and I think both departments bring great prestige to our institution. Indeed one hopes for more direct debate and critical engagement across those potential divides. There are central academic freedom issues at stake in this case and the spirit of our disputatious intellectual community has been diminished a bit I think by what amounts to a viewpoint based protest against the voice of "Gesellschaft" within the academy. Moreover I don't see anything wrong with naming a building or institute after a former and influential member of our faculty (I find it more appealing than naming it after benefactors) and the Institute is not an administrative decision to promote some new area of scholarship or research for the sake of funding (although it seems to me this has been done in some other areas – and it troubles me) but rather as an extension of existing faculty projects and interests and a measure of their success and achievements... Among the concerns I do have are (1) making sure that the new institute does not administratively function like the Hoover Institute – that is to say that it remains under normal University of Chicago academic governance procedures and is not semi-autonomous from an administrative point of view; and (2) getting our Dean and everyone else to worry about the problem of resource imbalances within the Division. More positively I think we should treat this development as an opportunity for broader engagement between anthropologists, economists, philosophers and others about those central issues concerning the market mentality that you have written about so brilliantly."

My colleague, as I recall, thought I was naïve to imagine fearless scholars on either side of that divide talking to each other at all or that the faculty could count on administrative leaders to maintain a balance in resources and viewpoints across the faculties in the social science division. While I would like to believe the jury is out on those judgments³¹ the creation of research institutes and centers has exposed a weakness in the structure of University of Chicago governance. To the extent they are merely institutional mechanisms for the extension and development of particular lines of inquiry by independent scholarly minds working alone or collectively at intellectually free-wheeling universities they are unquestionably in need of protection or insulation from the prospects of a hostile vote that might emerge from the very fact of viewpoint diversity on college campuses. Providing that protection is what academic freedom is for.

Unfortunately those research centers and research institutes also tend to become academic fiefdoms and financial resource centers, which not only satisfy the interests

³¹ It is certainly possible I was naïve or that it is utopian to imagine that viewpoint diversity is sustainable at institutions of higher learning and can be protected from subordination to politics or ideology.

(and egos) of individual faculty members, but also tend to weaken decision-making within departments and reduce the likelihood that those who hold different viewpoints will have the opportunity to engage each other in debate.³² In the worse case scenario they become a device by which individual faculty members in collaboration with Administrators (who are always concerned to do their best on the fund raising front) leverage the funds available to Research Institutes and Research Centers to influence faculty hiring in academic departments and hence exercise a not so subtle form of top-down control over the future research agenda of the institution. If and when the process moves in that direction the insistence on a vote by faculty ruling bodies when new institutes and centers are proposed becomes more understandable, as does the skittishness that has surfaced over the perception of undue influence.

But that is not the only reason to be cautious about ceding research or inquiry to Administrative control (research or inquiry being an academic function that, Bickel-like, some members of the faculty continue to define as central to the “educational work” of the university, which also includes teaching) The evolution of the regulations that currently require all researchers who study human beings to produce a research protocol for prior review and licensing by an Institutional Review Board is caution enough about the fragility of the norms that protect academic freedom. While there certainly may be risks to letting faculty ruling bodies intervene in the intellectual life of the university, there are hazards as well to placing the research function in the hands of Administrators, who are not necessarily as fearless as Edward Levi in protecting the core mission of a Socratic academic life, or as free as Robert Hutchins to resist the practical demands, pressures or recommendations of funding agencies, risk management advisors, efficiency experts, legal officers, benefactors, social activists, journalists or politicians.

Is Administrative Governance a Threat to Academic Freedom?

³² Here too the jury is out. In general does the proliferation of Research Institutes and Research Centers strengthen or weaken the free thought and disputatious speech environment of our great universities? It would be helpful to know the answer to that question.

The federal regulatory scheme specifically requiring Institutional Review Board (IRB) oversight of federally funded research at American universities and colleges (the Department of Health and Human Services 45 CFR 46 rules and definitions, also known as the “Common Rule”) was initiated by an act of Congress in 1974 and is currently enforced by the Office for Human Research Protections (the OHRP). The original act of Congress was motivated by concerns over perceived ethical violations in biomedical research conducted by the Public Health Service³³; and its aim was to make sure that all federally sponsored research is ethically sound. Within the terms of those federal regulations, research that is not federally funded is NOT mandated for “Common Rule” regulation. Alternatively stated, within the terms of the 45 CFR 46 regulations the scope and depth of OHRP enforcement is limited to federally funded projects; and it is legally possible for academic research institutions to shield and protect privately funded, personally funded and unfunded projects from the reach of the IRB surveillance and research licensing process (and its various definitions, rules and regulations), while at the same time assuring by other means that all research with human subjects will be guided by professional ethical standards.

Almost no university, including the free thinking University of Chicago, has done so. This is both surprising and disturbing, especially in the light of the expectation (held by Justices Frankfurter, Roberts and O’Conner, see above) of the “expansive freedoms of speech and thought associated with the university environment.” Surprising because that

³³ I say “perceived violations” because the instigation for the regulations was the four decades long Public Health Service research project investigating the natural course of untreated syphilis infections among already long infected and non-contagious African-American men in Macon County, Alabama, which was done in collaboration with African-American doctors and researchers at Booker T. Washington’s Tuskegee Institute and was reviewed and approved many times by panels of experts. For a detailed examination of the Tuskegee syphilis study and a critical discussion of the moral horror narrative that motivated the act of Congress creating the IRB regulatory system see Richard A. Shweder, “Tuskegee Re-Examined”, published in the on-line magazine Spiked (January 8, 2004) and available at this web address: <http://www.spiked-online.com/articles/0000000CA34A.htm>. My current discussion of the IRB regulations and their application at the University of Chicago reproduces several points from my essay “Protecting Human Subjects and Preserving Academic Freedom: Prospects at the University of Chicago”, see footnote 26 above.

tradition of academic freedom, as explicated in the Kalven Committee Report, holds that a university is a place where the life of the mind of individual scholars is granted very high degrees of autonomy. This implies that proposed restraints (even well-intended ones) on faculty and student research and other suggestions for regulating, monitoring, controlling or constricting scholarship that are not mandated by law should be viewed with a very skeptical eye (“except for reasons that are exigent and obviously compelling”, as Justice Frankfurter put it in *Sweezy v The State of New Hampshire*). One might have expected such regulations to be resisted within the academic community rather than uncritically embraced and voluntarily and quickly (over) generalized.

That lack of a resistance to unnecessary external regulations is also disturbing. Disturbing because over a period of nearly four decades the IRB “mission creep” has been a death of academic freedom by a thousand cuts (see footnote 24 above); as a result of a slow but inexorable process of implementation and efficiency management, prior review and research licensing by an administratively appointed committee has come to seem normal to many scholars, or at least irresistible. There may be times when academic freedom is threatened by the interference of the faculty in the intellectual life of the university. In this instance however this discretionary extension of the Department of Health and Human Services (DHHS) regulations to all university researchers (regardless of their funding source or whether the scholarship is funded at all) has been the result of decades of decision making by well-intended university administrators who thought they were protecting the University – its flow of external funding, its ability to attract members of the public to participate in medical experiments, its capacity to defend itself against law suits. With the best of intentions a system of regulation has been put in place that belies the discourse of the dawn (“The basic policies of the University of Chicago include complete freedom of research and the unrestricted dissemination of information”). This has happened without the benefit of open and robust debate about its implications for academic values, research performance or its effects on the ardor and fearlessness of scholars (faculty and students).³⁴ The annual monitoring and prior review

³⁴ Instructive in this regard is the University of Chicago convocation address (the 482nd) delivered in the summer of 2005 by Jonathan Moss, the Chair at that time of the IRB in

of research, this issuing of commands to refrain from research and data analysis and to cease and desist from the dissemination of information has evolved without a vote by any faculty ruling body. Indeed, the fact that there is no federally mandated legal requirement to universalize the 45 CFR 46 regulations (or any of its sub-parts) beyond federally funded projects has been a well kept secret among academic administrators, most of whom have done very little to educate their faculty in this regard or to bring the matter forward for appropriate deliberation. Perhaps in 1974, when the whole system of prior review was first put in place, a proposal to generalize IRB review to all inquiries involving human subjects at the University of Chicago (rather than limit it to individual researchers applying for federal grants) would not have survived an open debate in a faculty ruling body. Today, at least for some faculty, the IRB mission creep (even if intrusive, irritating and time consuming) has come to seem almost normal. For others the mission creep is valued as the instrument of a beneficent moral campaign. It is not unimaginable that if that vote on the proposal to universalize IRB regulations were taken today the threat to academic freedom might well come from the faculty itself.

The Institutional Review Board at the University of Chicago is probably my most faithful correspondent. This is because our intellectually autonomous student scholars are required by the University Administration to designate a faculty member as the Principal Investigator who is legally and ethically responsible for the student's research project. In response to one of the innumerable cease and desist orders I have received over the

the Biological Sciences and the Medical School. Dr. Moss, who on other occasions voiced a very pragmatic view of the public relations advantages of the IRB process of research permission granting for the sake of subject recruitment in drug trial research, and who was not a staunch defender of academic freedom (which I believe he thought was overvalued) remarked: "I have a growing concern about the barriers these regulations impose on new ideas—barriers that can be so daunting as to discourage innovation. As Institutional Review Board chair, I have seen many of our own young investigators drift away from clinical research because of these challenges. My experience is with medical research, but I suspect the problem of maintaining innovation in an increasingly regulated environment may well be a more general one." His convocation address, titled "Could Morton Do It Today?," is available at this website:
http://search.uchicago.edu/search?site=default_collection&client=default_frontend&output=xml_no_dtd&proxystylesheet=default_frontend&oe=utf8&ie=utf8&q=moss+convocation+address

years telling me (and the student) to stop all inquiry, data analysis, writing and information dissemination (the communication typically arrives when a student has failed to apply for an annual renewal of their research permission) I composed the following e-mail seeking the advice of three free-thinking, open-minded and dedicated members of the University of Chicago faculty, who also happen to be University Administrators: the President, the Provost and the Associate Provost for what is called “Research Administration.”

“I am sending you this e-mail to seek your counsel and get your reactions to a disclaimer I have composed, which I am contemplating attaching to the next non-federally funded student research IRB protocol application on which my name appears as “the signatory P.I.”

I have heard Bob[Zimmer] speak powerfully and eloquently about University of Chicago style academic freedom; and as an institution we do not hesitate to proudly point to some inspiring events in our history in that regard (President Hutchins’ testimony before the Illinois Seditious Activities Investigation Committee, the “Kalven Committee Report”, etc.). Nevertheless over the past forty years or so we have not been particularly vigilant in noticing and countering the erosion of those academic freedom values in the face of the Federal Institutional Review Board/Protection of Human Subjects movement – and by “we” here I include the faculty, the administration and our legal office. An instructive history of the protection of human subjects movement and its implications for academic freedom and social science research can be found in the recent book by the historian Zachary Schrag titled *Ethical Imperialism: Institutional Review Boards and the Social Sciences, 1965-2009* (Johns Hopkins University Press).

From my point of view, however, the problem is immediate. A recent exchange of e-mails with our Social Science IRB was enlightening in that it reactivated in me a long-standing matter of conscience and alerted me to the fact that I can no longer proceed with business as usual when it comes to the presumptions now built into our Institutional Review Board procedures, definitions and required declarations with regard to the responsibilities of University of Chicago faculty to their students and with regard to the academic research and writing enterprise more generally, particularly with respect to non-federally funded research projects in the social sciences. Thus I am sending you this e-mail. I would welcome your reactions to the following disclaimer, which I am contemplating attaching to the next non-federally funded or unfunded student research IRB application on which my name appears as the signatory P.I.

The disclaimer reads as follows:

“This student project has my approval. Given that the University of Chicago administration has decided to go beyond the requirements of federal law and insist that all

non-federally funded or even unfunded research with human beings in the social sciences must be reviewed by an I.R.B. and has mandated the formality of listing a faculty member as the P.I. on student research projects it should be understood that I am guided in my relationships with my students and with the University of Chicago administration by certain principles set forth in the University of Chicago Articles of Incorporation, Bylaws and Statutes and in the “Kalven Committee Report”. As articulated in those two documents “The basic policies of the University of Chicago include complete freedom of research and the unrestricted dissemination of information” and provide a guarantee of “autonomy” to both students and faculty “in the discovery, improvement and dissemination of knowledge.” At the very least what emerges from those principles is a robust presumption in favor of academic freedom and one that strongly inclines to the view that any general requirement calling for administrative prior review and a system of permit granting for all research is in conflict with those principles. I approve this student project but do not voluntarily agree to renounce the academic freedom principles mentioned above, if that is what the I.R.B. process is asking me to do.”

Why am I contemplating this move at this point? One reason is because last week the Social Science IRB sent me its standard expiration notice, in this instance concerning an unfunded student research project on which my name appears as the principal investigator. My name currently appears as a formality on many student research projects. It appears because the University has for some reason mandated that student researchers (for example those working on a Master’s thesis in the Divisional Masters Program or those working on a PhD in a graduate program in the social sciences) cannot submit an application on their own, despite our commitment to student autonomy “in the discovery, improvement and dissemination of knowledge.” Typically students ask their main research advisor to play the part of “signatory P.I.”; and I advise a fair number of students in the social sciences, on projects that typically involve talking to other human beings or observing behavior in settings to which the researcher has access. Hence when one of those IRB protocols for a student research project expires I receive a notification.

This is what the standard IRB expiration notice in the social sciences states: ““IRB approval for your research protocol has expired. Please note that the University requires active IRB approval for all research activities involving human subjects, including participant recruitment, data collection, and analysis/write-up of data containing or linked to identifying information about individuals (including, e.g., interview transcripts, audio/video recordings, laboratory or field notes). Student researchers in the data analysis/write-up phase of thesis research are required to maintain active IRB approval for their research activities for the duration of their affiliation with the University (e.g., through graduation).”

Only a few years ago (certainly as recently as 2005) these IRB expiration notices read like cease and desist orders: “We regret to inform you that IRB approval for your research Protocol has expired. Please note that research related activities (including interaction with human subjects, data collection, and/or data analysis) may not continue or be initiated until the IRB has approved the continuation of this research.”

So, although there has been a softening of the rhetoric of these communications, I found myself wondering whether “cease and desist from all activities relating to research and scholarship on this project” continued to be its intended implication. Indeed when I received my latest IRB expiration notice for a non-federally funded student research project I found myself wondering about my responsibilities as a University of Chicago faculty member if the student in question were at that moment to show up in my office and were to ask me to assist her with an ongoing analysis of already collected data. Does the IRB actually expect me to permit them to intrude into the faculty-student relationship and the educational agendas of our university and bring conversation about research to a halt? I wondered: would they really expect me to cease and desist from doing the kinds of things I do by virtue of being a member of a great intellectual community dedicated to academic freedom?

So I wrote back to the Social Science IRB with this request: “I hereby request an official response to the following question: Is it the view of the IRB that if the student in question requests an appointment with me to discuss the analysis of their research data or wishes to show me a version of their write up for comment that it is my responsibility as a faculty member at the University of Chicago to refuse to speak to them?”

After several e-mails involving two different IRB representatives it now seems clear that ceasing and desisting from all research related work (including data analysis, conversations about the research project and writing) is precisely what the IRB has in mind. It was even suggested to me that if I don’t like that state of play I should stop being the signatory P.I. on student research projects and let some other members of the faculty put their name on the student’s IRB application.

I hope you can see the problems with this suggestion, which might well lead to an invidious distinction in the minds of social science students between those faculty members who are willing to have their names placed on student IRB applications and those who are not. Given the current state of play and the compromises of academic freedom involved I am not entirely sure which category of faculty would be viewed as the more principled investigators by our students.

I was also reminded by the representatives of our IRB that there are other things I have agreed to do by honoring the University authored requirement that even non-federally funded student research projects must have a faculty member as signatory P.I.

Some of these are things that many of the faculty in the social sciences (for example those who have advisees who conduct research alone in field settings at remote locations) cannot possibly do and certainly ought to know they cannot possibly do when they agree to have their name on the IRB application. For example, “I will obtain informed consent from all subjects unless a waiver or alteration of the informed consent process was approved by the IRB.” With regard to this type of assumed responsibility the mandated signatory process is a mere charade. How can a faculty adviser know whether a student researcher in the field has actually followed the exact consent procedures approved by the

IRB? I would wager that many ethically sensitive student field researchers in anthropology and sociology do things on the fly in a dynamic field context where they might well justifiably deviate from those formally approved consent procedures using their ethical common-sense; and I will wager they rarely report these deviations to the signatory faculty P.I. unless some problem arises. Basically the faculty member is being asked to make promises that everyone knows can't be kept.

Or, to cite another example, "I will gain IRB approval before altering the research protocol, recruitment materials, or consent forms." I hope you can see the problem here, given that much research in the social sciences is a matter of formulating questions while the research is underway and of discovering the correct or the most useful questions to ask. To faithfully and literally honor that "agreement" (mandating IRB approval before any new questions can be asked of the human beings with whom one is interacting) is to kill academic freedom, or at the very least stifle the very process of research for many social scientists.

Indeed when it comes to most research in the social sciences and humanities (and even some research in medicine) I hope you can see the problem with the current system, which seems to unnecessarily universalize a set of procedures, definitions and rules mandated by the federal agencies for application specifically to federally funded projects and which were instituted with certain forms of biomedical research in mind. Short of an actual finding of serious wrongdoing the very idea of an IRB presuming to tell faculty to stop speaking to students about data they already have in hand and telling them to cease and desist from writing about it ought to startle us into action about the regulatory regime we have brought upon ourselves by allowing the federal IRB regulations to penetrate the entire university.

The good news is that legally we are at liberty to reform the way we go about maintaining ethical research standards in the social sciences and we can certainly do so with an eye on our cherished tradition of academic freedom. Zachary Schrag's book on the history of IRB regulation and its implications for social science research is not the only critical account of the current regulatory regime. And over the next several years a number of legal scholars and social scientists are sure to raise our consciousness about the collective failure on the part of those of us in the academy who say we cherish academic freedom yet were insufficiently vigilant in its defense when faced with federal guidelines and regulations concerning federally funded research in the biomedical sciences. But surely (given our history at the University of Chicago) if there is any academic institution in the country that one might expect to take the lead in reforming the system it is our own.

Reform in the social sciences is feasible; it is not an impossible dream. Approximately 80% of research projects in the Division of the Social Sciences are not federally funded (and many of those are entirely unfunded). The current University of Chicago system for ethical standards maintenance that is being applied to those non-federally funded projects (prior review and research permission granting by an Institutional Review Board for all research projects involving interactions with human beings regardless of funding source

and regardless of research method or topic) mirrors a federal model for the review of federally funded research projects but is NOT mandated by federal laws or regulations for non-federally funded projects and is thus legally capable of being reformed by us in the light of our own traditions. With respect to the vast majority of research projects in the social sciences and humanities involving interactions with human beings the current system of regulations, definitions and mandated procedures and declarations is the product of local decision making and not something attached as a string to federal research funding or required by Washington. It is something we can change.

This is a long e-mail and I know all three of you are very busy. If you have read this far I am grateful for your attention. I have attached to this e-mail an essay I published in the *American Ethnologist* a few years ago titled "Protecting Human Subjects and Preserving Academic Freedom: Prospects at the University of Chicago." At the time I was hopeful that the University of Chicago might take the process of reform to a new level. This did not come to pass, despite some initial steps in that direction (Over the years I have become aware of how easy it is to be risk averse; or to become habituated to regulatory regimes, even those that offend core academic values, if they can be made to run efficiently; and it is tempting to not be different and to just stay in the mainstream and keep a low profile; although these are not the qualities that historically have made us great)...

Conclusion: Death by a Thousand Cuts?

Deep and difficult questions about the foundations of free inquiry must certainly be raised and debated in any conversation about the nature and purpose of academic freedom. Such questions as to whether academic freedom is a "natural right" (having its source in some transcendental good or in something you ought to desire because it is inherently good) or a "constitutional right" (having its source in some kind of penumbra or extension of the first amendment of the US Constitution, an amendment which never mentions academic freedom per se and facially applies only to acts of Congress abridging freedom of speech or the press) or a "positive right" (having its source in the legal instruments that incorporate and empower an institution to be an authentic academic institution and hence faithful to the mission of a genuine university or center of higher learning).

Of course, the different aspects of the way of life associated with the free university may have multiple or different sources. When a wealthy patron or member of the Board of

Trustees of a private university instructs the President of that institution to make sure that a controversial or politically annoying junior faculty member is not retained on the faculty the First Amendment protections of the US Constitution are not going to be very helpful in defense of academic freedom. The relevance of that famous free speech amendment is far greater (and presumably would be decisive) if Congress itself ever passed a law requiring social science faculty members at private universities to submit their course readings and research proposals for content review by a committee of the Congress. But one feels less sure what would happen in a court of law if that hypothesized federal statute simply conditioned the receipt of sought after federal research funds on such a review, but never required researchers at private universities to apply for those funds. Is there a constitutional protection against that type of indirect government coercion, or not?

Nevertheless, the fact that such questions about the justification and basis for academic freedom even get raised may just be one more sign of the times. It does not help matters that many of us find ourselves to be surprisingly inarticulate and at a bit of a loss trying to answer the question “what is academic freedom for?” It is noteworthy that the best and most readily persuasive defense that comes to mind when academics converse with politicians, benefactors and the general public is some kind of instrumental appeal (precisely of the sort Edward Levi candidly set to the side, see above) to the collective material benefits (whether in the areas of technology, health, economics or energy) that derive from discoveries and inventions originating within the walls of the academy. Demonstrating that the unintended social benefits of academic freedom are great and far outweigh the costs to society is a great achievement (and here I hail Jonathan Cole for his magisterial book on that topic titled The Great American University).³⁵ I view such a showing however as a functional or practical account of the (for the most part) unintended (even if beneficial) consequences of the establishment of free universities and not necessarily as an account (or at least not a complete account) of what academic freedom is for. Aren't we able to say more about the telos of academic freedom and our

³⁵ Jonathan R. Cole, *The Great American University: Its Rise To Preeminence, Its Indispensable National Role, Why It Must Be Protected*. (Public Affairs Press, 2012).

intellectual motives as scholars? Might it not be true that those social benefits accrue largely because they are unintended and that the more they are intended or become part of our mission statement the less likely they are to accrue?

One of my favorite lines from a speech by a University of Chicago official is the one delivered by the Chairman of our Board of Trustees on the occasion of our 100th anniversary in 1992. He too quoted our former President Robert Maynard Hutchins, who stated, “The faculty is not working for the trustees; the trustees are working for the faculty.”

It is an observation that deserves to be true of any genuine institution of higher learning. The basic idea expressed by those words may seem counter-intuitive coming from the Chairman of the Board of Trustees, but it helps define the conditions that make for greatness in the academy (and as Felix Frankfurter imagined, for a vibrant and healthy society). Here is another way to make the point (quoting the philosopher Arthur Lovejoy, who helped found the American Association of University Professors, the AAUP): “The distinctive social function of the scholar’s trade cannot be fulfilled if those who pay the piper are permitted to call the tune.” (And one would like to add: the scholar’s trade also cannot be fulfilled if the piper creates and fashions his tune primarily with an eye on satisfying the tastes of those who pay her). It is a splendid, and of course I realize it is a wishful, vision: the luminous image of enlightened patrons - merchants, investment bankers, politicians, trustees - who understand the virtue of free and unfettered inquiry, and who believe it is wise and dignifying to resist the natural temptation to try to use one’s wealth and power to “call the tune”. A few years ago I delivered the convocation address at the 480th convocation at the University of Chicago. It was a winter convocation, which happened to be packed with students from our business school campuses. I advised them: if you ever become very rich or very powerful, strive for that type of wisdom - and nobility.³⁶

³⁶ “The Fun Index” was a convocation speech delivered during the Winter Convocation on March 18, 2005. My concluding remarks here recapitulate some of the conclusions from that speech.

Let me conclude by asking the reader (as I asked the students in that convocation address) if you remember the “fun index”. It was a ranking of 300 American colleges and universities put together by some clever and mischievous Harvard students nearly twenty years ago. It got lots of publicity in the mainstream press. The University of Chicago was ranked #300 out of 300, just behind the United States Military Academy. Russell Baker, the New York Times humorist, immediately responded in an Op-Ed essay. He complained that his alma mater, Johns Hopkins University, which was ranked #296 on the fun index, should not have been outdone by Chicago. Yale University was ranked in the bottom ten. Florida State University had the distinction of being #1.

That playful and prankish fun index – confirming the view that the University of Chicago just can’t compete in the same league with the fraternity parties and nightclubs at Florida State – managed to make administrators at many colleges around the country, and even in Hyde Park, a bit nervous. So in recent years we have invested heavily in the life of the body as well as the life of the mind. We have a new swimming pool; and a new award winning dining hall. We have some new dormitories and a new Center for the Performing Arts. We have enlarged the Medical School complex. We have a new Business School campus right across the street from Rockefeller Chapel, which, quite fortunately, achieves part of its splendor by remaining in the shadow of Rockefeller Chapel rather than overshadowing it (as some had feared). And by now the University of Chicago may even have nudged a bit ahead of Hopkins and Yale in providing those satisfactions in life that are abundant and readily available at Florida State University. Perhaps we are now #287 or even #252 on the going to college to have fun index, the type of fun they have at FSU.

It is possible I am just foolish to think it was actually an honor to have been placed at the very bottom of the fun index. Yet I do like to imagine that our real claim to fame at academic centers such as Columbia University and the University of Chicago is that we are mavericks, free wheeling, tough minded, intellectually annoying, against the current, out there on the fringe, sometimes even a little beyond the pale (some of us even had our

ancestral origins inside the Pale), and a bit perverse. I'd like to believe that is what academic freedom is really for. Its teleology, its objective and worthy end in life, its claim to fame is to make it possible for the creative imagination, critical reason and the rational will to have some special place to play. Its purpose is to maintain and protect an intellectual environment in which it is always possible "to follow the argument where it leads." It will be a great irony in the history of the great American university if the boundaries between church, state, Madison Avenue, the marketplace and the academy become so blurred and the interest groups associated with political, moral and commercial activism so influential that instead of welcoming him to the academy (and giving him exile there) it is within the halls of the academy that Socrates suffers a death by a thousand cuts: without open debate, without even a trial, and most likely without a formal vote by any faculty ruling body. Would his bleeding be stopped if faculty ruling bodies today actually managed to vote? How many faculty members still notice and really care? One recalls the dawn of the great American university with a smile yet one also wonders about the twilight of a great antiquarian tradition.