

THOUGHTS ON ACADEMIC FREEDOM. UROFSKY AND BEYOND

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INTRODUCTION

UNIVERSITY faculty and their supporters deeply believe that the university campus must be dedicated to the free expression of ideas. They are committed to academic freedom and to tenure, yet often take those freedoms for granted. Interest in academic freedom and tenure tends to be episodic. For example, during the McCarthy era, there was an outpouring of writing on academic freedom.¹

The U.S. Supreme Court recently declined to grant *certiorari* in *Urofsky v. Gilmore*,² which essentially says that state university professors have no greater academic freedom rights under the First Amendment than any other state employees. Under *Urofsky*, if there are constitutionally protected academic freedom rights, they belong to the university, not to individual faculty.³

This is an appropriate time to consider basic questions about academic freedom. I begin with some common understandings about academic freedom in the American university, consider briefly the Fourth Circuit's *en banc* opinion in *Urofsky*, and offer some observations, questions and suggestions.

I. SOME COMMON UNDERSTANDINGS

A. *European Roots and the American Association of University Professors*

All agree that academic freedom in the United States has roots in European universities. Indeed, the only major disagreement on this point is whether European universities protected academic freedom despite their religious roots or because of them.

At the beginning of the last century, many American professors were attracted by their understanding of academic freedom in German universities.⁴ The path-

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1. See, e.g., RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1955).

2. 216 F.3d 401 (4th Cir. 2000), *cert. denied*, 121 U.S. 759 (2001).

3. See *id.*

4. See RUSSELL KIRK, *ACADEMIC FREEDOM: AN ESSAY IN DEFINITION* 22-23 (1955):

Just what "academic freedom" meant at the German universities, not many Americans clearly understood: it was, in fact, almost wholly an internal freedom, the right to organize the curriculum without the interference of the minister of education; and it had been developed as a last safeguard against political meddling, in the secularized universities of the new bureaucratic

breaking American expression of academic freedom was the 1915 *General Report on Academic Freedom and Academic Tenure* for the newly founded American Association of University Professors (AAUP). Arthur O. Lovejoy, a celebrated philosopher and founder of the AAUP offered what became a well-known definition of academic freedom:

Academic freedom is the freedom of a teacher or researcher in higher institutions of learning to investigate and discuss the problems of his science and to express his conclusions, whether through publication or the instruction of students, without interference from political or ecclesiastical authority, or from the administrative officials of the institution in which he is employed, unless his methods are found by qualified bodies of his own profession to be clearly incompetent or contrary to professional ethics.⁵

This definition was said to reflect "the classical *Lehrfreiheit* of the Continental academicians."⁶

B. *The Principle of Neutrality*

The faculty who drafted the 1915 Declaration thought the university as an entity should be a nonpartisan community detached from the political struggles of the outside world. "In their view, while individual professors could express their opinions freely on controversial subjects, academic institutions should observe a strict neutrality toward all political, economic and social issues."⁷ The founders of the AAUP considered conservative trustees and compliant university presidents to be the greatest threat to academic freedom. The principle of institutional neutrality was an attempt to prevent administrators from establishing official orthodoxies that would inhibit professors or penalize them for expressing unpopular opinions. Professors also were to be protected with peer review and with tenure.

C. *Changes in the Last Century*

Since 1915, there have been many developments affecting academic freedom. The American university continued to evolve from a church-oriented college to a much larger, more diverse institution, with graduate and professional programs designed to serve the needs of a growing economy.

German Empire. It was a tolerance by the state, rather than the assertion of a prescriptive right or a moral tradition; but American professors took up this German concept with more goodwill than clarity of apprehension.

Id.

5. 1 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 384 (1930).

6. Will Herberg, *On The Meaning of Academic Freedom*, ON ACADEMIC FREEDOM 1 (Valerie Earle ed., 1971).

7. DEREK BOK, *BEYOND THE IVORY TOWER: SOCIAL RESPONSIBILITIES OF THE MODERN UNIVERSITY* 5 (1982).

- ▶ The university came to be seen not only as passing on inherited wisdom, but also seeking new knowledge, particularly in the sciences.
- ▶ Business and financial leaders continued to replace the clergy as dominant figures on the boards of leading universities.
- ▶ The topics in which students could major became more varied, often including the vocational. For example, at some universities, students can major in things such as real estate or “hospitality administration.”
- ▶ Universities are subject to many more external constraints, especially by regulation or contract with the federal or state government. Public universities in particular are subject to federal and state judicial determinations on many aspects of university affairs.
- ▶ Universities often engage in intense competition for funded research. In addition, private philanthropy is critical to sustain and to advance both private and public universities. Both can alter the course of institutions.
- ▶ Philosophy, including ethics, plays a much smaller role in the life of the university than it did in 1915.
- ▶ Over the years, threats to academic freedom have come from governing bodies, from other external agencies, and from students and faculty on both the left and the right.
- ▶ The idea of academic freedom expanded in scope after 1915. In addition to protecting the role of individual faculty, academic freedom came to include institutional autonomy in educational policy. “Specifically, universities insisted with greater success that curricula, admissions policies, and academic standards should be established by the faculty, rather than by outside groups, and should be fashioned for the sole purpose of carrying out the educational aims of the institution.”⁸ In a famous opinion, Justice Felix Frankfurter referred to “the four essential freedoms *of a university*—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”⁹
- ▶ As a college education has become more universally expected, universities have made significant efforts to include persons historically underrepresented in higher education. We undertook to act affirmatively so that “who may be admitted to study” would include persons of color.
- ▶ In recent years, judicial decisions, referenda or other government actions have prevented many of us from exercising affirmative action in admissions.
- ▶ Many universities are under intense pressure to account for the resources allocated to them. Although not all universities are in accountability modes, the phenomenon is not confined to the United States. Friends of mine on the Oxford faculty have been shocked by the extent to which they are being asked to account for themselves.
- ▶ We are being asked to justify our budgets in terms of specific outcomes. We cannot get new money, or a renewal of all the money we have, without articulating and quantifying our outcomes and how they will be affected.

8. *Id.*

9. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (emphasis added).

- ▶ In particular, we are being asked to justify the money we spend on tenure-track faculty. Tenure itself has received widespread criticism, and efforts are under way to reform or to eliminate it. Post tenure review is being established and strengthened around the country. Universities are experimenting with term contracts rather than with tenure-track appointments. Distance learning technologies are being used to lower faculty costs in part by reducing reliance on tenure-track faculty.

With this as a starting point, *Urofsky* may be as good a place as any to begin exploring some contested ground.

II. *UROFSKY*: THE PROFESSOR AS EMPLOYEE

A. *Introduction to Urofsky*

One of my colleagues is fond of saying that faculty politics cannot be understood without recognizing that most faculty think of themselves as self-employed. Her statement puzzles people outside the academy but tends to be borne out when faculty discuss their academic freedom. The typical faculty justification of academic freedom is utilitarian, and suggests a variant of the “trickle-down” economics many of them hold in disdain. If faculty are left to their own curricular, pedagogic and scholarly devices, they suggest, everyone—students, faculty, staff and indeed all of society—will be better off because of the ideas, energies and freedoms that result. Little is offered by way of qualification or limitation. Academic freedom is not defined nearly as often as it is discussed, and the suggestion is rarely made in polite academic conversation that academic freedom lies in the central administration.

Under the court’s holding in *Urofsky*, faculty are employees of the university and assigned to do its work. The plaintiffs in *Urofsky* were six professors employed by various public colleges and universities in Virginia. They challenged a statute that restricts state employees from accessing sexually explicit material, on computers owned or leased by the state, without agency approval.¹⁰ The United States Court

10. The central provision of the statute provides:

Except to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content. Agency approvals shall be given in writing by agency heads, and any such approvals shall be available to the public under the provisions of the Virginia Freedom of Information Act.

VA. CODE §§ 2.1-805 (Matthew Bender 1950) (recodified as VA. CODE ANN. §§ 2.2-2827B (2001)).

of Appeals for the Fourth Circuit, *en banc*,¹¹ held there was no violation of faculty First Amendment rights.

The professors made two basic arguments. First, they argued that the statute was unconstitutional as to all state employees. In the alternative, they argued that the statute violates the academic freedom of academic employees.

B. *The First Amendment Rights of State Employees*

The *Urofsky* court concluded that the professors' speech was in their role as employees and hence within the control of their employer. In short, because the statute did not affect the speech of professors in their capacity as private citizens speaking on matters of public concern, it did not infringe on their First Amendment rights as state employees.¹²

The most interesting aspect of this portion of the court's opinion is its statement that restrictions on public employees' speech "in their capacity as employees are analogous to restrictions on government-funded speech."¹³ "In both situations—public employee speech and government-funded speech—the government is entitled to control the content of the speech because it has, in a meaningful sense, 'purchased' the speech at issue through a grant of funding or payment of a salary."¹⁴ Many academics will be dismayed that the court at this point relied on *Rust v. Sullivan*,¹⁵ in which the Supreme Court rejected an argument that regulations prohibiting abortion counseling in a federally funded project violated the First Amendment rights of clinic staff. The "funding authority" could permissibly restrict the scope of the project to exclude abortion counseling. This analogy raises a whole host of questions about constitutionally permissible restrictions attached to university funding. For example, could a legislature permissibly restrict the content of a state law school's course in reproductive technology from including the topic of abortion counseling?

11. The District Court granted summary judgment in favor of the professors, concluding that the Act unconstitutionally infringed on state employees' First Amendment rights. See *Urofsky v. Allen*, 995 F. Supp. 634 (E.D. Va. 1998). A panel of the United States Court of Appeals for the Fourth Circuit reversed, and a majority of the active circuit judges voted to hear the appeal *en banc*. See *Urofsky v. Gilmore*, 216 F.3d 401, 401 (4th Cir. 2000), *cert. denied*, 121 U.S. 759 (2001). Unless otherwise indicated, the quotes that follow are from Judge Wilkins opinion in the *en banc* review.

12. It is debatable whether the First Amendment scrutiny should have been cut off by the determination that the restriction affected the employees in their capacity as employees. See generally Note, *Constitutional Law—First Amendment—Academic Freedom—Fourth Circuit Upholds Virginia Statute Prohibiting State Employees from Downloading Sexually Explicit Material*, 114 HARV. L. REV. 1414 (2001). In concurring in the judgment, Chief Judge Wilkinson said that the state's interest in the restriction should be balanced against the burden of the restriction. He concluded that the Act passed muster under the balancing analysis. See *Urofsky*, 216 F.3d at 406 (Wilkinson, C.J., concurring).

13. *Urofsky*, 216 F.3d at 408 n.6.

14. *Id.*

15. 500 U.S. 173 (1991).

C. *The Academic Freedom Issue*

The faculty also argued that, even if the statute was valid as to state employees in general, it violated the First Amendment rights of professors. As the court saw it, the basic academic freedom argument of the faculty was “that a university professor possesses a constitutional right to determine for himself, without the input of the university (and perhaps even contrary to the university’s desires), the subjects of his research, writing and teaching.”¹⁶

The court emphasized that academic freedom, as conceived of by the AAUP, was a professional norm, not a legal one. The AAUP principles¹⁷ have been widely adopted into bylaws, faculty contracts, and collective bargaining agreements.

In view of this history, we do not doubt that, as a matter of professional practice, university professors in fact possess the type of academic freedom asserted by Appellees. Indeed, the claim of an academic institution to status as a “university” may fairly be said to depend upon the extent to which its faculty members are allowed to pursue knowledge free of external constraints Were it not so, advances in learning surely would be hindered in a manner harmful to the university as an institution and to society at large.¹⁸

Despite this apparent sympathy for academic freedom, the court referred to the “audacity” of the claim of special constitutional protection for faculty. Giving special protection to faculty would be “manifestly at odds with a constitutional system premised on equality.”¹⁹ The Supreme Court “has never recognized that professors possess a First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship, despite opportunities to do so.”²⁰ A concurring opinion expressed similar skepticism about the faculty claims:

If it is the case that the public university’s professors operate independently of state supervision and public accountability, then it is a surprise to me. And I am confident that it would come as a surprise to the public, who pays the professors’ salaries in order that they may conduct important research for the public and without whose tax money the professors’ research and writing would not be possible.²¹

16. *Urofsky*, 216 F.3d at 409-10. In their brief, the professors argued that “[a]cademic freedom embraces not only professors but [also] the librarians, research assistants, and other staff without whom they cannot effectively function.” *Id.* at 410 n.8. At oral argument, the professors “went so far as to suggest that the Act infringes the academic freedom of any state employee who engages in ‘intellectual work’ analogous to the work of a professor.” *Id.* The court referred to the “virtually limitless” nature of this suggestion. *Id.*

17. The 1915 principles were later codified in a 1940 Statement of Principles on Academic Freedom and Tenure promulgated by the AAUP and the Association of American Colleges.

18. *Urofsky*, 216 F.3d at 411 n.12 (citations omitted).

19. *Id.* at 412 n.13.

20. *Id.* at 414. The court did leave open the possibility that a denial of authority to access material “might raise genuine questions—perhaps even constitutional ones—concerning the extent of the authority of a university to control the work of its faculty” *Id.* at 415 n.17

21. *Urofsky v. Gilmore*, 216 F.3d 401, 424 (4th Cir. 2000) (Luttig, J., concurring).

The court concluded its review of the case law by saying that any constitutional right to academic freedom that might be said to exist is the university's, not a right of individual faculty.²² To the extent the U.S. Supreme Court has constitutionalized a right of academic freedom, it "appears to have recognized only an institutional right of self-governance in academic affairs."²³

III. SOME OBSERVATIONS, QUESTIONS AND SUGGESTIONS

Urofsky's suggestion that academic freedom rights exist in the university as an entity rather than in individual faculty is contrary to the American tradition as articulated by the AAUP. It is, however, consistent with significant judicial and scholarly opinion. In 1989, Professor Peter Byrne stated that, rather than protect the professional autonomy of individual faculty, "constitutional academic freedom should primarily insulate the university in core academic matters from interference by the state."²⁴ In Professor Byrne's view: "When presented with claims by faculty members that other academics, usually administrators and department chairs, have violated their rights to academic freedom, courts should only ascertain if the administrators can establish that they have in good faith rejected the candidate on academic grounds."²⁵ *Urofsky* (and I think Professor Byrne's analysis) is, however, limited to academic freedom as a constitutional matter.

Is there an institutional champion for the academic freedom of American law schools? The American Bar Association's accreditation process is subjecting law schools to pressures that are inconsistent with accountability and other educational initiatives. Unlike our university administrations and funding sources, the accreditation process has tended to focus on requiring more inputs rather than on examining outcomes, although efforts are under way to improve in this regard. Similarly, the ABA process is bucking the trend to confine tenure by pressuring law schools to offer tenure, or something reasonably similar to it, to more faculty rather than fewer. Most of the ABA's pressure has focused on clinical faculty, although legal writing faculty are now bearing down on the ABA process to pressure the law schools on their behalf. The accreditation process also tends to pressure law schools with regard to what should be taught and how it should be taught, particularly in the area of skills training. Finally, it tends to discourage the use of distance learning technologies. The recently formed American Law Deans Association has opposed a number of aspects of the ABA accreditation process, fighting for the rights of law schools to manage themselves, with some success.

The Association of American Law Schools may hold the greatest potential as an effective champion of the academic freedom of American law schools to determine their own academic programs and how they should be managed. The AALS is

22. See *id.* at 410 ("[T]o the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors").

23. *Id.* at 412.

24. J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 252, 255 (1989).

25. *Id.* at 308.

reconsidering its core mission, trying in particular to decide whether it should continue to have its own accreditation process or become instead an association of all law schools that wish to join. If it frees itself up from an agenda of universally applicable institutional minimum standards, it may become more of a resource to, and more of a champion of, our efforts to craft special missions appropriate to our individual circumstances and aspirations.

If academic freedom for law faculty has little or no constitutional protection or powerful institutional champion, it is important for those of us in the academy to consider the steps we can and should take to protect academic freedom. It is true that the reputational effects of a move away from academic freedom could be very significant. Faculty are protected by market forces. There are markets for faculty, markets for administrators, markets for students and, especially in the context of graduate research universities, markets for external funding. A university, its governing boards and funding sources, are subject to the external constraints of those markets. Nevertheless, administrators and faculty should not rely on market forces. We should address what is under our control: the importance of providing academic freedom both as a matter of institutional culture and as a matter of faculty contract.

Historically, academic freedom has been permitted because universities and their faculties have been perceived and valued as seekers, teachers and publishers of truth. We have special respect, special deference, and are valued in various markets, because we are perceived as seekers of truth. If we want to advance the cause of academic freedom, we have to protect and advance the cause of truth-seeking on campus. We need to insist, among ourselves and for others to perceive, that important truths are being sought and told by competent and productive professionals. This means we need to consider both individual and institutional accountability.

We are probably best at holding untenured faculty individually accountable. Even here, the experience varies greatly among law schools, and within a school seems to vary depending upon whether teaching or research is the focus. Some schools or colleges that impose standards at or close to their true aspirations do so in part out of fear of being reversed by university promotion and tenure committees, provosts or presidents. For an individual faculty member, or for a dean, there can be far more pain than gain in imposing high standards on colleagues, especially given the prevalence of allegations of improper motive.

We have not done as good a job at holding tenured faculty accountable. Nationwide, post-tenure review is being forced from the top down because we in the academic units have failed to do it. Consider in particular the annual faculty contract. At many schools, a faculty member is each year given an assignment of responsibilities that breaks down the year's contracted-for assignment into the three components of teaching, scholarship and service. At our university, for example, it is common for faculty to have from 25-35% of their assignment earmarked for research. Yet too many faculty have produced too little research. In some cases, it is not clear how the research advances institutional goals. University funding sources now look at the faculty payrolls, compare them to the faculty assignments of responsibility, come up with a dollar amount, and ask what they are getting for the money. What should we ask of a law faculty of 40, with an average salary of

\$110,000 per year and an average research assignment of 25%? How much scholarship should the law school generate for the \$1,100,000 it has contracted to pay? What should the nature of the scholarship be? In many universities, faculty and deans, and even provosts and presidents, have been too timid to hold tenured faculty accountable. We will lose some of the academic freedom we have if we do not do so.

We also need to make sure that we maintain healthy academic communities that nurture academic freedom among a diversity of scholars. Professor Mary Ann Glendon explained the (professional) death of the great treatise writers at Harvard Law School by saying that they were caught between the clinical faculty who thought they were too theoretical, the faculty whose principal loyalty was to a discipline other than law, who thought they were not theoretical enough, the faculty who disdained any search for objective truth, and the faculty who thought that a social agenda trumped all other agendas.²⁶ In effect, she describes a faculty that has a diminished regard for itself as a community of seekers, teachers and tellers of truth.

I think the kind of balkanization Professor Glendon describes is unfortunate and to be avoided. Doctrinalists may undervalue critics, who may undervalue law and economics types, who may undervalue law and literature types, who may undervalue doctrinalists, etc. There may be an uneasy truce among the various camps. Although on a daily basis they tend to live and let live, they are more likely to clash over promotion, tenure and appointments. We need to value a diversity of scholarship while striking a balance between a big tent and the Tower of Babel.

We need to protect the academic freedom of new faculty. We need to be honest with ourselves and with them about the kind of scholarship that is valued at our institution. One size does not fit all. At some institutions, faculty who are not economically-oriented in their writing will not be valued. Some institutions are refreshingly honest about this. Others are less forthcoming. At some institutions, personal narrative will be viewed with skepticism, either at the law school or at the university level. A part of the academic freedom we owe to new faculty is clarity and honesty about the parameters within which it operates. We must be more specific about our expectations for them as scholars. If we are going to control what they write about and how they write about it, if we are seeking to purchase a specific kind of scholarly good, we ought to let them know when they are first offered a position.

Another threat to academic freedom is presented by faculty who are pulling or sending punches in their scholarship, or sending bouquets, to curry academic, business or political favor. Faculty develop scholarly product lines for external markets. A faculty member who develops a specialty advocating for fiduciary duties may be less valuable as an expert witness after converting to contractarianism. Addressing "the effect of money and worldly ambition on scholarly writing and research," former Harvard University President Derek Bok wrote that, "it is quite

26. See MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 206 (1994).

possible that the resulting dangers pose a greater risk to scholarship than any threats arising from conventional attacks on academic freedom."²⁷

We should also ask about institutional accountability for our academic freedom. Assuming that faculty will account for their assigned tasks, what should those tasks be? Most broadly, if we are to be respected institutions of truth seeking and telling, we need to seek truths that are important and that are valued by a significant element of our internal and external constituencies. There is great room for different institutional missions. Some schools can emphasize certain subject matters and others can emphasize a distinctive educational process or philosophy. To maximize our academic freedom, each of us should strive for tolerance and balance within our own mission. At a minimum, we must acknowledge and give proper respect to the truth seeking of others, both in the classroom and in our scholarship.

At Florida State, we believe that philosophical inquiry must be at the heart of the educational experience. Philosophy is an organization of experience, experience with matters such as good and evil, right and wrong, the just and the unjust. We should prepare our students to deal with such weighty matters in their own lives, careers and communities by exposing them to rigorous consideration of the great issues. Law schools in particular should embrace their role as teachers in a learned profession.²⁸ Especially in an era in which we are enrolling hospitality administration or real estate majors, law schools must make available to their students the systematic exploration of the great philosophical and moral questions. Part of our educational program must be remedial at the highest possible level. History and philosophy must have a place of great importance in our curriculum.

Ethics is an important part of philosophical inquiry. Writing in 1982, Bok faulted professional schools because they "virtually ignored moral education in practice." "[I]nstructors were generally content to review the prevailing codes of professional ethics without exploring the moral adequacy of the codes themselves or the ways in which they were often used as rationalizations to justify self-serving practices."²⁹ Bok's comment on teaching ethics by the pervasive method is blistering: "In scattering the responsibility for moral education among a large number of professors, faculties conveniently overlooked the fact that few, if any, among them had a knowledge of ethics that was equal to the task."³⁰

In addition to broad philosophical inquiry, law schools should also be involved in the exploration of solutions to injustice. In this respect, there has been a major shift since I started teaching law thirty years ago. At that time, there were courses and textbooks on poverty law, housing law and educational law. Those courses focused on concrete, practical issues such as the financing of income supplements, home ownership for the poor, subsidized rental and public housing, and education. Today, issues of specific doctrinal or structural reform often take a back seat to more abstract discussion of theory. For example, many faculty are eager to talk about the

27. BOK, *supra* note 7, at 25.

28. See generally Rob Atkinson, *Law as a Learned Profession: The Forgotten Mission Field of the Professionalism Movement*, 52 S.C. L. REV. 621 (2001).

29. BOK, *supra* note 7, at 120.

30. *Id.*

redistribution of wealth, provided there is no extensive discussion of the federal income tax.

Empirical research is a form of truth seeking that has been particularly unappealing to the legal professoriate. The past decades have seen almost endless discussion of default rules in contracts, business forms, and virtually every other area of the law. Many statutes have been passed adopting new rules. Yet very little empirical research has been done to identify the default rules that tend to exist in negotiated transactions. The provision of legal services for the less fortunate in our society is another neglected topic in the academy. This is a matter of virtually no concern—in the sense of professional effort—to most law faculty. Clinical faculty experience the need for legal services for the poor and moderate-income “in the trenches” on a daily basis. Perhaps in part because of that, many of them are not in a position to explore it as a research matter.

In short, much of our research seems to be limited. I am sure that most law faculties include members writing about the insights of economics, literature, game theory, and cognitive psychology. My guess is that there are far fewer faculty with members researching the financing of the delivery of housing, health care, education, or legal services to the poor. In short, we seem to be truth-seekers of a limited sort, serving our own academic interests, convenience or careers more than the needs of society.

Does legal education, in the aggregate, offer the diversified portfolio of truth seeking and telling about justice issues that society wants? At a time when, on the continent and in England, accounting firms are taking over law firms, we might well ask what should be taught and researched in the law schools and what should be located in the business schools or economics or other departments. Accounting firms are taking over law firms to offer their clients the one-stop-shopping they seek. Within the academy, are business schools doing a better job of that than the law schools? Do they have more important things to say to society about health care and other important social issues? Years ago, Karl Llewellyn remarked that the law schools, and the legal profession, were ceding the business of tax law to others. I submit that, on many other important issues, law schools are ceding important business to other segments of the university. To that extent, we are less socially useful than we could be.

What do we claim as peculiarly our own? Beyond the first year curriculum, most law schools will clearly claim constitutional issues to themselves, and the litigation process, although generally only the clinical faculty know a great deal about the trial process. Do we claim the financing, structure and social accountability of major public and private institutions? Stated differently, if law practice is going global and merging with accounting and financial consulting, are the law schools going to lead the way or are they going to be the last to change? Are we going to retreat to our core function of the litigation process? Are we going to cede much legal doctrine to other disciplines? If a next generation college graduate wants to work in a sophisticated global firm, why attend law school if a law degree is no longer required to become partner? What is a law school likely to bring to the table? Perhaps more narrowly, how should law schools prepare students to be partners with accountants? Should they teach something about financial accounting standards? About accounting or business ethics?

How are we going to make available to our students everything from core doctrine, to philosophy and ethics, to close investigation of solutions to social problems? We cannot all do all things. Most of us have limited resources and will need to define a core mission. We will decide to do some things rather than others. On the other hand, many of us have not fully deployed all the resources at our disposal. Law schools that are part of larger universities often remain remarkably isolated from the rest of campus. One way to teach more philosophy, economics or social welfare is to collaborate with other units on campus. We need to make the teachings of particular faculty available to our students, and we need to use those individual faculty as a bridge between faculties. Collaboration among faculty might, for example, help law faculty engage in empirical research. We can also use teleconferencing technology to bring people from other campuses, or from off-campus, to our students and colleagues in a cost-effective way.

An extremely sensitive aspect of institutional neutrality is hiring for balance. When do you do it and how do you do it? Do you do it if virtually all of your faculty are of one political party? Do you do it if you lack any or several of the most popular brands of scholars? Do you hire people because of their politics? Or do you hire people because of their subject matters or theoretical orientations? Bok suggests the subject matter approach.

If a faculty within a particular school, college or university does not seek a meaningful mission of truth-seeking, and a balanced approach to that mission, the dean, university administration or external funding source may take action. The faculty may lose its freedom to define the institution. The dean might raise professorships or chairs to provide incentives to faculty to perform very specific tasks. Provosts, presidents or external funding sources may, with or without the encouragement of the dean, provide new monies, or renew old monies, only on the condition that they be spent for particular purposes. If university administrations or external funding sources feel that redirecting the law school is inefficient or unpleasant, they may simply deploy the resources elsewhere. Fortunately, there is still great opportunity to rededicate ourselves to earning the academic freedom that has been lavished upon us.