THE ACADEMY IN THE COURTS: A SYMPOSIUM ON ACADEMIC FREEDOM

Foreword

BY JOHN W. POULOS*

Universities, we are told, like cathedrals and parliaments, are a product of the Middle Ages.[1] They emerged in the twelfth and thirteenth centuries with all of the familiar machinery of instruction, faculties, colleges, courses of study, examinations, commencements and academic degrees.[2] And with their emergence they claimed a measure of autonomy, the right of self-governance, in academic affairs.[3] Perhaps the most famous example of the recognition of these claims by medieval authority was Gregory IX's bull *Parens scientiarum*, issued in 1231.[4] It contained a general statement of all the scholarly privileges, including the requirement that the chancellor of the University of Paris accept the judgment of the various faculties regarding a candidate's qualifications before he awarded a degree, and a confirmation of the liberty of individual faculties to determine their methods of teaching, the hours of lectures and disputations, and the habits in which they were to be attired.[5] Although the specifics of academic privileges and immunities varied with the ebb and flow of medieval history after the early thirteenth century, a measure of privilege and autonomy was always associated with the academy and academics.[6]

---

* Professor of Law, University of California, Davis; A.B. 1958, Stanford University; J.D. 1962, University of California, Hastings College of the Law. Professor Poulos is the former chair of the Committee on Academic Freedom of the University of California.

[1] C. HASKINS, THE RISE OF UNIVERSITIES 1 (1957).

[2] *Id.* at 2.

[3] *See generally* P. KIBRE, SCHOLARLY PRIVILEGES IN THE MIDDLE AGES (1962).

[4] *Id.* at 94-96; C. HASKINS, note 1 *supra*, at 15-16; S. LAURIE, THE RISE AND EARLY CONSTITUTION OF UNIVERSITIES 204-05 (1912).

[5] P. KIBRE, note 3 *supra*, at 95.

[6] *Id.* at 325-30.

I do not mean to suggest that there is a clear and unbroken line of authority recognizing specific instances of academic autonomy which operates as relevant precedent for the resolution of academic disputes today. Rather, my point is that since their birth in Italy and France, universities and colleges, and the scholars that people them, have claimed autonomy in academic affairs; and those claims have been recognized, in varying degrees, by government and the society they serve. Autonomy for the academy in academic affairs has become part of our conception of the academy itself. But the content of that notion has varied with the felt necessities of the day. This symposium carries this historic process into our time with a series of six articles which discuss the proper resolution of the academy's claim of autonomy when it is challenged in the courts by both academics and those outside the academic community.

Until the late 1960s, most litigation over academic issues involved disputes between the academic community and government, and the cases generally were resolved under the rubric of first amendment freedoms, although these opinions frequently referred to an amorphous right called "academic freedom."[7] It is in this tradition that the symposium begins with an article by the President of the University of Wisconsin System, Professor Robert M. O'Neil, *Scientific Research and the First Amendment: An Academic Privilege*, which argues for the recognition of a new form of academic autonomy, a constitutionally based qualified privilege to resist compelled disclosure of academic research at the behest of those outside the academic community.

Although Professor O'Neil's article demonstrates that important academic issues continue to be raised in disputes between the academic community and outsiders, and that special protection arguably should be given to academics so they may freely perform their tasks, the bulk of academic litigation today is of a different type. It involves disputes between the academy and its academics. Reflecting this modern trend in litigation, the remaining five articles in this symposium discuss two varieties of intra-academic disputes: (i) claims that the academy has violated the academics' first amendment freedoms, including their right to "academic freedom"; and (ii) claims that the academy has discriminated against them in violation of title VII of the Civil Rights Act of 1964.

Intra-academic disputes largely began with the first amendment cases. Professor Katheryn D. Katz traces this development in her article, *The First Amendment's Protection of Expressive Activity in the*

---

[7] Professor Katz discusses this development *infra*, at 857.

University Classroom: A Constitutional Myth. Professor Katz also provides us with a thorough discussion of the first amendment's application to intra-academic disputes. But, of course, the first amendment only proscribes "state action." Academies which are not imbued with state action are beyond the pale of the first amendment. In their article entitled *University Faculty Members' Right to Dissent: Toward a Unified Theory of Contractual and Constitutional Protection*, Professors Martin H. Malin and Robert Ladenson argue that "academic freedom" is grounded in the first amendment, that the concept of academic freedom is an implied term of academic employment contracts, and that the standards for determining a breach of this contract provision should be the teachings of the first amendment. Although this article inevitably covers some of the topics explored by Professor Katz, it is a unique attempt to provide private academics with the same protection enjoyed by their colleagues in public institutions, and it doubles the rationale for protecting academics at public institutions by adding contract protections as well.

Since title VII of the Civil Rights Act of 1964 was extended to all higher educational institutions in 1972, an ever increasing proportion of intra-academic disputes involve claims of employment discrimination by academics who are members of one of title VII's protected classes.[8] Three of the articles in this symposium discuss the application of title VII to employment discrimination in the academy. This portion of the symposium begins with a comprehensive article by Professor Christine Godsil Cooper concerning discrimination against female faculty, one of title VII's protected classes. The article, entitled *Title VII in the Academy: Barriers to Equality for Faculty Women*, critically assesses the status of women in academia and the law which prohibits discrimination against them. She concludes that contemporary doctrine does not adequately protect the rights of academic women, and suggests an interesting innovation in the application of title VII to employment discrimination against academic women. Believing that the disparate impact theory of title VII is of little avail to women, Professor Cooper concentrates on the disparate treatment theory. She argues that extension of the "pattern and practice notion" (a concept of systemic disparate treatment) should be applied to sex discrimination in the academy.

The second article on employment discrimination in academia, *Title VII, Equal Employment Opportunity and Academic Autonomy: Toward a Principled Deference*, by Professor Harry F. Tepker, Jr., fo-

---

[8] *See* Yurko, *Judicial Recognition of Academic Collective Interests: A New Approach to Faculty Title VII Litigation*, 60 B.U.L. REV. 473 (1980).

cuses on the effect that academic autonomy has had on the application of the disparate impact theory of title VII in academic employment discrimination. Although he finds that the courts have given too much deference to the academy in disparate impact litigation, he recommends reform, not abolition. He suggests that there should be a reallocation of the evidentiary burdens in these cases. Professor Tepker would continue the requirement that the academic employer come forward with substantial evidence of the reasonableness of an academic standard, but he would also require the institution to prove that the standards bear some substantial relationship to an important educational objective. When the Cooper and Tepker articles are read together, they provide a general, but critical, view of the law of title VII as it is applied to academic employment discrimination.

Secrecy in University and College Tenure Deliberations: Placing Appropriate Limits on Academic Freedom, by Professor John DeWitt Gregory, is the final article on employment discrimination in academia. In this article Professor Gregory argues that "academic freedom" protects the professor, not the institution; that there is no concept of institutional academic autonomy which protects the secrecy or confidentiality of the deliberations and notes of tenure committees from discovery by academic plaintiffs; and that it would be an unwarranted extension of the concept of academic freedom to extend such autonomy to the academy.

Although all three articles on employment discrimination conclude that the academy should not be privileged to withold all confidential information concerning tenure proceedings, Professor Gregory alone insists that there is no concept of institutional autonomy which must be factored into the decision.

There are common threads which run through all the articles on intra-academic disputes in this symposium, whether they address first amendment issues or employment discrimination. First, all the articles demonstrate that the concept of academic freedom is difficult, if not impossible, to define in terms which are not so general as to lack all utility. But regardless of how that concept is defined, it does not weigh heavily in favor of the academic in a dispute with the academy. However, when the academic dispute is between a professor and an outsider, be it government or some third person, the academic is cloaked with an autonomy similar to the autonomy of the academy. It is in this situation that one finds most of the rhetoric about "academic freedom." Second, these articles illustrate, at least to me, that autonomy in academic affairs is part of our conception of the academy. The academy, to some degree, is synonymous with autonomy, and that autonomy operates in

at least three ways in intra-academic disputes: (i) the substantive law is not as protective of the rights of academics as it would be in a nonacademic dispute; (ii) the academy, as defendant, is given procedural advantages which are not available to nonacademic institutions; and (iii) the academy is perceived as the only competent institution to decide academic affairs.

Third, these articles are largely critical of each of these three specific applications of the academy's autonomy. In varying degrees, our authors all argue that the balance struck is too favorable to the institution.

Absent from this symposium is an article devoted to the vigorous defense of autonomy for the academy. I would like to suggest that much of what Professor O'Neil writes in his article urging the recognition of an academic research privilege may be used to construct an argument that the academy's autonomy is based on principles found in the first amendment. But that is a discussion for another day.

What you are about to read is interesting, informative, stimulating, and timely. It lies on the cutting edge of the developing law of academic disputes.