

BOOK REVIEW

AN ACCOUNT OF THE DELIBERATIONS OF THE FACULTY COMMITTEE ON ACADEMIC FREEDOM AND UNACCEPTABLE SPEECH

MICHAEL BÉRUBÉ AND JENNIFER RUTH, *IT'S NOT FREE SPEECH:
RACE, DEMOCRACY, AND THE FUTURE OF ACADEMIC FREEDOM*
Baltimore: Johns Hopkins University Press, 2022.

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I. THE COMMITTEE'S PROVENANCE AND CHARGE

This University has long maintained a policy that assures faculty the protection of academic freedom. The policy's text is taken from the *1940 Statement of Principles on Academic Freedom and Tenure*. The

* Professor of Law, the University of Illinois at Urbana-Champaign and co-author, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* (2009) (with Robert Post). What follows is dedicated to the memory of William Warner Van Alstyne, one of the nation's most respected scholars in constitutional law, president of the American Association of University Professors, and author of *The University in the Manner of Tiananmen Square*, 21 HASTINGS CONST. L.Q. 1 (1993), from which the following takes instruction.

1940 Statement was drafted jointly by the American Association of University Professors (“AAUP”) and the Association of American Colleges (“AAC”), the leading organizations of the time representing college and university teachers and the administrations of liberal arts colleges.¹ The *1940 Statement* is currently endorsed by over two hundred disciplinary societies and educational organizations, has been adopted by name or in text by numerous institutions of higher education, and has proven influential in the courts.² It extends the protection of academic freedom to four aspects of professorial expression: (1) instructional speech (freedom of teaching); (2) speech connected directly to research (freedom of research and publication); (3) speech addressing matters of institutional policy or action (speech as an “officer” of the institution); and (4) speech on matters of public concern having no necessary connection to the speaker’s discipline (speech as a citizen).³

When faculty have spoken in any of these ways, they have sometimes uttered words that have offended, even outraged some listeners, on campus as well as off. The AAUP, which had undertaken to interpret the *1940 Statement* and to apply it in contested cases, has given greater license for speech as a citizen than to disciplinary speech: it has maintained that professional standards of care apply to disciplinary speech, but not to speech as a citizen which, when measured by constitutional standards, may be robust and unfettered.⁴ Consequently, a professor of modern European history who denies the Holocaust could be held to account for it; a professor of electrical engineering who does the same could not.

Michael Bérubé, a professor of literature at Pennsylvania State University and former president of the Modern Language Association, and Jennifer Ruth, a professor of film at Portland State University and a leader of her faculty’s union, see this situation as more than anomalous; they see it as unjustifiable. They provide a full-throated critique and call for a change in policy. Toward that end, they propose that a faculty committee should be assigned the tasks of drafting a revision to academic freedom policy and adjudicating disputes arising under it. Their defense of the essentiality of a faculty committee is equally full-throated, drawing on the historical rationale undergirding the role of faculty in institutional government; but, they explain, the task should not be given to

1. AM. ASS’N OF UNIV. PROFESSORS, *1940 Statement of Principles on Academic Freedom and Tenure*, in POL’Y DOCUMENTS AND REPORTS 13, 13 (11th ed. 2015) (ebook).

2. *Id.* at xiv.

3. *Id.* at xv.

4. *Id.* at 11.

just any faculty body at large, it should be given to a committee chosen on the basis of disciplinary expertise.⁵

The President of the University read Bérubé and Ruth and found the book more than persuasive; he found it unassailable. Consistent with the University's commitment to shared governance, the President reached out to the President of the University's Faculty Senate and urged her to read the book. She too found it compelling and with the President's concurrence appointed a select committee in line with Bérubé and Ruth's recommendation. The Committee met over the course of the academic year.⁶ What follows is an abbreviated account of its work.

But first, a parliamentary clarification. In its initial organizational meeting, a committee member questioned the body's composition: there were no members from any of the many natural sciences, disciplines that feature prominently, if not predominantly, in the University's portfolio of research and instruction, nor from the applied sciences (engineering and agriculture), the behavioral sciences (economics, government, and public policy), or the major professional schools (business, law, and medicine). The Chair explained that the members were chosen on the basis of disciplinary expertise. The interlocutor pressed the point: academic freedom does not mean one thing in physics and another in economics; none is more expert than another concerning the freedom's meaning or application. She maintained that as all disciplinary sectors in the University were to be governed by the policy the Committee was to craft, surely a representative sample of faculty across the major academic sectors should be involved.

The Chair demurred. He pointed out that, technically, the speaker was out of order: the Committee was charged to implement Bérubé and Ruth's proposal, not to debate it; and, pursuant to Bérubé and Ruth, it was emphatically not the case "that faculty participate on a kind of lottery basis."⁷ Their proposal was "that faculty . . . *with expertise in the relevant areas* be the primary drivers of any committee . . . "⁸ and they explain wherein that needed expertise resides—in departments of Black

5. See MICHAEL BÉRUBÉ & JENNIFER RUTH, *IT'S NOT FREE SPEECH: RACE, DEMOCRACY, AND THE FUTURE OF ACADEMIC FREEDOM* 212 (2022).

6. Twelve was thought a suitable number for the Committee; large enough to secure a variety of views, small enough to be workable. The Committee was composed of one faculty member from each of these academic units: African American and African Studies, American Indian Studies, Anthropology, Art and Design, Communications and Media Studies, Interpretation and Criticism, Asian Languages and Culture, English, Gender and Women's Studies, History, Latina/Latino/Latinx Studies, and Middle Eastern Studies.

7. BÉRUBÉ & RUTH, *supra* note 5, at 8.

8. *Id.* (emphasis in original).

studies, women's/gender/sexuality or indigenous studies and the like—disciplines that have

succeeded in at least planting the idea that all research in the human sciences is anchored (or “situated”) in a necessarily partial perspective, and one purporting to be universal is likely to be centered on [W]hite or dominant culture. Indeed, even the allegedly neutral term “freedom,” upon which the phrase “academic freedom” relies, has a racialized history⁹

Accordingly, only those from disciplines in which adepts have been educated to discern the deeper racial, ethnic, sexual, or political meanings in what is said have the necessary expertise to deal with speech so freighted. A White male professor of mathematical logic, he explained, would, as a matter of course, take the *modus ponens* to be an objective, universal inferential form, nothing less or more. (The *modus ponens* is: if P, then Q; P, therefore Q.) But a feminist scholar could see the *modus ponens* as a male-invented way of defining rationality that oppresses women.¹⁰ A White male professor of geology would, as a matter of course, take Moh's Scale to be an objective, universal means of measuring the hardness of minerals in relation to one another, nothing less or more; but to a feminist literary critic, it would be part of a “knowledge system that *privileges* quantity over quality and equivalence over a difference.”¹¹ Faculty members steeped in disciplines that lack an appreciation of the socially constructed nature of facts¹² would lack the requisite expertise.¹³ There was no further discussion.

9. *Id.* at 10.

10. Ruth Ginzberg, *Feminism, Rationality and Logic*, APA NEWSL. (Feminism and Philosophy), Mar. 1989, at 37.

11. MARY POOVEY, A HISTORY OF THE MODERN FACT: PROBLEMS OF KNOWLEDGE IN THE SCIENCES OF WEALTH AND SOCIETY 4 (1998) (emphasis added) (speaking of all “numerical representation” not of Moh's Scale alone).

12. Or, as Professor Poovey puts it, that “facts” seem (and can be said) to exist only when they constitute evidence for some theory. *Id.* at 1, 336 (placing ‘fact’ “in imaginary question marks to signal their socially constructed nature”).

13. The Chair did note that law was a difficult case. Some members of the law faculty have avowed commitments to critical race studies, which Bérubé and Ruth devote an entire chapter to extoll pointing to Richard Delgado and Patricia Williams as among its notable adherents. BÉRUBÉ & RUTH, *supra* note 5, at 127–73. The Chair further noted that one of the tenets of critical race theory is “an insistence on ‘naming our own reality.’” Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 95 n.1 (1990). Thus, when Tawana Brawley, a Black, teenage girl, fearful of retribution by her stepfather for running away from home, fabricated a story of torture and rape by a group of White men, Patricia Williams wrote that, “Tawana Brawley has been the victim of some unspeakable crime. No matter who did it to her—and even if she did it to herself. Her condition was clearly the expression of some crime against her” PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 169–70 (1991). No doubt as much could be said of the more recent case of Jussie Smollett's claim of having been subject to a racist attack in

The introductory to the Committee's work having been completed, the Committee decided that, given the complex texture of the University's rule and the critique of it, it would expedite the Committee's work if a study subcommittee would summarize the matter for the larger body and try its hand at a draft policy, better to focus discussion and give direction to the larger body's deliberations.

II. THE REPORT OF THE SUBCOMMITTEE

The subcommittee started from consideration of the relevant section of Article X of the University's Academic Policies taken from the *1940 Statement*. Subsections (a) and (b) of that Article deal with freedom of teaching and freedom of research. Subsection (c) deals with the others:

(c) College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence, they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.¹⁴

The subsection treats the teacher's freedom as a citizen to address issues of public moment as something distinct from disciplinary utterance in teaching and in publishing research results; speech as a citizen is made a matter of academic freedom, but is made subject to a separate set of responsibilities. The obligation to be accurate is inherent in the standard of care in all disciplinary discourse, but the document says that accuracy is to be observed in all other matters as well, indeed, "at all times."

The other obligations attached to speech as a citizen have no counterpart in disciplinary discourse. A teacher engaged in disciplinary

Chicago. Deepa Shivaram & Jonathan Franklin, *Jussie Smollett Will Serve 150 Days in Jail for Lying About an Attack on Him*, NPR (Mar. 10, 2022, 7:45 PM), www.npr.org/2022/03/10/1085718072/jussie-smollett-sentence [https://perma.cc/35UT-GZFB]. This "racial way of knowing" is concordant with the disciplinary expertise that informs the Committee's work. But, looking at law as an objective science, where critical race theorists would see a victim those who espouse the law without that commitment would see a criminal, whence the discipline's incapacity at large to appreciate how situationally anchored is the Committee's work and which incapacity disables mainstream law professors from doing committee service. However, to avoid any tincture of bias in selection, appointments were made on the basis of disciplinary affiliation, not individual commitments, and so law at large was excluded from consideration.

14. BÉRUBÉ & RUTH, *supra* note 5, at 69.

speech is not required to show respect for the opinions of others, particularly those with whom she vehemently disagrees; the obligation to “exercise appropriate restraint” has no counterpart in disciplinary contention; nor is the teacher or researcher required to be cognizant of what the larger public may think of her institution or of the academic profession as a result of what she teaches or publishes. As the AAUP’s founding manifesto, the *1915 Declaration of Principles on Academic Freedom and Tenure*, explained, progress, as much in the social as the natural sciences, may involve “the expression of opinions which point toward extensive social innovations, or call in question the moral legitimacy or social expediency of economic conditions,” and is unlikely to be achieved if subject to a “tyranny of public opinion.” The University should be an intellectual experiment station, where new ideas may germinate and where its fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may become a part of the accepted intellectual food of the nation or of the world.

Or, the subcommittee added, where the ideas advanced might be found wanting and are rejected, for progress is assisted as much in negative experiment results as in positive ones.

In view of the justification for the vocational freedoms of teaching and research, the subcommittee wondered whether speech “as a citizen” on matters of public import unconnected to disciplinary expertise should be treated as a matter of academic freedom at all. A half century ago, William Van Alstyne argued that a liberty for speech unrelated to vocation cannot be abstracted from a doctrine grounded in the need to protect vocational speech.¹⁵ The negotiators of the *1940 Statement*, acting out of a laudable impulse to protect political speech at a time when political expression by public employees was not constitutionally protected, nevertheless sought the wrong shelter. As the Supreme Court later did extend the protection of the First Amendment to the political utterances of public employees, that prudential perception—the need to find *some* ground of allowance for political speech—is no longer the case. Ironically, then, to categorize speech as a citizen as an aspect of academic freedom, subject to the *1940 Statement’s* cabining obligations, results in academics having potentially less protection for their political speech than other public employees; that is, that the sheltering of political speech under the rubric of an academic freedom has perverse results:

15. William W. Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberties*, 404 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 150–51 (1972). The subcommittee found it curious that this seminal writing on the issue, passes without Bérubé and Ruth’s notice.

[T]he trade-off the AAUP appeared to have accepted with the [AAC] in 1940—namely, to cultivate public confidence in the profession by laying down a professionally taxing standard of institutional accountability for all utterances of a public character made by a member of the profession—is substantially more inhibiting of a faculty member’s civil freedom of speech than any standard that government is constitutionally privileged to impose in respect to the personal politics or social utterances of other kinds of public employees.¹⁶

The controversy has not abated and Bérubé and Ruth enter it. They recognize that, today, for teachers in public universities the First Amendment and academic freedom, though overlapping at some points, are differently derived and function differently. But they are not prepared to reserve public political discourse exclusively for constitutional regulation.¹⁷ In supporting the extension of academic freedom to political speech they embrace the corollary that Van Alstyne found to counsel abstention: that even as we shelter some political speech as a matter of academic freedom, speech that we do not shelter, because it fails to meet the standards we expect of academics, we rightly can condemn and, where possible, sanction.¹⁸

16. *Id.* at 155. “What needs to be done,” Van Alstyne wrote:

is not merely to make clearer that a faculty member may not properly be held to answer to an institution for the integrity of his general utterances by the same standard by which he may have to account for his academic freedom, but to enlarge upon the implication of our position that his substantive accountability for such utterances will ordinarily not run to the institution at all.

Id. at 155–56.

17. They maintain that as “the experience of freedom is indivisible . . . extramural speech must be protected as a prophylactic protection for freedom of research and teaching.” BÉRUBÉ & RUTH, *supra* note 5, at 89.

18. Their position would play out differently in private and public higher education. As the First Amendment has no bite on non-state actors, objectionable speech not sheltered under a private university’s academic freedom policy would provide grounds to dismiss. In a public institution, such as ours, the fact that speech would be not sheltered institutionally would not mean that it would not be sheltered constitutionally. It might be the case, for example, that a White supremacist could not be discharged for expressing that belief consistent with the First Amendment, even as she could not claim her speech to be a matter of academic freedom. Were such to be the case Bérubé and Ruth still see value in denying the utterance institutional as opposed to constitutional protection for it would deprive the speaker of any aura of academic respectability in uttering it. It remains the case that speech on a matter of public interest may be perceived as potentially so disruptive of harmonious relations in the employment setting—within a school or university—as to be denied constitutional protection, as, for example, a high school teacher’s support, howsoever discrete, for the Man/Boy Love Association. *See, e.g., Melzer v. Bd. of Educ.*, 336 F.3d 185, 198–99 (2d Cir. 2003). Thus, it could be the case that a faculty’s strong condemnation of a colleague because of his opinion, especially when certified to by an official internal faculty body calling for the speaker’s dismissal, would evidence the genuine prospect of such serious internal disruption as to outweigh the speaker’s rights.

As Bérubé and Ruth's argument proceeds from the gloss the AAUP has placed on the "special obligations" clause, starting with the Koch case at the University of Illinois in 1960, it would be well to start with it.¹⁹ Leo Koch, an assistant professor of biology, published a letter in the student press advocating the propriety of undergraduate pre-marital sex.²⁰ This outraged some alumni leaders and parents. The University's president wrote that, "[t]he views expressed [by Koch] are offensive and repugnant, contrary to commonly accepted standards of morality and their public espousal may be interpreted as encouragement of immoral behavior."²¹ Koch's letter cast "serious doubt as to his sense of academic responsibility."²² He was discharged.²³

The AAUP's committee of investigation was chaired by Thomas Emerson of the Yale Law School, one of the nation's leading scholars on the First Amendment.²⁴ The committee of investigation concluded that "academic responsibility" could not be a valid standard for the imposition of discipline:

There can be no doubt that the ordinary citizen, addressing himself to a matter of public concern, is not limited by any standard of "responsibility." Apart from the law of libel or similar legal restrictions—which are clearly not applicable here—there is no requirement that the citizen speak with restraint, dignity, respect for the opinion of others, or even accuracy. To impose any such official limitation would effectively cut off any real discussion of controversial issues of either fact or opinion.²⁵

This led to disagreement within the parent committee and within the larger organization. (The chairman of the parent committee termed it, "the sort of case that tries men's souls."²⁶) The upshot was a separate *Statement on Extramural Utterances* in 1964 that turned away from asserting the existence of a "special obligation" to stress an idea that had run through the AAUP's understanding of the ground for discharge under the *1940 Statement*: that the misconduct had been such as to render the professor unfit for office. The express extension of this ground of

19. BÉRUBÉ & RUTH, *supra* note 5, at 72.

20. *Academic Freedom and Tenure: The University of Illinois*, 49 AAUP BULL. 25, 26 (1963).

21. *Id.* at 28.

22. *Id.*

23. *Id.*

24. *Id.* at 34.

25. *Id.* at 36.

26. David Fellman, *Report of Committee A, 1962–1963*, 49 AAUP BULL. 125, 127 (1963).

sanction to speech as a citizen was agreed to by the AAC in a joint Interpretive Comment appended to the *1940 Statement* in 1970:

The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his or her position. Extramural utterances rarely bear upon the faculty member's fitness for the position. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar.²⁷

Over the course of the ensuing half century in which the academic community has confronted a wealth of hotly contested speech disputes, the most intractable being subject to AAUP investigation and report, in no case has speech been found by the Association to have rendered a professor unfit per se. As a result, there is scant texture in the AAUP's case reports exploring wherein unfitness would reside. That is the lacuna Bérubé and Ruth seek to fill.

They do so by marching a veritable parade of horrors before the reader: faculty members who denied that children had really been killed in an incident of mass school shooting,²⁸ asserted that the attack on *Charlie Hebdo* in Paris was a false flag operation mounted by Mossad, that Black Lives Matter is funded by the CIA, that differences in the intelligence test scores between Blacks and Whites are explained by genetics, that the reason Blacks and Hispanics are economically worse off than Whites is because they come from cultures that are more collective and less enterprising, that colonialism had positive benefits for the colonized, that America would be better off with fewer Asians, and more along these lines.²⁹ These examples "shine light on what kinds of beliefs and utterances can be deemed so outrageous as to . . . disqualify[] [the professor] across the board."³⁰ Their position, in other words, is that when a professor gives voice to unacceptably outrageous ideas the speech is not an exercise of academic freedom even as a citizen, and the speaker is rendered unfit for office.

Bérubé and Ruth provide guidance on how to "deem" what is intolerable from the merely eccentric or outré. But at this point the subcommittee strove to learn wherein the connection between speech and

27. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 1, at 14–15 n.6.

28. See BÉRUBÉ & RUTH, *supra* note 5, at 95. They refer to only one such case, notably by a professor of communications who was sanctioned by his institution on other grounds. *Id.* Bérubé and Ruth take his university to task for failing to pursue his discharge for his denial of the shooting as manifesting unfitness in his disciplinary discourse, and quite rightly. *Id.* at 97–98. His was not an instance of speech "as a citizen" to which disciplinary standards would not apply. *Id.* at 98.

29. *Id.* at 2–3, 99, 111–12, 114, 199.

30. *Id.* at 95.

unfitness resides inasmuch as it is not the speaker's specific discipline that is implicated, but the connection to any professorial office at all: according to Bérubé and Ruth a professor who advocates White superiority on genetic grounds could seek no shelter in academic freedom whether the speaker is a professor of genetics or one with no biological grounding whatsoever, as was William Shockley, a specialist in electronics, inventor of the transistor, holder of the Nobel Prize in Physics, and staunch advocate for the theory of "dysgenesis," of "retrogressive evolution," that "explained" the relative intellectual inferiority of Blacks.³¹

The clearest guide to the connection Bérubé and Ruth advance is illustrated in what they condemn—the AAUP's *Statement on Freedom of Expression and Speech Codes*, a pronouncement whose "ringing terms" they say "ring false."³² The *Statement* defends, *inter alia*, the use of epithets and slurs as consonant with accepted constitutional free speech doctrine and responds to the argument that words of that nature are of such a low order they can, in the balance, be suppressed:

[A] college or university sets a perilous course if it seeks to differentiate between high-value and low-value speech, or to choose which groups are to be protected by curbing the speech of others. A speech code unavoidably implies an institutional competence to distinguish permissible expression of hateful thought from what is proscribed as thoughtless hate.³³

In reply, Bérubé and Ruth accuse the AAUP of an "abnegation of critical judgment":

[I]t is one of the primary functions of a college or university, if not *the* primary function, to distinguish between high-value and low-value speech. This what professors do every time they grade student papers, write student recommendations, evaluate the work of their colleagues (especially for tenure and promotion), or participate in routine committee work. What is the intellectual mission of the university, we wonder, if it abandons the obligation to exercise critical judgment about the value of speech acts?³⁴

Bérubé and Ruth are well aware of the fact that the *Statement of Freedom of Expression and Speech Codes* was addressed exclusively to extracurricular utterances—remarks made in the public sphere, in social

31. *Extremist Info: William Shockley*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/individual/william-shockley> [https://perma.cc/J5LS-Q6WN] (last visited Apr. 1, 2023).

32. BÉRUBÉ & RUTH, *supra* note 5, at 174–75.

33. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 1, at 361–62.

34. BÉRUBÉ & RUTH, *supra* note 5, at 177.

media postings and the like—and that these were addressed solely in terms of free speech, just as the *Statement*'s title says; the phrase “academic freedom” makes no appearance in the document. “Critical judgment,” which Bérubé and Ruth fault the AAUP for abnegating, to the AAUP concerns vocational speech which does demand that discrimination between low value and high value speech be made, just as they say, but which is not the concern of the *Statement of Freedom of Expression and Speech Codes*.

The subcommittee does not point to Bérubé and Ruth's treatment of the *Statement of Freedom of Expression and Speech Codes* as criticism, but rather to emphasize the subcommittee's understanding that the *Statement*'s actual focus is ignored because of Bérubé and Ruth's firm rejection of the distinction between speech as an academic and speech as a citizen. A professor of macramé in the College of Arts who posts a blog asserting that vaccines cause autism, that climate change is not affected by human action, that the low socioeconomic status of Black and Brown people stems from their cultural difference with the White population, that phrenology has strong explanatory power as a gauge of human personality—speech that the AAUP would shelter as “speech as a citizen” under the 1940 *Statement*—should not be able to be sheltered under the University's academic freedom policy.³⁵

In other words, Bérubé and Ruth would breathe life into the discarded or at least moribund obligations in the “speech as a citizen” clause. This the subcommittee sought to capture in a revision of policy. How to decide what speech would be intolerable—the question that undergirds the policy change—was to be taken up during the larger Committee's later deliberations which the draft was devised to incite.

III. THE COMMITTEE'S DELIBERATIONS

After the subcommittee shared its summary of Bérubé and Ruth's position with the Committee, it submitted a rough draft, a “first cut,” on a policy revision.

Draft No. 1

(c) A faculty member may speak on any issue of public interest free of institutional censorship or discipline save insofar as [in those rare instances] the speech [clearly] manifests unfitness for office. Unfitness is manifested by [among other matters] the speaker's advocacy, support, or approval of [W]hite supremacy or colonialism. A final decision on

35. *Id.* at 178–80.

unfitness should take into account the faculty member's entire record as a teacher and scholar.

In placing the draft before the parent body the subcommittee pointed to the policy choices before the Committee posed in the language included within the brackets: (1) because the *Statement on Extramural Utterances* emphasized that unfitness as manifested in speech alone was "rare," the subcommittee thought to add a prophylactic against undue expansion; (2) the adverb "clearly" was meant to signal a standard of proof, to guide the speaker—for at times the line between the permitted and the forbidden might not be clear—and the hearing committee in those instances where adjudication might be required; (3) though Bérubé and Ruth mention many other assertions the advocacy of which would render the speaker unfit, the major focus of their concern was race, whence the two instances the draft addresses, the question posed by the bracketed language is whether the policy needs to signal more clearly that the two are not exclusive.

On the first, the Committee decided to omit the word "rare." As the number of instances of speech that would be subject to possible sanction could not be known, there was no empirical evidence for the making of any normative judgment. Further, the inclusion of "rare" might be taken as a signal for a more permissive speech license than unfitness constrains.

On the second, the Committee decided to omit the word "clearly." The University's policy on cause for dismissal, adopted from the AAUP's advisory *Recommended Institutional Regulations on Academic Freedom and Tenure*, provides that cause to dismiss must "be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers." The Committee saw no need to address the level of proof here.

On the third, the Committee was concerned that the singling out of the two categories of speech could possibly be taken, wrongly, as preclusive of others. It accepted the inclusion of "among other matters."

Attention turned to the two categories of speech that were set out for sanction. A Committee member inquired of the subcommittee of why "[W]hite supremacy" was used rather than "racist" more generically. She pointed out that though White supremacy is an expression of racism there are other forms of racism, pointing to the beliefs of the Nation of Islam as an example.³⁶ She asked if a Black professor of, say, Robotics,

36. The member referred to the Southern Poverty Law Center's *Extremist Info: Louis Farrakhan* article which summarizes the Nation of Islam's beliefs to include the following:

who posted an opinion on a social medium asserting that White people were inherently deceitful and murderous would be considered unfit to profess.

The subcommittee chair replied that not all expressions of odious beliefs render the holder unfit. Bérubé and Ruth address how the line should be drawn—a matter that should be taken up by the Committee later, once the larger context has been explored. He suggested that on this specific matter the Committee might care to consider language that would better capture what the wrong was that White supremacy, in particular, wrought, perhaps the “maintenance of the inherent or genetic supremacy of any racial group over another,” the subtext needing no amplification.

A committee member turned to the singling out of colonialism, in light of, the possible substitution of the above for “[W]hite supremacy,” as the evil of colonialism was surely situated in an assumption of racial supremacy by the colonial power. She noted that Bérubé and Ruth also refer to imperialism as an evil, but only in passing,³⁷ and that they do not expressly identify the extolling of imperialism as speech that would render the speaker unfit, as would the extolling of colonialism. A committee member responded by pointing out that not all colonial enterprises were based on White supremacy, pointing to Japan’s colonial regime in Korea. Another member replied that the failure to address imperialism might rest on the fact that while some empires were built on racial supremacy, others were not—pointing to modern thought about the Habsburg Empire which fostered (and then fell) on national identity.³⁸ If racial supremacy is the crux of what is wrong with colonialism, she suggested that it would not make sense to mention it in addition to White supremacy as the reference would be redundant.

Another committee member turned to colonialism. She noted that the state of Israel has been accused of being a colonial enterprise and, at times, even a racist one. If the subcommittee’s draft were to be adopted,

[O]riginal humans were [B]lack, and that God, who is a [B]lack man, created them. White people were not created by God but by the evil [B]lack scientist Yakub. Yakub used eugenics to create [W]hite people, killing many [B]lack babies to do so. Because of the process by which Yakub created the [W]hite race, [W]hite people are inherently deceitful and murderous.

Extremist Info: Louis Farrakhan, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/individual/louis-farrakhan> [<https://perma.cc/A4XU-QDXG>] (last visited Apr. 1, 2023).

37. BÉRUBÉ & RUTH, *supra* note 5, at 29, 65, 164–65.

38. Pieter M. Judson, *The Habsburg Empire: A New History*, 6 HUNGARIAN HIST. REV. 180, 186–87 (2017).

she asked whether supporters of Israel could be determined to be unfit for professorial office by virtue of their maintaining a belief in Israel's right to exist insofar as it is considered to be a colonial state. A member responded by observing that the Zionist narrative was to an opposite effect: that the Jews, long exiled from their land, had simply returned to it, to which the first member replied that to some that very narrative was racist.

The Chair observed that if the policy were to declare colonialism out of bounds for favorable comment, and if complaints were made of a faculty member's favorable remarks concerning the state of Israel, it would be a disputed question whether Israel was or was not a colonial state. Consequently, the hearing committee—the expert body charged with adjudicating speech disputes under the rubric of unfitness—would have to decide the question or, he went on, it might decline decision on the ground of the lack of consensus on which narrative was correct. The last speaker replied that even if colonialism were to be removed in terms, and racism retained, a complaint might nevertheless be lodged against supporters of Israel on the ground of Israel's being a racist state which allegation the hearing Committee would have to decide. The Chair agreed.³⁹

A member of the Committee drew attention to the draft policy's concluding clause: that fitness for office *vel non* is to be decided in the context of the speaker's entire record. As the member understood it, the clause rested on two notions. One was that a valued faculty member of long service should not be held automatically amenable to discharge merely for having gone on a momentary tirade, a “one-off” offensive frolic. Second, but more important, that the idea of unfitness for office entailed an examination not of the speech alone, in isolation, but of its relationship to all that the holding of office entails. In the Angela Davis case at UCLA in 1970, concerning her non-reappointment in the philosophy department for the content of her political speeches, the AAUP committees of investigation gave a brief account of what unfitness means:

39. As to the body's capacity to decide whether Israel was a racist or colonial state, the Chair noted that several of the academic units from whose ranks members of the committee had been drawn had passed resolutions in their name after the Gaza War condemning Israel as a “settler colonial” and “oppressor” state, as had several of their cognate departments in other universities. Obviously, these units deemed themselves qualified to make that judgment; and, noting that the administration had made no effort to disclaim their power to do so, it follows that the administration had agreed or, at the very least, acquiesced in the competence of the members of the unit to make that judgment. Inasmuch as the units' actions were by secret ballot, the fact of a majority having so resolved to commit their units to that position does not disqualify any one member of the unit from serving on a hearing committee.

To meet the AAUP's standard of unfitness, then, the faculty member's shortcoming must be shown to bear some identified relation to his capacity or willingness to perform the responsibilities, broadly conceived, to his students, to his colleagues, to his discipline, or to the functions of his institution, *that pertain to his assignment*. The concept cannot be reduced to a generalized judgment of "unsuitability" at large. AAUP standards of responsibility identify objectionable features in extramural speech, and their presence in any serious degree is prima facie evidence to trigger an inquiry into the speaker's fitness for an academic position, but it does not by itself establish unfitness.⁴⁰

The member thought this was quite at odds with what Bérubé and Ruth and presumably the subcommittee would have the policy to be. It is not that charlatanism or fabulism in political speech allows inquiry into whether the speaker was a charlatan or fabulist in her professorial work, but that any speech that crosses a line to deem it "so outrageous as to be disqualifying across the board" by itself establishes unfitness.⁴¹

The Committee agreed that the latter was Bérubé and Ruth's position, but some members thought the "whole record" notion injected a different, more contextualizing element that bore on the suitability of discharge. The Chair drew the Committee's attention to Bérubé and Ruth's thought that an institutional reaction lesser than discharge might be the preferable course to pursue (referring to a reprimand in lieu of suspension or discharge for posting of offensive tweets),⁴² and, following their cue, suggested that other, rehabilitative efforts should be undertaken where appropriate. He suggested the matter be returned to once the substantive policy had been agreed on. On that assurance, the Committee decided to omit the final clause in the draft.

As informed by the discussion, the subcommittee took the draft in hand and produced a revised version for discussion.

Draft No. 2

(c) A faculty member may speak on any issue of public interest free of institutional censorship or sanction save insofar as the speech manifests unfitness for office. Speech manifesting unfitness for office includes but is not limited to advocating, supporting, or approving the idea that any race is inherently superior to any other.

40. *Academic Freedom and Tenure: The University of California at Los Angeles*, 57 AAUP BULL. 382, 398 (1971).

41. BÉRUBÉ & RUTH, *supra* note 5, at 75, 95.

42. *Id.* at 93.

The Committee agreed that the draft captured the gist of the discussion so far, and that specific reference to White supremacy and colonialism need not be made, which obviated the problem of dealing with the Israel-Palestine question in terms, but some members found the lack of substantial guidance on the larger meaning of unfitness inadequate, the inclusion of the single, even though broadened instance, jarring. They asked the subcommittee if there was more to work with, adverting expressly to the array of examples that Bérubé and Ruth had marshalled, but which the draft did not address.

The subcommittee chair replied that Bérubé and Ruth set out two general propositions upon which their argument to the concrete cases rests and that these might be looked to. The first lies in the expression of “claims made with complete disregard for, or reflexive dismissal of, a settled body of knowledge built on well-documented scholarship and research.”⁴³ This could, for example, be scientific in nature—as in denying climate change or finding value in astrology—or historical in nature, as in extolling the economic and social merits of colonialism or denying the Holocaust, or could conceivably implicate other organized bodies of knowledge as well. The second lies in the making of “morally [or] politically repellant claims”⁴⁴ that do not depend on any scientific, historical, or other grounding but are purely normative in nature.

A committee member expressed a reservation about the first category—speech in disregard of accepted scientific knowledge. She noticed that major leaps in scientific knowledge have been made against the accepted wisdom, sometimes over the strong opposition of the scientific establishment. She saw no harm in advocating a theory merely because it has few adherents or is scoffed at as being in disregard of settled knowledge; Galileo did just that and, she noted, cold fusion has been widely rejected but has managed to retain some adherents nevertheless. The Chair replied that Bérubé and Ruth made clear that support for crackpot theories or of pseudoscience was a necessary condition of unfitness on this ground, but not a sufficient one. The member responded: if a professor of astronomy were to publish a book advocating astrology; a professor of biology to advocate phrenology, the “science” of deducing character from the shape of the skull; or a professor of psychology to advocate physiognomy, the “science” of detecting character traits from facial characteristics, the University could inquire into whether they were unfit to profess their disciplines—but not if these books were written by professors of law, economics, geography, or any other field of

43. *Id.* at 6.

44. *Id.* at 122.

study having no bearing on these “scientific” claims. Nonsense being nonsense, and, obviously, being speech of low value, she failed to see why anything more was required to render their utterances out of bounds *per se*, as unworthy of the protection of academic freedom on the ground of it being speech as a citizen on issues of public interest.

Another member replied that the speaker herself had acknowledged that some ideas believed nonsensical at one point in time might bear fruit in light of later acquired knowledge. She pointed to facial recognition technology, an outgrowth of physiognomy, which today is being deployed to detect character traits and is being used in connection with the hiring of employees. She was not persuaded that advocacy of what is now be considered pseudoscience should not be in exercise of academic freedom at least in the sphere of public discourse.

The Chair asked the Committee to forbear from this line of inquiry until the second, the sufficient condition was discussed. He thought the analysis would become clearer when considered in the context of the category not of false science, but of morally or politically repellant speech.

A committee member then turned to that category. She noted that the Boycott, Divest, Sanction (“BDS”) movement directed against Israel calls for the University to sever its connection with Israeli universities. The AAUP has condemned the boycott for, to adhere to it, faculty members would be forbidden to collaborate with colleagues in Israel who inexorably bear ties to their institutions; that is, participation in the boycott would violate freedom of research. Surely, she said, BDS’ advocacy of an academically unacceptable result is politically repellant. She inquired if it would be sanctionable for, surely, she ruminated, academic freedom does not extend to advocacy for its suppression.

The Chair thought the comments of the last three speakers should be pursued. He suggested the draft could better focus discussion on them drawing specifically on what further guidance Bérubé and Ruth provide. The subcommittee returned to the task and presented a revision.

Draft No. 3

(c) A faculty member may speak on any issue of public interest free of institutional censorship or sanction save insofar as the speech manifests unfitness for office. Speech manifesting unfitness for office includes but is not limited to assertions that are made with complete disregard for, or reflexive dismissal of a settled body of knowledge based on well-documented scholarship or research or in the advocacy, approval, or support of morally or politically repellant beliefs.

The subcommittee chair returned to the issue of the lack of scientific grounding. He reiterated that Bérubé and Ruth's concern was not about the expression of crackpot ideas or pseudoscience—astrology, phrenology, physiognomy—but only of those ideas that might be believed and that, if believed, would lead to harm. He laid stress on Bérubé and Ruth's argument that the traditional model of democracy as being a "marketplace of ideas," where good ideas or sound facts will prevail over bad ideas or false facts has been shown to be in error⁴⁵—was, indeed, a "liberal shibboleth"⁴⁶—in an age where the echo chambers of social media precluded the open-minded sharing of ideas and debate. In this world, the answer to bad ("false") thought is not to increase the volume of corrective ("good") thought, but to suppress the expression of bad thought. In the academy, this means denying the mantle of respectability that academic freedom affords by disallowing those who utter such speech the ability to fold what they say in it. Denying climate change, for example, could have devastating real world consequences. So, too, of White supremacy, inherently grounded in scientifically discredited theories of eugenics. Academic credibility should not be lent to them, even by the speech of an academic with no grounding in climate science or genetics.

The subcommittee chair then turned to the member who had pressed the question of why the advocacy of pseudoscience alone would not render a professor unfit. The subcommittee chair opined that in the absence the prospect of harm there would be, literally, no harm in it and so no academic wrong: astrology, for example, had no element of moral or political repulsion. To this the committee member who had advocated for error alone to be disqualifying observed that if moral or political repulsion was needed as a sufficient condition to deprive scientifically ungrounded claims of the protection of academic freedom, advocacy of phrenology would render the speaker unfit to profess because phrenology had deeply racist roots.⁴⁷ The subcommittee chair thought the Committee needed to attend to the sufficient condition.

Turning to the sufficient condition, the subcommittee chair stressed that repulsion alone was not enough: that according to Bérubé and Ruth only those morally repellant ideas that are likely to persuade *and* to an ill effect should be denied a claim on academic liberty. In the case of BDS, as no university has joined in it, there appears no genuine threat of its realization and its adherents can continue to so advocate. The Chair drew

45. *Id.* at 178.

46. *Id.* at 185.

47. She adverted to JAMES POSKETT, MATERIALS OF THE MIND: PHRENOLOGY, RACE, AND THE GLOBAL HISTORY OF SCIENCE 13–14, 1815–920 (2019).

an analogy to the Angela Davis case a member had earlier adverted to. She was denied reappointment to the Philosophy Department by the Regents of the University of California for several speeches she had given in one of which she said that she regarded academic freedom “as an ‘empty concept’ and a ‘real farce’ if divorced from freedom of political action, or if ‘exploited’ to maintain such views as the genetic inferiority of [B]lack people.”⁴⁸ Ms. Davis voiced disbelief in the idea of academic freedom and, from what appears, would have abrogated it if she could. But, important for the Committee’s purpose is that the abolition of academic freedom was never in prospect.⁴⁹ The UCLA faculty committee engaged with the issue thusly, “even if Miss Davis’s speeches and views suggest a willingness to deny others the same freedoms which are invoked to protect her, we must recognize that to use this to punish her would *actually* abrogate freedom of speech, whereas she has merely *talked* about doing so.”⁵⁰

This, he thought, stood in sharp contrast to those who supported Israel. If the hearing committee determined it to be a racist state, the influence of advocacy opposed to the boycott and supportive of Israel could be drawn from the failure of its opponents to have been able to move the dial of public opinion. It would follow that were a hearing committee to find Israel to be a racist state, those who have voiced public support for it would be unfit for office.

The Chair then summed up: there appeared to be two additional factors that need to be added to the draft: the likely acceptance of what the speaker says—that the speech would be influential—and the likelihood of serious harm flowing from that influence. These, when combined with what the Committee has fashioned so far, articulate the grounds on which the protection of academic freedom should be denied to extramural utterance. The Committee agreed that a version along that line should be drafted.

Draft No. 4

(c) A faculty member may speak on any issue of public interest free of institutional censorship or sanction save insofar as the speech manifests unfitness for office. Speech manifesting unfitness for office includes but is not limited to assertions that are made with complete disregard or reflexive dismissal of a settled body of knowledge based on well-documented scholarship or research, or in advocacy, support, or

48. *Academic Freedom and Tenure*, *supra* note 40, at 391.

49. *Id.* at 391–92.

50. *Id.* at 392.

approval of morally or politically repellant ideas, when, in either case, such speech is likely to be believed by a more than trivial portion of the populace and is likely to result in serious harm to individuals or to society.

A member of the Committee directed the body's attention to a bill recently introduced in the State's General Assembly that would declare that a human life comes into being at the very moment of conception and that would criminalize the abortion of it, or any aiding or abetting of such. First, she noted, there was no settled body of scientific knowledge in support of the bill's grounding, that is on exactly when a human being *tout court* comes into being. Second, social science research has documented the harm done to the women coerced into bringing babies to term, to those around them, and to larger society. Under the draft, it would seem to be the case that a professor who, even if out of religious belief, advocates for the bill would be unfit for office as, obviously, her speech would plainly meet the draft's strictures: her support as a professor would carry weight among those agnostic in the matter and the harm flowing from their acceptance would be palpable. By the same reasoning, she noted, an opponent of the measure would rightly be exercising her academic freedom as a citizen.

Another member agreed: speech in opposition of the bill would not render a faculty member unfit; but, what if the ground of opposition were that a significant cohort of those involuntarily bringing babies to term would be poor, uneducated, single Black women and that making them bring their babies to term will have socially harmful consequences in significantly increasing the rate of crime when these unwanted, economically deprived children become young adults?⁵¹ That argument, she said, would be racist, even if well intended, and she wondered whether in making it the speaker would be rendered unfit.

The Chair replied that Bérubé and Ruth seem to have anticipated the very question in the clearer context of instructional speech uttered for a pedagogical purpose and germane to the subject which ordinarily one would expect to be shielded as a matter of freedom of teaching. The case is of an instructor in English who uses the word "niggardly" in class, a word having no etymological connection to a racial slur, to make that very point and does so because no other word would make that point quite so forcefully.⁵² To them, the instructor's pedagogical intent is not

51. She adverted to the reportage in John Donohue & Steven Levitt, *The Impact of Legalized Abortion on Crime Over the Last Two Decades*, (Becker Friedman Inst., Working Paper No. 2019-75, 2019).

52. BÉRUBÉ & RUTH, *supra* note 5, at 56–65.

controlling. The reply they would make to him, in the face of student protest, is this: “*you may have meant x, but you were widely and understandably taken to be saying y, so some form of apology or explanation is in order.*”⁵³ However, they would not dismiss the instructor: the matter would be better resolved by the instructor’s acceptance of his error and him making an apology, a sincere apology, to the students.⁵⁴ This in the context of otherwise absolutely protected vocational speech. If a teacher may be made to recognize his error and be required sincerely to apologize for using a word that others wrongfully take to be racist when trying to educate them on just how wrongful the mistaking of the word is, it would seem to be the case that a sociological claim made during a debate on an issue of public policy that some listeners might take to be racist can be grounds of sanction in spite of the fact that the speaker did not intend to convey a racially charged message.

A member expressed some unease with the “is likely to be believed” and “is likely to result” provisions insofar as they inject a causal connection. There are so many influences from so many sources that play on people’s minds in unimaginable ways that she could not see how it could be determined that a book, an article, or a speech—one or many, singly or in concert—or one or a series of tweets are to have a discernable influence or that a harmful result can be attributed specifically to it.

The Chair agreed the task would be difficult, but that, according to Bérubé and Ruth, lines must be drawn even when they might be less than obvious. He suggested two considerations weighed on the matter. First, because we do trust a jury of laypersons to decide if advocacy of a prohibited end is “likely to . . . produce such action,”⁵⁵ there is no reason to be skeptical of a faculty committee’s capacity to perform an analogous function. Even if a faculty committee is no more expert in what sways public opinion than a lay jury, neither has it any less such expertise. Second, a faculty committee, whatever its expertise might be on public opinion, is expert in matters of professional fitness. If the Committee were persuaded to recalibrate the protection afforded speech or public issues to hold faculty more responsible for what they say, the Committee hearing a contested case would have to be chosen based on its ability to distinguish the responsible from the irresponsible in which the degree of irresponsibility ineluctably requires an assessment of likely harm.

53. *Id.* at 58.

54. *Id.* at 60–61.

55. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

In the aftermath of this last observation, some committee members were troubled that a career might be at risk on the basis of an inference. One member, for example, thought discharge for having made the argument to the connection between abortion and the crime rate was just too harsh along the line Bérubé and Ruth explore in the case of the offending tweet or the offending teaching by the English instructor. The Committee agreed that in view of the problems of causation in connection with a discharge on grounds of unfitness, the focus of the policy ought primarily to be on rehabilitation and education, to have faculty avoid utterances that would call their fitness into account. The Chair agreed that the policy should make that clear.

At this point a member who had not spoken heretofore took the floor.

Let me see if I understand correctly what we are about to propose. I'll start with our current policy. The university has renounced any right to censor or to discipline a faculty member because she has spoken as a citizen. Consequently, a faculty member, no less than any other citizen, may speak on a matter of public concern even if she has not investigated the facts in what she says, is willfully blind to them, or even if she distorts them; and she is free to essay all manner of foolishness. Even so, a faculty member must remain fit for office. Non-disciplinary speech containing, for example, fabrications or gross misstatements, is a reason for the university to investigate whether the speaker has been similarly cavalier in her professional work. If that investigation proves that she had, grounds would be presented for discharge. But if she had not, the matter would be at an end. The faculty member, found competently to be teaching, researching and publishing, competently to be mentoring students, and diligently contributing to the work of faculty committees may continue to do so even as, at home, late at night, she furiously posts QAnon conspiracies on her social media. In this way, the university respects the idea that debate in the public sphere must be allowed to be robust and unfettered; and that faculty members are to be no more restrained by a notion of responsibility in public discourse than are the university's groundskeepers.

The draft the subcommittee has placed before the body would work a radical change. Not only does it impose a general obligation to be accurate insofar as scientific or other knowledge is concerned—even though the speaker's discipline is not in the science in question or in any other relevant discipline—it requires a faculty member to abjure advancing moral or political ideas that are deemed repellent when they are likely to persuade and would result in harm if persuasive. Speech that satisfies these conditions is to be excluded from being an exercise of the faculty member's academic freedom as a citizen and renders the

speaker unfit for office, possibly to be discharged were the law to allow it. Do I have it right?

The Chair allowed that she had. She proceeded.

I must confess that I am perplexed. Let me take up three real world cases. I return to the Koch case and place the facts against what is before us now. The advocacy of extramarital sex among undergraduates was, in President Henry's words, "repugnant . . . to commonly accepted standards of morality" at the time, and as I read the AAUP's report no one said that Henry's judgment was inaccurate. (Nor do I see a difference between "repugnant" and "repellant," the gist is the same.) Surely, it is a fair inference that the teenagers in receipt of Koch's advocacy would have been buoyed by his encouragement; and there should be no doubt that that conduct bore the prospect of serious harm for, in Illinois, sex out of marriage was a crime.⁵⁶ I see no difference between what the University of Illinois did and what the draft would allow our University to do.

In Florida, in the late 1960s, Broward County had launched upon a program called "Operation Teen-Age Alert" in the secondary schools and at the junior college to deal in part with sexual deviation: its operatives investigated "instances of suspected sexual deviation among students, faculty, and staff."⁵⁷ When the program's lead operative spoke at a public meeting on the evils of homosexuality, Lawrence Kassan, a first year assistant professor of art at Broward County Junior College, newly come from New York City, questioned the program's intolerance of homosexuals. Kassan was discharged for having spoken. He was not accused of being a homosexual, but rather of holding "certain attitudes" creating an atmosphere of tolerance of homosexuality. There can be no doubt how morally and politically repellant homosexuality was at that time and place, that, as a professor, it would be fair to infer that his students would be swayed by his attitude—which was the basis for his discharge, his tolerance—and that the tolerance he modeled before his students would conduce toward acceptance of homosexuality in which more tolerant atmosphere harm could result as homosexual activity at the time was a crime.⁵⁸ I see no difference between what Broward County Junior College did and what the draft would allow our University to do.

In 1940, the City College of New York appointed Bertrand Russell to teach mathematics in its philosophy department. A court ordered his appointment to be rescinded on the express ground that he was "unfit" for the position – the term taken verbatim from state education law –

56. It still is. See 720 ILL. COMP. STAT. 5/11-40 (2012).

57. Am. Ass'n of Univ. Professors, *Academic Freedom and Tenure: Broward Junior College (Florida)*, 55 AAUP BULL. 71, 72–73 (1969).

58. § 1, 1917 Fla. Laws 211.

based on his writing in support of “companionate marriage,” which the court termed “immoral.”⁵⁹ There is no doubt that the idea Russell advocated, akin to Koch’s and Kassan’s expressions, was repugnant to many and, as with Koch and Kassan, the holding of professorial office lent weight to the idea the speaker was propagating. The court said, “[t]eachers are supposed not only to impart instruction . . . but by their example to teach the students.”⁶⁰ The harm identified by the state in its criminal law, present in Koch and Kassan’s cases was identified expressly in Russell’s, as adultery was a crime in New York.⁶¹ The court having drawn the very inference on which the policy before us rests, went on to draw the conclusion the policy draws, for the court refused to:

[T]olerate academic freedom being used as a cloak to promote the popularization in the minds of adolescents of acts forbidden by the Penal Law. This appointment affects the public health, safety and morals of the community and it is the duty of the court to act. Academic freedom does not mean academic license. It is the freedom to do good and not to teach evil.

Academic freedom cannot authorize a teacher to teach that murder or treason are good . . . Academic freedom cannot teach that abduction is lawful nor that adultery is attractive and good for the community.⁶²

I see no difference between what the judge said and did and what the draft says and would allow our University to do, whence my perplexity.

The Chair agreed that it would be possible for a suitable adjudicative body, measuring the speech involved in these cases against standards the draft sets out, could find the speech unprotected: what the speakers advanced could be held to have been morally repellant (indeed criminal) at the time, was likely to be influential—the Chair noted, ironically, that society has pretty much moved in the direction all three had advocated—and, if influential, would have posed a serious threat of legal harm resulting from engagement in the conduct the speakers advocated or asked to be tolerated. But, the Chair observed, the preceding speaker had failed to note two important—indeed, critical—differences.

59. *Kay v. Bd. of Higher Educ.*, 18 N.Y.S.2d 821, 826–27 (1940).

60. *See id.* at 826, 829 (“A person we despise and who is lacking in ability cannot argue us into imitating him. A person whom we like and who is of outstanding ability, does not have to try. It is contended that Bertrand Russell is extraordinary. That makes him the more dangerous.”).

61. N.Y. PENAL LAW § 255.17 (McKinney 1967).

62. *Kay*, 18 N.Y.S.2d at 829.

First and foremost, in the cases the member had pointed to no faculty body had passed on the relationship of the speech to professorial fitness. For the reasons Bérubé and Ruth emphasize, it is imperative that decisions on whether faculty speech is sheltered or not, and, if not sheltered, provides grounds for sanction, be in the hands of the faculty; and, he stressed, not just any faculty body, but one with the requisite expertise. As that essential aspect had apparently escaped even one as astute as the member who had raised these cases, the Chair thought it ought be set out in the policy.

Second, these instances all involved terminations of appointment—two summary in nature, one by judicial dictate—but as for how this policy will operate going forward there is general agreement that termination should be a last resort, reserved only for the most egregious cases and only, again, after rehabilitation or educational efforts had been found wanting. The Chair emphasized that the purpose of the policy is not punitive. It is intended to dampen the expression what Bérubé and Ruth term “groundless, delusional, or corrosive” speech.⁶³ Because the line between the allowed and the forbidden might not always be obvious—as Bérubé and Ruth’s examples of the offensive tweet and the offensive English instruction make clear—and because dismissal would rest on an inference of causation that might be difficult to establish with certainty, counseling and other educative efforts alone should be expected to achieve the desired end.

The Committee agreed with both points and asked the subcommittee to return with what was expected to be the final draft.

Final Draft

(c)(1) A faculty member may speak on any issue of public interest free of institution censorship or sanction save insofar as the speech manifests unfitness for office. Speech manifesting unfitness for office includes but is not limited to assertions that are made with complete disregard or reflexive dismissal of a settled body of knowledge based on well-documented scholarship or research, or in advocacy, support, or approval of morally or politically repellant ideas, when, in either case, such speech is likely to be believed by a more than trivial portion of the populace and is likely to result in serious harm to individuals or to society.

(2) Any instance where the application of this policy is disputed shall be decided by a faculty hearing committee appointed by the President

63. BÉRUBÉ & RUTH, *supra* note 5, at 197.

of the Faculty Senate from those disciplines expert in the culturally constructed nature of facts.

(3) Where speech is held by the hearing committee provided for in subsection (2) to have fallen afoul of the standards set out in subsection (1) remedial measures lesser than dismissal should be implemented save for egregious instances. These remedial measures any include verbal warning, referral to counseling/training, written reprimand, or suspension.

The Committee met to take up the Final Draft. The President of the University attended the meeting as did the President of the Faculty Senate. After the Committee voted to approve, the President thanked the Committee for its thoughtfulness, its meticulous care, and its many hours of hard work. The Committee was discharged with thanks.

V. POSTSCRIPT

Shortly after the Committee's report was made public, the President of the University received a letter from an enterprise offering its services as it had, it said, "rather extensive experience conducting training programs designed to ensure that training subjects come fully to appreciate the importance of what they say on identified sensitive topics and how what they say impacts others." Moreover, because its training, counseling, and assessment involve the use of "sophisticated technologies, including facial recognition, voice stress analyses and electronic feedback systems," training could be accomplished remotely thereby saving the University money and saving training subjects the inconvenience of travel to the enterprise's training center in Xianjing Province. The President of the University expressed his appreciation to the firm and directed his staff to follow up with it.⁶⁴

64. Jason Kilborn, Professor of Law at the School of Law in the University of Illinois at Chicago, gave an examination in which a scenario character used the "n" word, redacted, in a question concerning employment discrimination. After a group of Black students accused him of "racism" he was suspended from teaching and ordered to undergo training. The University's directive to him is set out in Professor Kilborn's legal complaint. Amended Complaint, *Kilborn v. Amiridis*, No. 1:22-cv-00475 (N.D. Ill. Feb. 17, 2022), Exhibit "E."

[Y]ou will complete a training program designed and administered by . . . LLC. The goal of the training will be to ensure that you appreciate the importance of your position including your voice and authority in the classroom when assessing students, and how your words and actions impact others. You will be deemed to have completed the training program when . . . [LLC] provides a written report to the Law School indicating that you have (1) engaged constructively in action planning and identified what you will do differently in class, on assessments, and when otherwise interacting with students orally and in writing; and (2) developed the skills and tools to engage effectively with a diverse group of students on sensitive topics.

Id.