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ARTICLE

ACADEMIC FREEDOM AND THE CATHOLIC UNIVERSITY: AN HISTORICAL REVIEW, A CONCEPTUAL ANALYSIS, AND A PRESCRIPTIVE PROPOSAL

JOHN M. BREEN* & LEE J. STRANG**

INTRODUCTION

Among university professors, researchers, and instructors, academic freedom is universally acknowledged as a principle that is indispensable to the academic enterprise. Those involved in higher education often describe the principle as a “constituent element” of the modern university¹—a principle that “distinguishes a university from a propaganda institution or a center of indoctrination.”² Supported by a culture of deference to individual faculty, given juridical form, and accompanied by rights of due process, the principle of academic freedom is a formidable source of protection for faculty engaged in both classroom instruction and scholarly research.

But what does this principle mean in the context of an academic institution that itself holds substantive truth commitments with respect to questions that are a source of debate and inquiry within the academic community? Can a college or university be committed to both academic freedom, which establishes the procedural ground rules for conducting the scholarly enterprise, and a set of substantive commitments that the institution believes are grounded in truth? Although the tension between open inquiry and other truth-laden convictions can be found in any institution where both kinds of commitments are present, historically, critics have

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1. See, e.g., Lonnie D. Kliever, *Religion and Academic Freedom: Issues of Faith and Reason*, 74 *ACADEME* 8, 8 (Jan.–Feb. 1988) (“Academic freedom is a constituent element of the very foundations upon which the modern university rests.”).

2. Charles E. Curran, *Academic Freedom: The Catholic University and Catholic Theology*, 66 *ACADEME* 126, 127 (Apr. 1980).

claimed that the most pressing challenges to academic freedom have resided in religiously-affiliated colleges and universities.

In the Essay that follows, we take up these questions specifically in the context of a Catholic university. The Essay is composed of four parts. In Part I, we sketch the origins of the concept of academic freedom in colleges and universities in the United States. We then examine the contemporary understanding of the concept as set forth in the *1940 Statement of Principles on Academic Freedom and Tenure* from the Association of American Colleges (AAC) and the American Association of University Professors (AAUP). We also examine several key documents that led up to the *1940 Statement* and the official interpretive gloss that the AAUP has put on the document since it was first issued. Next, we provide a brief history of the experience of academic freedom in Catholic universities in the United States. This history includes a series of pivotal controversies in the 1950s-1960s at four Catholic universities: the University of Notre Dame, St. John's University, the University of Dayton, and the Catholic University of America. It also includes a brief review of two transformative documents—the *Land O'Lakes Statement* (1967) and *The Catholic University in the Modern World* (1972)—in which leading Catholic educators endeavored to articulate a conception of a modern Catholic university that included a robust role for academic freedom. In light of these developments,³ Catholic universities revised their policies on academic freedom. Here we trace the development of this policy at one school, Loyola University Chicago, as representative of what took place at most Catholic institutions of higher learning.⁴

In Part II of the Essay, we offer a conceptual critique of academic freedom as defined in the *1940 Statement*. We argue that this widely accepted articulation of the concept is question begging at best, and at worst internally incoherent. The AAUP definition of academic freedom is question begging because it assumes a particular conception of the university as normative and then draws its definition of academic freedom from that conception. There are, however, other reasonable conceptions of what constitutes a “university” with their own entailed conceptions of academic freedom, such that the AAUP’s implicit assumption stands undefended. Furthermore, the AAUP definition is internally incoherent. The AAUP conception of academic freedom declares that every idea must be subject to challenge and possible refutation while, at the same time, harboring certain

3. These developments coincided with the reorganization of most Catholic universities under the governance of lay boards of trustees and the general reception of Vatican II. See JAMES JEROME CONN, S.J., *CATHOLIC UNIVERSITIES IN THE UNITED STATES AND ECCLESIASTICAL AUTHORITY* 153–84 (1991).

4. An appendix to the Article provides examples of similar policies at several Catholic universities including Loyola University Chicago, Creighton University, Georgetown University, the University of Dayton, and the University of Notre Dame.

ideas as unassailable and immune from criticism. All rational thought, including the *1940 Statement*, must proceed by assuming the truth of certain presuppositions. Yet, without argument, the *1940 Statement* singles out religious propositions as uniquely obnoxious to the academic enterprise. In developing this critique, we draw upon the work of Pope John Paul II, especially his apostolic constitution, *Ex Corde Ecclesiae*, on the nature of Catholic universities, and his encyclical, *Fides et Ratio*, on the relationship between faith and reason. We also examine the strikingly different approach to academic freedom taken in the founding document of Thomas Aquinas College, and in the work of philosophers David Schindler and Alvin Plantinga.

In Part III of the Essay, we argue that the many striking contradictions between the conception of academic freedom (as articulated in the *1940 Statement* and typically defended in academic circles) and the actual practice of academic freedom in American universities (private and public, secular and religious) indicates that few people actually believe in the AAUP version of the principle. This disconnect also suggests that the *1940 Statement* is not so much the articulation of a foundational principle of academic life as an ideology that serves ends other than those it purports to advance.

Of course, some version of academic freedom is necessary for universities to fulfill their mission as conveyors of knowledge and centers of inquiry. This is no less true of Catholic universities. In Part IV of the Essay, we offer some practical suggestions for how Catholic universities can remain faithful to the truth professed by the Church, while giving their faculty members the freedom necessary to raise questions, conduct research, and participate in the great conversation that is the essence of the scholarly enterprise.

I. A BRIEF HISTORY OF ACADEMIC FREEDOM IN AMERICAN UNIVERSITIES

A. *The Emergence of Academic Freedom in the Late-Nineteenth Century*

From the colonial period through the first half of the nineteenth century, college and university professors were regularly selected from the ranks of clergy who were members of the denomination sponsoring the college.⁵ Though the questions of academic freedom that arose during this era of college sectarianism often involved the charge of heresy, “these experiences had not shaped any broad principles to guide the life of the colleges.”⁶ The old-time college professor typically cared little about

5. See GEORGE M. MARSDEN, *THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF* 81 (1994).

6. FREDERICK RUDOLPH, *THE AMERICAN COLLEGE & UNIVERSITY: A HISTORY* 410–11 (1962).

publishing the latest tract on the new topic in his discipline—assuming he saw himself as a member of a discrete academic discipline, which would have been unusual. Rather, his position was to share what he knew and to serve as a role model embodying the Christian wisdom and virtues of the college's sponsoring religious community.

Following the German university model, major American universities in the late nineteenth and early twentieth centuries were reconfigured as research institutions. No longer content with merely conveying knowledge from one generation to the next, the modern university was now dedicated to the discovery of new knowledge. Thus, the new academic man was identified by “[i]ntellect rather than piety”⁷ and marked by his productivity in scholarly publication rather than his proficiency in the classroom. American academics borrowed two concepts from their German counterparts: *Lernfreiheit*—the freedom of students to study and take the courses of one's choice—and *Lehrfreiheit*—the right of the professor to freedom in his teaching, as well as the right to freedom of inquiry, and to share the results of his research with others.⁸

Both of these concepts related to the experience of students and teachers within the university community itself. American academics supplemented these freedoms by adding the sacrosanct value of free speech to the activities of professors outside the classroom. This was important because “in seeking to apply their economic and political and social discoveries to the real world, [they] often collided with the men who were serving the universities as benefactors and trustees.”⁹ To speak out in favor of labor unions and against railroads and monopolies, for instance, sometimes led to dismissal.¹⁰

Out of these sorts of cases of faculty discipline and dismissal, a clearer and stronger sense of the principle of academic freedom emerged. Combined with a tenure system, which ensured job security and supplied a structure of rank and seniority and salary schedules, American academics developed into a professional class.¹¹

The influence of the German research university model complimented a more home-grown reason for academic freedom. As George Marsden explains, “America's pace-setting universities were products of liberal Protestant culture.”¹² The first generation of American research university-

7. *Id.* at 410.

8. *Id.* at 412.

9. *Id.* at 413–14.

10. See MARSDEN, *supra* note 5, at 300 (“[B]ig business would now be seen as the primary threat to free expression.”).

11. Cf. RUDOLPH, *supra* note 6, at 415–16.

12. GEORGE M. MARSDEN, *THE OUTRAGEOUS IDEA OF CHRISTIAN SCHOLARSHIP* 14 (1997). Marsden explains that the culture was “Protestant” in that Protestantism was the historically dominant religion, and “liberal” in that “it emphasized the unifying moral dimensions of its spiritual heritage, rather than the particulars of traditional Protestant doctrine.” *Id.*

builders were New Englanders who saw freedom as the touchstone of American civilization and who “saw themselves as standing for individual freedom and freedom of inquiry” and against authoritarianism. They saw freedom as “an outgrowth of the best in the Protestant tradition,”¹³ whereas authoritarianism was seen as Roman Catholic in origin and practice. Scientific research and inquiry in the university “would have to be free from appeals to supernaturally based authority”¹⁴ and so defined in purely naturalistic terms. But this naturalistic inquiry “could be supplemented by humanistic moral ideals that also emphasized freedom and that would advance Christian and democratic society.”¹⁵

Prior to the development of academic freedom as a feature of university life, “[a] teacher held his post at the president’s pleasure, or that of his board.”¹⁶ Christopher Lucas contends that when a teacher was fired for voicing his viewpoint, “it was usually a matter of his having taken a stand contrary to prevailing religious orthodoxy.”¹⁷ The examples he cites, however, deal with the expression of political and economic opinions. The most famous of these took place in 1900. Jane Lathrop Stanford, co-founder (with her late husband) of the university named for her late son, instructed president David Starr Jordan to fire Edward Ross, an economics and sociology professor at the school. Ross had spoken out in favor of the Democratic Party’s “Free Silver” policy and against corporate monopolies and the importation of cheap Oriental labor—“coolie” workers—on both economic and racial grounds. Mrs. Stanford objected to Ross’ use of the University’s name in support of partisan ends, as well as the substance of his opinions. Jordan reluctantly requested Ross’ resignation, and a number of Stanford faculty members resigned in protest.¹⁸ “For faculty defenders of academic freedom, issues of high principle were at stake,” but to university administrators, it was a matter of “public relations.”¹⁹ This left the outspoken academic in a rather precarious position since many college and university trustees viewed any given professor as “an employee of the institution, no more, no less” such that “[i]f his conduct was displeasing to management, officials were entitled to give him his walking papers as readily as business executives might fire a factory hireling.”²⁰

13. *Id.* at 14.

14. *Id.*

15. *Id.* at 15.

16. CHRISTOPHER J. LUCAS, *AMERICAN HIGHER EDUCATION: A HISTORY* 202 (2d ed. 2006).

17. *Id.*

18. Brian Eule, *Watch Your Words, Professor*, *STAN. MAG.* (Jan.–Feb., 2015), <https://medium.com/@stanfordmag/watch-your-words-professor-1b1c03bd91e0>.

19. LUCAS, *supra* note 16, at 205.

20. *Id.* See also RUDOLPH, *supra* note 6, at 414 (citing several examples, in addition to Ross at Stanford, in which faculty members were dismissed, not for their religious unorthodoxy, but because their political and economic views were at odds with those of university trustees and benefactors).

B. AAUP Statements

1. The 1915 Declaration

The firing of Edward Ross at Stanford directly gave rise to the contemporary articulation of academic freedom and the institutional forms it assumed. In 1915, a group of professors (including philosopher Arthur Lovejoy who left Stanford in the wake of the Ross affair) established the American Association of University Professors. The AAUP organized a committee to address the problem of academic freedom and shortly thereafter adopted a *Declaration of Principles on Academic Freedom and Academic Tenure* (the *1915 Declaration*).²¹ Referring to *Lehrfreiheit*, the document defined academic freedom as “freedom of inquiry and research,” “freedom of teaching,” and “freedom of extramural utterance and action.”²²

The *1915 Declaration* rejects the claim that the relationship between the university trustees and the faculty member is “analogous to that of a private employer and his employees.”²³ Instead, it proposes that “the relationship of professor to trustees may be compared to that between judges of the federal courts and the executive who appoints them.”²⁴ Professors may speak freely of their own accord on matters of interest to them and to the public, even if what they say does not find a welcome audience among the school’s administrators. In this way, teachers at universities and colleges can contribute to public deliberation, offering their counsels as “the disinterested expression of the scientific temper and of unbiased inquiry.”²⁵

The *1915 Declaration* draws a rather stark demarcation between those institutions that enjoy “complete and unlimited freedom to pursue inquiry and publish its results” and all others. The document repeatedly refers to academic freedom in absolutist terms: “It is obvious that here again the scholar must be absolutely free not only to pursue his investigations but to declare the results of his researches, no matter where they may lead him or to what extent they may come into conflict with accepted opinion”²⁶; “The responsibility of the university as a whole is to the community at large, and any restriction upon the freedom of the instructor is bound to react injuriously upon the efficiency and the morale of the institution.”²⁷

As examples of schools that do *not* enjoy the full measure of academic freedom, the *1915 Declaration* pointed to “a proprietary school or college designed for the propagation of specific doctrines prescribed by those who

21. Am. Ass’n of Univ. Professors, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, 1 BULL. 17 (Dec. 1915), reprinted in AM. ASS’N OF U. PROFESSORS, POLICY DOCUMENTS AND REPORTS, app. at 291 (10th ed. 2006) [hereinafter *1915 Declaration*].

22. *Id.* at 292.

23. *Id.* at 293.

24. *Id.* at 295.

25. *Id.* at 297-98.

26. *Id.* at 296.

27. *1915 Declaration*, *supra* note 21, at 296.

have furnished its endowment.” The document identifies religiously affiliated schools as akin to these institutions:

If a church or religious denomination establishes a college to be governed by a board of trustees with the express understanding that the college will be used as an instrument of propaganda in the interests of the religious faith professed by the church or denomination creating it, the trustees have the right to demand that everything be subordinated to that end.²⁸

However, such an institution does not “accept the principles of freedom of inquiry, of opinion, and of teaching, and their purpose is not to advance knowledge by unrestricted research.”²⁹ Such an institution “should not be permitted to sail under false colors”³⁰ promoting itself as a genuine university. Indeed, “any university which lays restrictions upon the intellectual freedom of its professors proclaims itself a proprietary institution, and should be so described whenever it makes a general appeal for funds.”³¹

2. *The 1940 Statement*

Following a series of joint conferences in 1940, the Association of American Colleges³² and the AAUP agreed upon a new document restating the principles of academic freedom and their relation to faculty tenure. This document, known as the *1940 Statement of Principles on Academic Freedom and Tenure*,³³ has been endorsed by numerous professional and academic organizations, and incorporated into the policies of hundreds of American colleges and universities. Consequently, in the American context, the *1940 Statement* is the focal point of discussions concerning academic freedom today.

The *1940 Statement* provides that the purpose of the document is “to promote public understanding and support of academic freedom and tenure.” Thus, the document not only proposes a regulatory standard, it is, self-consciously, an advocacy document designed to persuade its audience of the merits of the principle of academic freedom.

The *1940 Statement* argues that colleges and universities are conducted to advance the common good, and that “[t]he common good depends upon the free search for truth and its free exposition.”³⁴ The *1940 Statement* ap-

28. *Id.* at 293.

29. *Id.*

30. *Id.*

31. *Id.*

32. The Association of American Colleges is now the Association of American Colleges & Universities (AAC&U).

33. *Am. Ass’n of Univ. Professors, 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, 56 AAUP BULL. 323 (1970), reprinted in AM. ASS’N OF U. PROFESSORS, POLICY DOCUMENTS AND REPORTS 13 (11th ed. 2014) [hereinafter *1940 Statement*].

34. *Id.* at 14.

plies this rationale to faculty speech in the contexts of research and scholarship, teaching, and citizenship. Because “[f]reedom in research is fundamental to the advancement of truth,” the *1940 Statement* posits that “[t]eachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties.”³⁵ Because academic freedom “is fundamental for the protection of the rights of the teacher in teaching,” the *1940 Statement* posits that “[t]eachers are entitled to freedom in the classroom in discussing their subject,” though they “should be careful not to introduce into their teaching controversial matter which has no relation to their subject.”³⁶ Moreover, when teachers “speak or write as citizens, they should be free from institutional censorship or discipline” while bearing the responsibility to make clear that they “are not speaking for the institution.”³⁷

The *1940 Statement* also sets forth academic tenure as a practical mechanism to ensure that a teacher’s right of academic freedom—in research, in classroom teaching, and as a citizen—is guaranteed. Under the system of tenure, a teacher enjoys continuous employment and may be terminated “only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.”³⁸

Unlike the *1915 Statement*’s claim that a religiously affiliated institution cannot in principle possess academic freedom, the *1940 Statement* sets forth only one significant caveat concerning academic freedom for religiously affiliated schools: the Limitations Clause. This portion of the *1940 Statement* provides that “[l]imitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of appointment.”³⁹ This language explicitly anticipates that academic freedom may be different at religious schools. As such, it assumes that academic freedom may exist at religiously affiliated universities, and it implies that such a limitation may be legitimate. It does not say that an institution that employs what the *1940 Statement* plainly allows is less of a university or not genuinely committed to the academic enterprise. Rather, all that is required for such a limitation to be effective is that notice be given at the time of appointment.

35. *Id.*

36. A notorious example of a professor speaking out on an issue outside his field of study is Arthur Butz, a longtime professor of electrical engineering at Northwestern University who is a Holocaust denier. See ARTHUR R. BUTZ, *THE HOAX OF THE TWENTIETH CENTURY: THE CASE AGAINST THE PRESUMED EXTERMINATION OF EUROPEAN JEWRY* (4th ed. 2015).

37. *1940 Statement*, *supra* note 33, at 14.

38. *Id.* at 15.

39. *Id.* at 14.

3. *The 1967 Special Committee Report*

In 1967, the AAUP appointed a Special Committee on Academic Freedom in Church-Related Institutions “to study and make more explicit the meaning of the *1940 Statement of Principles on Academic Freedom and Tenure vis-à-vis church-related institutions*.”⁴⁰

The committee’s report recognized the value of the Limitations Clause in the *1940 Statement*. At the same time, it cautioned that, “[w]hile this general position accommodates the church-related institutions, its application can constitute a threat to free inquiry and expression.”⁴¹ The report recommended that institutions employ the Limitations Clause sparingly, that a college or university limit academic freedom only where it is “essential to the religious aims of the institution,” and that any limitation “should be clearly stated in writing with reasonable particularity and made a matter of public knowledge.”⁴²

Overall, the report represented a begrudging acknowledgment of the Limitations Clause. It reflected the desire of AAUP to do away with the Limitations Clause but also recognized that it would not be politically feasible to seek to amend the *1940 Statement* to eliminate the Clause. Thus, the next best strategy was to attempt to limit its scope and discourage its application as much as possible.

4. *The 1970 Interpretive Comments to the 1940 Statement*

In 1970, the AAUP and the AAC appended a set of “Interpretive Comments” to the *1940 Statement*.⁴³ They did not amend the document itself. Although the actual text of the *1940 Statement* remained unchanged, including the Limitations Clause, the comment drafters sought to alter the text’s meaning by claiming that it is a living document that “has evolved through a variety of processes,” and that the incorporation of the comments “is based on the premise that the 1940 ‘Statement’ is not a static code but a fundamental document designed to set a framework of norms to guide adaptations to changing times and circumstances.”⁴⁴ According to the drafters, the comments represented their attempt “to formulate the most important of these refinements.”⁴⁵

The 1970 comment that addresses the Limitations Clause provides: “Most church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 ‘Statement,’

40. W.J. Kilgore, *Report of the Special Committee on Academic Freedom in Church-Related Colleges and Universities*, 53 AAUP BULL. 369, 369 (1967).

41. Tom J. Truss, Jr., et al., *Statement on Academic Freedom in Church-Related Colleges and Universities*, in 53 AAUP BULL., *supra* note 40, at 370.

42. Kilgore, *supra* note 40, at 370.

43. *1940 Statement*, *supra* note 33, at 13–16 nn.1–11.

44. *Id.* at 13–14 n.1.

45. *Id.*

and we do not now endorse such a departure.”⁴⁶ This sentence sought to modify the meaning and import of the *1940 Statement* without actually changing the text itself.

In 1988, the AAUP again explored the possibility of disavowing the Limitations Clause.⁴⁷ Although this position was not formally adopted by the AAUP and the Limitations Clause remains a part the *1940 Statement*, narrowing or eliminating the Clause appears to be the goal of enough university educators and administrators to repeatedly prompt a re-evaluation of its presence in the text.

C. *The Movement of Catholic Higher Education Toward the AAUP's Conception of Academic Freedom*

1. *Initial, Inchoate, Conceptions of Academic Freedom in Catholic Higher Education*

At their founding, Catholic universities generally maintained modest conceptions of academic freedom. Few if any universities employed written policies or statements on the topic until the mid-twentieth century. Instead, university practices reflected an inchoate conception of academic freedom which, in turn, reflected a consensus perspective of faculty and administrators.

Catholic universities employed this inchoate, practical conception of academic freedom for at least three reasons. First, and most importantly, the intellectual architecture of Catholic education during this period was Neo-Scholasticism—a revival of the philosophical and theological thought of St. Thomas Aquinas combined with an effort to see its relevance in the modern university across all disciplines.⁴⁸ This perspective aspired to be all-encompassing, and within its purview Catholic faculty robustly pursued inquiry. But its boundaries were policed so that scholars were limited in their capacity to challenge or work outside of it.

Second, most Catholic universities maintained the pedagogical goals of providing religious instruction and character formation in educating their students, instead of primarily serving as centers for the production and transmission of knowledge. Thus, the curricula, teaching, and hiring practices at these schools focused on forming young people in the tried-and-true

46. *Id.* at 14 n.5.

47. Matthew W. Finkin, et al., *The “Limitations” Clause in the 1940 Statement of Principles*, *ACADEME* 52, 52–57 (Sept.–Oct. 1988).

48. See PHILIP GLEASON, *CONTENDING WITH MODERNITY: CATHOLIC HIGHER EDUCATION IN THE TWENTIETH CENTURY* 119 (1995) (describing the Catholic perspective in the first half of the twentieth century wherein Neo-Scholasticism was thought to “constitute [] the most appropriate cognitive foundation for the culture of a whole society”). Although Aquinas lived in the thirteenth century, the proponents of Neo-Scholasticism insisted that “Thomism is not a museum piece” but “is relevant to every epoch.” JACQUES MARITAIN, *A PREFACE TO METAPHYSICS* 9 (1962). For a general account of the revival, see GERALD A. MCCOOL, *THE NEO-THOMISTS* (1994).

ways of the Church's tradition. Faculty did not need unfettered freedom to successfully pursue this mission.

Third, most Catholic universities were controlled by the religious orders that created them. The governing boards of these institutions ensured that the universities under their charge continued to serve the goals of the founders.

As we describe below, beginning in the middle of the twentieth century, a series of pivotal controversies at four major Catholic universities catalyzed a new conception of academic freedom in American Catholic universities. This new conception soon became normative in Catholic higher education during the late-1960s and early-1970s. These disputes, which took place at the University of Notre Dame, St. John's University, the University of Dayton, and the Catholic University of America, were publicly portrayed and widely-understood as pitting "American-style" academic freedom against "un-American" religious-hierarchical authority.

2. *Four Historical Controversies that Precipitated a New Conception of Academic Freedom at American Catholic Universities*

The four episodes recounted below, involving academic freedom and faculty governance by teachers at Catholic universities in the 1950s and 1960s, help explain why the vision of institutional autonomy and academic freedom articulated contemporaneously in two landmark statements on Catholic higher education—the *Land O'Lakes Statement* and *The Catholic University in the Modern World*⁴⁹—proved to be so compelling. Following these incidents, the debate over academic freedom was framed in such a way that it became nearly impossible to think of a robust Catholic intellectual identity as compatible with the intellectual life of a modern university. A Catholic presence that went beyond the ceremonial and ornamental was regarded as unavoidably repressive. Under these circumstances, the abandonment of the traditional Catholic approach to academic freedom and the adoption of the AAUP view was perhaps inevitable.

Prior to these incidents, Catholic institutions and their faculties sincerely believed that they enjoyed the freedom to ask questions, conduct research, and publish the results obtained.⁵⁰ They also shared the belief that their academic freedom was to be exercised within the religious commitments of the institution.⁵¹ They did not understand themselves as scholars

49. Both statements are discussed in the following section. See *infra* Section I.C.3.

50. Although it was not a controversy of the same magnitude, the question of academic freedom in Catholic institutions did arise prior to the four incidents recounted above. See, e.g., John Tracy Ellis, *A Tradition of Autonomy?*, in *THE CATHOLIC UNIVERSITY: A MODERN APPRAISAL* 206, 206–70 (Neil G. McCluskey, S.J. ed., 1970).

51. GLEASON, *supra* note 48, at 309 (noting that the National Catholic Education Association did not flatly endorse academic freedom on Catholic campuses until 1965, and that prior to this

who were bound by arbitrary restrictions, but as Catholic scholars who operated within a framework of beliefs that they held to be true in communion with the Church. To proceed in the examination of some subject based on premises that one holds to be true is, of course, the method whereby all scholarly inquiry proceeds.⁵²

As historian Edward Power notes, Catholic colleges had for many years “proudly proclaimed the existence of full academic freedom in their institutions,” sometimes even insisting “that only in a Catholic college was academic freedom possible.”⁵³ However, according to Power, this view from the inside did not so much reflect a faithful adherence to the principle of academic freedom as it did reflect the religious make-up of faculties at Catholic colleges. The teachers at these institutions had, he said, “been carefully selected on the basis of religious orthodoxy and it was impossible to imagine them ever thinking about or actually teaching anything in conflict with the official policies of the college or the established doctrines of the Church.”⁵⁴ Moreover, the endorsement of academic freedom in the faculty handbooks and formal policies at these schools were explicitly qualified: “professors were free to teach truth, to pursue it wherever it might lead, as long as they did so responsibly and as long as they refrained from teaching or writing anything either remotely or explicitly contrary to the doctrines of the Catholic Church.”⁵⁵ In such an environment, “nothing of consequence pertaining to academic freedom could ever have been tested.”⁵⁶ The challenge of academic freedom only arose when faculties at Catholic institutions became more diverse, and the innovations of Vatican II popularized new understandings of Catholic identity, individual freedom, and conscience.

a. *The University of Notre Dame*

In the 1950s, Rev. Theodore M. Hesburgh, C.S.C., president of the University of Notre Dame, experienced a challenge to university autonomy and academic freedom that profoundly informed his views. Because of Father Hesburgh’s leadership among Catholic educators, in time these views

and the incident at St. John’s described in the text, “the few treatments on the subject produced by Catholics emphasized the limitations on academic freedom imposed by their religious commitments”).

52. According to historian Edward Power, prior to the 1960s faculties at Catholic colleges believed in their faithful adherence to academic freedom. EDWARD J. POWER, *CATHOLIC HIGHER EDUCATION IN AMERICA: A HISTORY* 420 (1972). By contrast, Charles Curran claims that during this time, Catholics were in “general agreement that full academic freedom could not exist in Catholic institutions.” Curran, *supra* note 2, at 128. Indeed, Curran claims that “[t]he incompatibility between Catholic colleges and full academic freedom was accepted as a matter of course.” *Id.* at 129.

53. POWER, *supra* note 52, at 420.

54. *Id.*

55. *Id.* at 421.

56. *Id.* at 420.

came to change the nature of Catholic higher education in the United States. An account of the incident appears in Hesburgh's autobiography, *God, Country, Notre Dame*.⁵⁷

In 1954, just two years after Hesburgh became president, the Superior General of the Congregation of the Holy Cross, Rev. Christopher O'Toole, C.S.C., instructed Hesburgh not to publish a collection of papers that had been presented at a conference at Notre Dame. The book was entitled *The Catholic Church and World Affairs*.⁵⁸ It contained a paper by Rev. John Courtney Murray, S.J., commenting on church-state relations that Alfredo Cardinal Ottaviani, prefect of the Holy Office, wished to suppress. Hesburgh refused to comply, offering instead his resignation. He feared that if he followed Ottaviani's order, "Notre Dame would lose all its credibility in the United States, and so would I, if an official in Rome could abrogate our academic freedom with the snap of his fingers."⁵⁹

A compromise of sorts was worked out whereby Notre Dame sold the copies of the book already in print and the University did not run a second printing.⁶⁰ Father Hesburgh did not resign and, as he notes, Fr. Murray's views on church-state relations were "fully vindicated several years later at Vatican Council II."⁶¹ Yet the incident left a lasting impression that led Hesburgh to insist on institutional autonomy from church authorities when he led the preparation of the *Land O'Lakes Statement*.⁶²

b. *St. John's University*

The incident at St. John's University in New York was less a matter of academic freedom in the sense of *Lehrfreiheit*⁶³ and more a matter of the denial of due process and the absence of faculty governance. Still, the St. John's affair was significant because it "demonstrated the power of a faculty to modify or to halt the operation of a huge college"⁶⁴ and "the

57. THEODORE M. HESBURGH, *GOD, COUNTRY, NOTRE DAME: THE AUTOBIOGRAPHY OF THEODORE M. HESBURGH* 223–27 (1999).

58. *THE CATHOLIC CHURCH IN WORLD AFFAIRS* (Waldemar Gurian & M.A. Fitzsimmons eds., 1954).

59. HESBURGH, *supra* note 57, at 225.

60. *Id.*

61. *Id.* at 226.

62. Hesburgh was also influenced by another incident involving academic freedom, or more specifically, the right of faculty members at Catholic universities to engage publicly as citizens, making their views known on current issues of the day. The incident involved a group of faculty members who publicly supported Adlai E. Stevenson in the 1952 presidential election against Dwight D. Eisenhower. Their letter of support brought embarrassment to the University and complaints from the Eisenhower campaign when the support for Stevenson was incorrectly attributed to the University. See Philip Gleason, *A Question of Academic Freedom*, *NOTRE DAME MAG.* (Spring 2013), <https://magazine.nd.edu/news/a-question-of-academic-freedom/>.

63. As noted above, *Lehrfreiheit* refers to the freedom to conduct one's classes and to publish the results of one's research. See *supra* notes 7–20 and accompanying text.

64. POWER, *supra* note 52, at 466.

futility of depending too heavily on authority to impose order on an academic community.”⁶⁵

Like most Catholic colleges at the time, St. John’s⁶⁶ underwent enormous growth in the post-war years. In 1955, St. John’s had a faculty of 252 and an enrollment of 7,616 students. By 1965, the University had approximately doubled in size, boasting a faculty of 659 and an enrollment of 13,125 students.⁶⁷

St. John’s had grown from a small college to a complex institution, yet many faculty were frustrated that, instead of making changes in governance and administration to meet this new reality, the University “was still being run in highly paternalistic fashion by its Vincentian administrators.”⁶⁸ Chapters of the AAUP and the United Federation of College Teachers (UFCT) worked to organize the campus to give voice to these concerns,⁶⁹ and the University took steps toward reform. In response to a faculty walk out in the spring of 1965, the Board of Trustees reconstituted themselves, increased faculty salaries and benefits, instituted a democratically elected Faculty Planning Council, and put in place a new University president and administration.⁷⁰ Nevertheless, the administration did not enact the proposed reforms “with the alacrity desired by faculty members.”⁷¹ “Impatient for reforms, 18 philosophy professors—with the intent of embarrassing the university—ran an ad in the *New York Times* saying that they were seeking new jobs.”⁷²

In response to these actions, which it viewed as detrimental to the University, in December, 1965, the St. John’s administration dismissed thirty-one faculty members, both lay and clerical, twenty-three of whom were immediately suspended from all classroom duties and not allowed to complete their fall classes.⁷³ This amounted to “a colossal breach of academic

65. *Id.* at 467.

66. St. John’s University is an institution sponsored by the order founded by St. Vincent DePaul, the Congregation of the Mission. They are more popularly known as the Vincentians.

67. ANTHONY J. DOSEN, CATHOLIC HIGHER EDUCATION IN THE 1960S: ISSUES OF IDENTITY, ISSUES OF GOVERNANCE 164 (2009).

68. GLEASON, *supra* note 48, at 309. *See also* DOSEN, *supra* note 67, at 165 (noting that Rev. John Flynn, C.M., who retired as St. John’s president in 1961, was able through his personal commitment and concern “to shepherd the institution through a period of massive growth” but that “his autocratic and patriarchal style of leadership did not allow for the serious dialogue that was the *sine qua non* of democratic administration of higher education.”); POWER, *supra* note 52, at 467 (stating that the St. John’s saga helped advance Catholic higher education by “harking back to threadbare authoritarianism”).

69. GLEASON, *supra* note 48, at 309.

70. ALICE GALLIN, NEGOTIATING IDENTITY: CATHOLIC HIGHER EDUCATION SINCE 1960, 60–63; John A. Christie, Willard H. Pedrick & John T. Noonan, Jr., *Academic Freedom and Tenure: St. John’s University (N.Y.)*, 52 AAUP BULL. 12 (Mar. 1966). *See also* Francis Canavan, *St. John’s University: The Issues*, 114 AM. MAG. 122–24 (Jan. 22, 1966); John Leo, *Strike at St. John’s*, 83 COMMONWEAL 500 (Jan. 28, 1966).

71. Christie, Pedrick & Noonan, Jr., *supra* note 70, at 13.

72. *Universities: Strife at St. John’s*, TIME, Dec. 31, 1965, at 35.

73. *Id.*

due process”⁷⁴ because none of the affected faculty were provided a hearing or even a reason for the termination.⁷⁵ “The administration made a fatal mistake in dismissing several professors whom it considered to be ringleaders in the insurrection.”⁷⁶ To complete the courses that no longer had instructors and to fill the need in the upcoming spring semester, the University brought in non-university teachers from the Vincentian order thereby “revealing their lack of loyalty to academic standards by using persons to conduct university classes who had none of the credentials of the academic guild.”⁷⁷ In response, the AAUP and UFCT called a faculty strike. Although the University remained open during this time, the striking faculty rallied student support and made good use of the media “to focus attention on the competence of the administration at St. John’s and to call into question its competence as an educational institution.”⁷⁸

The AAUP committee investigating these events concluded that, by summarily firing faculty members, the University violated its own statutes and the *1940 Statement*, which the Board of Trustees had in principle agreed to adopt.⁷⁹ By excluding instructors from the classroom “without demonstrated reason,” St. John’s had “injured its faculty” and had “destroy[ed] the academic character of the University.”⁸⁰ Moreover, to have done so “without granting the faculty members an opportunity to be heard [was] a grievous and inexcusable violation of academic freedom.”⁸¹

The dispute was not simply a matter of faculty salary, benefits, and governance. It also involved the institution’s religious character: “Some faculty members made no secret of their conviction that Vincentian control of the university was the basic problem.”⁸² Rosemary Lauer, a philosophy professor, claimed that the Catholic Church should get out of the business of higher education “because churches and universities don’t mix.”⁸³ Although she made the comment after she was dismissed, others had voiced the same viewpoint disparaging Catholic sponsorship of universities and colleges prior to the dismissal.⁸⁴ The University saw in this attitude the danger of wholesale secularization. The University contended “that the aca-

74. GLEASON, *supra* note 48, at 308.

75. Christie, Pedrick & Noonan, *supra* note 70, at 13.

76. POWER, *supra* note 52, at 467.

77. *Id.*

78. DOSEN, *supra* note 67, at 183; *see also* POWER, *supra* note 52, at 466.

79. Christie, Pedrick & Noonan, *supra* note 70, at 17–18.

80. *Id.* at 18–19.

81. *Id.* at 19.

82. GLEASON, *supra* note 48, at 310.

83. *Id.*; *see also* Francis Canavan, *Academic Revolution at St. John’s*, 113 AM. MAG. 136 (Aug. 7, 1965) (setting forth similar comments against St. John’s religious character).

84. Canavan, *supra* note 70, at 124 (quoting Rosemary Lauer that the Catholic Church “ought not to operate a university” and remarking: “If academic freedom means that the only kind of university that has a right to exist is a liberal, nonsectarian one, then we are going to have some very bitter disputes in the American Catholic Church over academic freedom.”).

democratic welfare and even the continuance of St. John's as a Catholic institution was threatened and could only be saved" by the dismissals.⁸⁵

Eventually, St. John's submitted the cases of faculty dismissal to arbitration. The faculty senate soon proposed a statement on academic freedom, and in 1968 the Board of Trustees formally endorsed the *1940 Statement*.⁸⁶ Thus, the resolution of the conflict at St. John's witnessed a shift in the balance of power between faculty and administrators and a realignment of Catholic identity that influenced events in American Catholic higher education in the years to come. This influence included the transfer of control of Catholic institutions to lay boards of trustees, the adoption of a nearly unqualified principle of academic freedom, and the declaration of independence from ecclesial authority.

c. *The University of Dayton*

The dispute over academic freedom that arose at the University of Dayton was unlike the other affairs recounted above because it involved a charge of heresy. In the early 1960s, the philosophy department at Dayton began to diversify its faculty, hiring two new professors who were not Thomists.

Neo-Thomism was a revival in the thought of St. Thomas Aquinas that began in the mid-nineteenth century at the Roman universities.⁸⁷ It burgeoned into a comprehensive movement such that, by the mid-twentieth century, Neo-Thomism was the defining intellectual feature of Catholic colleges and universities around the world. While it affected every discipline, Thomism's dominance was especially pronounced in philosophy and theology.

In 1966 Dennis Bonnette, a Thomist and an assistant professor of philosophy at the University of Dayton, wrote to the Archbishop of Cincinnati, Karl J. Alter, stating that his colleague, Eulalio R. Baltazar "was subverting Church doctrine."⁸⁸ Receiving no reply, Bonnette persisted, writing to the University of Dayton Academic Council, and to Alter again, along with a copy to Archbishop Egidio Vagnozzi, the Apostolic Delegate in Washington, D.C.⁸⁹ Bonnette accused Baltazar of defending "philosophical plural-

85. Christie, Pedrick & Noonan, *supra* note 70, at 14, 15 (quoting the University's "Summary of Points for Consideration by the Committee of the American Association of University Professors Visiting St. John's University, January 28, 29, 30, 1966.").

86. DOSEN, *supra* note 67, at 186-87.

87. See McCool, *supra* note 48.

88. Erving E. Beauregard, *An Archbishop, a University, and Academic Freedom*, 93 REC. AM. CATH. HIST. SOC'Y PHILADELPHIA 25 (Mar.-Dec. 1982).

89. *Id.* at 25-26; Mary J. Brown, *An "Inevitable" Campus Controversy: The "Heresy Affair" at the University of Dayton, 1960-1967*, 113 AM. CATH. STUD. 79, 82 (Spring-Summer 2002).

ism,”⁹⁰ questioning the infallibility of the Church, defending birth control and situation ethics, and denying the dogma of purgatory.⁹¹ He leveled similar charges against three other teachers, John M. Chrisman, Randolph F. Lump, and Lawrence P. Ulrich. After receiving responses from each of the accused, Dayton’s president, Rev. Raymond A. Roesch, S.M., concluded that the four named faculty members were “innocent of the charge of teaching and advocating doctrines contrary to the magisterium of the Church.”⁹² Still, he appointed an ad hoc faculty committee to clarify “the role of a Catholic University and the responsibility of a Catholic scholar in the academic world.”⁹³

Faculty and student groups both for and against the accused professors organized and issued competing recriminations and demands. In response to the University’s finding of innocence, nine faculty members issued a “Declaration of Conscience on the Doctrinal Crisis at the University of Dayton.” Characterizing the University’s actions as a “whitewash,” the document’s nine signatories accused University officials as “exhibit[ing] no sincere religious concern for the spiritual welfare of the students.”⁹⁴

Now perceiving the matter to be of greater importance than first imagined, Archbishop Alter convoked a fact-finding commission to investigate the situation.⁹⁵ President Roesch defended the authority of the Archbishop both to investigate the University and to forbid any individual from teaching heresy at a Catholic institution. By contrast, the Dayton Chapter of the AAUP saw the mere existence of the Archdiocesan Commission as “a flagrant breach of academic freedom.”⁹⁶ The AAUP at Dayton also complained that the lack of notice and due process at the University was less protective of the accused than “the rules of the thirteenth century inquisition.”⁹⁷ It concluded that Catholic universities would not survive if their

90. Alice Gallin, O.S.U., attributes the controversy at Dayton to “the shift away from Thomism as an ‘official’ philosophical system” within the Church. GALLIN, *supra* note 70, at 66. The dispute, however, was about more than the introduction of philosophical pluralism to Dayton. Plainly, Baltazar and the other three faculty members whom Bonnette accused rejected Thomism and championed the use of other philosophical methods. See Brown, *supra* note 89, at 81 (quoting Baltazar’s lecture that Thomism was “irreconcilably out of step with the times.”). Not only was Bonnette concerned about the faculty members’ use of other philosophical methods, he also complained that they contradicted Church teaching on matters of substance such as the morality of abortion and contraception, and the reality of purgatory and Church infallibility. *Id.* at 83–84.

91. Beauregard, *supra* note 88, at 26.

92. *Id.* at 27; see also Brown, *supra* note 89, at 88.

93. Beauregard, *supra* note 88, at 28.

94. Brown, *supra* note 89, at 88–89.

95. *Id.* at 90–91.

96. Beauregard, *supra* note 88, at 30–32.

97. *Id.* at 32.

scholars were subject to the same pressures brought to bear on faculty members at Dayton.⁹⁸

The Archdiocesan Commission concluded its investigation but did not make its report public. It did, however, release a three-page summary which concluded that there had been “on some occasions teaching contrary to Catholic faith and morals, which teachings may not have been contrary to defined doctrines but which were opposed to the teaching of the [m]agisterium.”⁹⁹ In reporting the Commission’s findings to the public, however, Rev. James M. Darby, S.M. (Provincial for the Cincinnati Province of the Society of Mary and Chairman of the University’s Board of Trustees) insisted that it had “reinforce[d] the decision of the University in so far as it clears the accused professors of any charge of heresy.”¹⁰⁰

Following these competing portrayals of the Archdiocesan Committee’s conclusions, Father Roesch addressed the entire University on March 1, 1967, in which he affirmed Archbishop Alter’s “pastoral concern for the spiritual welfare of the members of the Archdiocese.”¹⁰¹ Roesch also “made clear the position that on the University of Dayton campus there must flourish genuine academic freedom,”¹⁰² a statement that the local press interpreted as a “declaration of independence” from the Church, and which others saw as a step toward Dayton becoming a “real” university.¹⁰³

In July 1967, the ad hoc faculty committee appointed by Roesch issued its report in which it affirmed the principle of institutional autonomy. The report declared that a Catholic university “cannot accept any direct relationship to the Magisterium in academic matters; only its Catholic members as individuals are related to magisterial authority.”¹⁰⁴ Indeed, a Catholic university “jealously maintains its independence of all outside authority.”¹⁰⁵ This autonomy would prepare the University for its new mission: to be secularized. As the report explained, to be secularized “means to come of age, to come into the time and forms of the city of man today. It means a new freedom for men to perfect the world in a *non-religious* way.”¹⁰⁶ The report was downplayed by Roesch, and its effect on the University is open to serious doubt. Still, its conclusions represent a watershed moment in the history of Catholic higher education, namely, the conclusion that the fulfill-

98. *Id.* at 33. As Philip Gleason remarked, this infighting “clearly reflected the postconciliar breakdown of Catholic consensus on basic matters of doctrine and discipline.” GLEASON, *supra* note 48, at 311.

99. Brown, *supra* note 89, at 91.

100. Beauregard, *supra* note 88, at 34.

101. *Id.* at 35.

102. Brown, *supra* note 89, at 92.

103. *Id.* (quoting, separately, a Dayton newspaper article and an interview with Lawrence Ulrich, one of the accused professors).

104. Beauregard, *supra* note 88, at 36.

105. *Id.*

106. GLEASON, *supra* note 48, at 312.

ment of a university's Catholic intellectual identity requires the abandonment of its Catholic identity.

Today, the University of Dayton's faculty handbook provides that "[a]ll members of the faculty, whether tenured or not, are entitled to academic freedom as set forth in the 1940 Statement of Principles on Academic Freedom and Tenure."¹⁰⁷

d. The Catholic University of America

The Catholic University of America (CUA) is unique in that it is the only pontifically chartered Catholic university in the United States. CUA had been thought of as a model of academic freedom—"subject to neither 'the hand of an order' nor the pressure of a state legislature."¹⁰⁸ Yet, in the spring of 1963, CUA barred the appearance of four invited speakers: Jesuits John Courtney Murray and Gustave Weigel, Benedictine liturgical reformer Godfrey Diekmann, and Hans Küng, a Swiss priest and peritus to the Second Vatican Council. When word of the ban was made known in the campus newspaper, public outcry soon followed.¹⁰⁹ CUA's rector, Monsignor William J. McDonald feared that "giving a forum to these scholars might seem to place his school on the liberal side in debate at the council." Still, the ban elicited a strong rebuke from the Catholic press and from several bishops.¹¹⁰

Küng's exclusion from CUA also had the effect of promoting his lecture tour, which went ahead as scheduled in dioceses and on Catholic campuses across the country, the theme of which was freedom in the Church.¹¹¹ Küng's lecture "did not, of course, *cause* the eruption of academic freedom cases, outbursts of student rebelliousness, and demands for institutional autonomy that followed in the mid-and late sixties,"¹¹² but it represented the "new vision" of Catholic higher education that stood in sharp contrast to the old order witnessed at CUA.

That "new vision" was embraced by a number of CUA faculty members, including a young priest-theologian from Rochester, New York, named Charles Curran. Father Curran's relationship with CUA presents a tale of academic freedom told in three parts. Here, however, we wish to focus on only the first two.¹¹³

107. Office of the Provost, *University of Dayton Faculty Policy and Governance Handbook*, U. DAYTON 46 (2014), https://udayton.edu/provost/_resources/facadminaffairs/documents/August_2014_UD_FacultyHandbook_Final.pdf.

108. *Universities: Crisis at Catholic U.*, TIME, Mar. 29, 1963, at 58.

109. GLEASON, *supra* note 48, at 306.

110. *Universities: Crisis at Catholic U.*, *supra* note 108.

111. At the conclusion of his tour, *Commonweal* published Küng's lecture. Hans Küng, *The Church and Freedom*, 78 COMMONWEAL 343 (1963).

112. GLEASON, *supra* note 48, at 308.

113. Nevertheless, so as not to leave the reader in suspense, in the third and final chapter of the tale, CUA succeeded, through its own internal procedures and in the civil courts, in removing

The first chapter in the controversy began in April 1967, when Bishop William J. McDonald, the rector of CUA, informed an untenured Father Curran that his contract with the University would not be renewed for the following academic year. The decision followed from a review of Curran's work by a committee of three bishops appointed by CUA's Board of Trustees.¹¹⁴ In his published work, Curran proposed not only new answers to moral questions involving contraception, sex outside of marriage, and masturbation, but a new basis for determining morality: "the experience of Christian people."¹¹⁵ Curran's dealings with the committee raised questions as to his credibility.¹¹⁶ Substantively, the committee found that Curran's work was problematic and recommended that he not be retained. The Board accepted the recommendation, but decided that it need not explain its reasons, even though Curran had received the unanimous recommendation of the faculty of the School of Theology and the support of the faculty senate.¹¹⁷

In response to McDonald's news, Curran claimed that he had been denied academic due process and said that he was prepared to contact the media. He then rallied his colleagues in the School of Theology to his support. They likewise threatened to make the matter public and thereby damage the reputation of the University. "Their argument supporting Curran was to be based entirely on the principles of academic freedom and would *not* in any way address Curran's theological position."¹¹⁸ Curran's support-

Father Curran as a teacher of Catholic theology. This action was precipitated by a lengthy investigation into Father Curran's published works by the Congregation for the Doctrine of the Faith, then headed by Cardinal Joseph Ratzinger (the future Pope Benedict XVI). In 1986, the CDF concluded that, given Father Curran's open dissent from church teaching on such topics as "the indissolubility of consummated sacramental marriage, abortion, euthanasia, masturbation, artificial contraception, premarital intercourse and homosexual acts," Father Curran was no longer "suitable nor eligible to exercise the function of a professor of Catholic theology," and that it reached this conclusion with the express approval of Pope John Paul II. Joseph Ratzinger, *Letter to Father Charles Curran*, VATICAN (July 25, 1986), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19860725_carlo-curran_en.html. Although he retained his tenure at CUA, rather than stay at a university where he could not teach, Father Curran resigned and accepted appointments at other universities. Since 1991 he has served as a tenured faculty member at Southern Methodist University.

114. The bishops were McDonald, Archbishop Philip Hannan of New Orleans, and Archbishop John Krol of Philadelphia. PETER M. MITCHELL, *THE COUP AT CATHOLIC UNIVERSITY: THE 1968 REVOLUTION IN AMERICAN CATHOLIC EDUCATION* 32 (2015). The works reviewed included Curran's book *Christian Morality Today* and an interview article in the *National Catholic Reporter*. See CHARLES E. CURRAN, *CHRISTIAN MORALITY TODAY: THE RENEWAL OF MORAL THEOLOGY* (1966); *Curran—No Monopoly of Spirit*, NAT. CATH. REP. Sept. 21, 1966, at 2.

115. MITCHELL, *supra* note 114, at 29–30; LARRY WITHAM, *CURRAN VS. CATHOLIC UNIVERSITY: A STUDY OF AUTHORITY AND FREEDOM IN CONFLICT* 20 (1991).

116. MITCHELL, *supra* note 114, at 35 (noting that Cardinal Krol found that Curran engaged in "doublespeak"); WITHAM, *supra* note 115 (noting that Curran claimed that the published interview was inaccurate, but that the *National Catholic Reporter* claimed that it gave the article to Curran in advance and that he made slight revisions).

117. MITCHELL, *supra* note 114, at 36.

118. *Id.* at 28.

ers drafted a resolution calling for his reinstatement and the faculty organized an already restless student body. Faculty and students united in peaceful rallies on campus in support of Curran and against the University administration. They also implemented a strike that effectively shut down the CUA campus for a week. The faculty made effective use of the media which portrayed Curran as a likeable, avuncular figure and moderate theologian fighting an authoritarian power structure for the right to free speech, due process, and academic freedom.¹¹⁹ In the face of mounting pressure, the Board of Trustees capitulated by not only reinstating Curran, but inexplicably promoting him to the rank of associate professor with tenure.¹²⁰

The second chapter in the Charles Curran saga took place the following year. On July 29, 1968, Pope Paul VI issued his much-anticipated encyclical on artificial contraception, *Humanae Vitae*. In it, the Pope reaffirmed the Church's historic teaching against contraception as contrary to "the objective moral order which was established by God."¹²¹ The day before its release, Curran received a phone call from a correspondent at *Time* magazine informing him that the letter would be publicly introduced in Rome the next day. Curran obtained a copy of the text from Father James T. McHugh at the National Conference of Catholic Bishops, and Curran, along with CUA colleagues Daniel Maguire and Robert Hunt (both priest theologians who would later leave the priesthood), collaborated to draft a statement.¹²² In it, they severely criticized the papal document and dissented from its central teaching, concluding that "spouses may responsibly decide according to their conscience that artificial contraception in some circumstances is permissible and indeed necessary to preserve and foster the values and sacredness of marriage."¹²³ They presented their views at a press conference at the Mayflower Hotel the next day. In a matter of days, the statement had gained the signatures of some six hundred Catholic theologians.¹²⁴

In response to the notoriety created by this public statement of dissent, and the confusion it created with respect to church teaching, Patrick Cardinal O'Boyle, Archbishop of Washington, D.C., asked to meet with those faculty who signed the statement, pursuant to his role as chancellor of CUA. The meeting resulted in a stalemate: the theologians conceded nothing and even refused to cooperate with O'Boyle's request to submit written

119. *Id.* at 57–67.

120. *Id.* at 44–55; WITHAM, *supra* note 115, at 22–24.

121. Paul VI, Encyclical Letter *Humanae Vitae* ¶ 10 (July 25, 1968), http://w2.vatican.va/content/paul-vi/en/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae.html.

122. WITHAM, *supra* note 115, at 25–26; CHARLES E. CURRAN, *LOYAL DISSENT: MEMOIR OF A CATHOLIC THEOLOGIAN* 50–51 (2006).

123. *Statement by Catholic Theologians, Washington, D.C., July 30, 1968, reprinted in READINGS IN MORAL THEOLOGY* NO. 8: *DIALOGUE ABOUT CATHOLIC SEXUAL TEACHING* 135, 136–37 (Charles E. Curran & Richard A. McCormick, S.J., eds., 1993).

124. MITCHELL, *supra* note 114, at 152.

responses to questions concerning the exact meaning of their published statement of dissent. The theologians claimed that Cardinal O'Boyle "had no right to ask for such an explanation, even as chancellor of the university. Curran stated that asking them for an explanation in and of itself violated academic freedom."¹²⁵

CUA's Board of Trustees decided to turn the matter over to a faculty inquiry. In doing so, the American bishops subverted their own doctrinal authority "and made concern for academic freedom paramount."¹²⁶ The Marlowe Committee,¹²⁷ as it became known (named for the engineer and architecture professor who chaired it) issued a report on April 1, 1969, completely exonerating the theologians. The basis of this decision was the norms of academic freedom set forth by the AAUP. The committee concluded that the dissenters' statement rejecting *Humanae Vitae* was a "tenable theological position,"¹²⁸ and that the style and manner of dissent had been "dignified, grave, and measured."¹²⁹ Although not within the committee's charge, the report concluded that the University's statutes were inconsistent "with modern American practice in higher education" as reflected in the AAUP standards, such that the CUA statutes could not be considered binding.¹³⁰ The report recommended that the University formally adopt the *1940 Statement* but without the Limitations Clause permitting religiously affiliated institutions to qualify the right to academic freedom.¹³¹ The report was received and accepted by the Board of Trustees, and the University proceeded to amend its statutes and bylaws.¹³²

The Curran affair represented an enormously significant development concerning the place and nature of academic freedom in Catholic higher education, eclipsing the incidents at Notre Dame, St. John's, and Dayton. Following the 1967 faculty strike, the Board of Trustees "had pledged to uphold" the AAUP principles of academic freedom.¹³³ To be clear, the Board at CUA never formally adopted the AAUP standards regarding academic freedom in its several instantiations. The Board did, however, scrupulously follow the AAUP statements on academic freedom and due process in conducting the work of the Faculty Board of Inquiry.¹³⁴ More than this, the deference the Board showed to the AAUP standards—its treatment of these standards as normative in practice, if not by formal adoption—communicated the idea that it was legitimate and appropriate for a

125. *Id.* at 165.

126. *Id.* at 181.

127. *Id.* at 186–87; WITHAM, *supra* note 115, at 27.

128. MITCHELL, *supra* note 114, at 191.

129. *Id.* at 193.

130. *Id.*

131. *Id.* at 198.

132. *Id.* at 206–07, 227–32.

133. *Id.* at 151.

134. MITCHELL, *supra* note 114, at 180–81, 186.

Catholic university to follow these standards as part of the internal life of the institution.

The theologians who dissented from the teaching of *Humanae Vitae* were not subject to any ecclesiastical discipline or administrative penalty from the University. Thus, as Philip Gleason rightly observes, the outcome of the dispute “amounted to a practical victory for academic freedom in Catholic higher education, even in the sensitive area of religious doctrine.”¹³⁵ Indeed, the incident confirmed that theologians at a Catholic university could openly dissent from Church teaching at the highest level without fear of repercussion. Being a Catholic theologian at Catholic University of America was akin to being an engineer at Purdue or a chemist at MIT: the only basis for evaluation of one’s work was one’s peers within the academic guild and specifically within one’s given scholarly discipline. Everyone else lacked the necessary competence to make judgments in their particular field of expertise.¹³⁶

The Board made no effort to articulate its own standard for academic freedom in a Catholic institution. Nor did it direct the CUA administration to the hard work of setting forth such a standard—an omission that was not remedied until 1991 (and then, only imperfectly), following the final denouement of the Curran drama.¹³⁷

* * *

135. GLEASON, *supra* note 48, at 313.

136. The idea that the only person competent to judge the scholarly work of an academic is a fellow academic, even where the field of study is theology, became the *de rigueur* response to any suggestion that ecclesiastical authorities might have something to say about the truth of academic opinions in a Catholic university. See, e.g., *Can the Charles Currans Be Freed?: Zeroing in on Freedom*, 86 COMMONWEAL 316 (June 2, 1967), reprinted as *Catholic Scholars Witness to Freedom: A Symposium*, in *THE CATHOLIC UNIVERSITY: A MODERN APPRAISAL* 308 (Neil G. McCluskey, S.J. ed., 1970) (“The right to academic freedom on the part of the faculty is grounded in demonstrated professional competency. . . . It is understood that competency does not necessarily mean agreement with majority opinion, or with what are generally considered to be the safer, the more orthodox, or the more traditional views—either in theology or in any other academic field.”). This idea has been repeated, like a mantra, down through the years. See, e.g., Richard P. McBrien, *Why I Shall Not Seek a Mandate*, 182 AM. 14 (Feb. 12, 2000) (arguing that he would not seek a mandate from the local bishop and stating that he was qualified to teach theology in a Catholic university because “[o]nly the academic administration of a university and college, and the chair and faculty of a department are competent to determine those matters”).

137. CUA’s current statement on academic freedom is virtually indistinguishable from statements at the majority of the nation’s universities with respect to every academic discipline but theology. With respect to theology, the CUA statement provides that the University “recognizes that freedom of inquiry, thought and expression is requisite to the advancement of knowledge and to the deepening of understanding in matters of faith.” Office of the Provost, *Academic Freedom at the Catholic University of America*, CATH. U. AM. (June 4, 1991), <https://provost.cua.edu/handbook/Academic.cfm>. It further provides that “Catholic theologians are expected to give assent to the teachings of the magisterium in keeping with the various degrees of assent that are called for by authoritative teaching. Differences arising over the interpretation and presentation of Church teaching are resolved through dialogue of scholars with members of the magisterium, with due recognition that final authority in matters of faith and morals lies with the magisterium.” *Id.*

The conception of academic freedom that arose from and was exemplified by these four controversies found expression in two seminal documents of the time—the *Land O’Lakes Statement* (1967) and *The Catholic University in the Modern World* statement (1972). These documents, discussed next, represent an attempt by prominent Catholic educators to articulate the nature of a modern Catholic university that included a robust, AAUP-style conception of academic freedom.

3. *Statements on Catholic Higher Education: Land O’Lakes and The Catholic University in the Modern World*

In 1967, representatives from eleven Catholic universities, together with members from their sponsoring religious communities and two bishops, met at the Land O’Lakes retreat in northern Wisconsin.¹³⁸ Under the leadership of Notre Dame’s president, Rev. Theodore M. Hesburgh, C.S.C., the group gathered to discuss, clarify, and articulate their understanding of the nature and purpose of a Catholic university. The document that they prepared, *The Nature of the Contemporary Catholic University*, more commonly known as the *Land O’Lakes Statement*, proved to be deeply influential in the development of American Catholic higher education throughout the remainder of the twentieth century.¹³⁹

The *Land O’Lakes Statement* refers to “academic freedom,” though it does not define the concept or offer a rationale for its acceptance. It does say that “[t]he whole world of knowledge and ideas must be open” to students at a Catholic university, and that “there must be no outlawed books or subjects.”¹⁴⁰ But the focus of the *Land O’Lakes Statement* is not on the academic freedom of students or faculty members. Its principal concern is the institutional freedom of the Catholic university as a whole:

To perform its teaching and research functions effectively the Catholic university must have a true autonomy and academic freedom in the face of authority of whatever kind, lay or clerical, external to the academic community itself. To say this is simply to assert that institutional autonomy and academic freedom are essential conditions to life and indeed survival for Catholic universities and for all universities.¹⁴¹

Although this declaration of institutional autonomy was ostensibly directed against “authority of whatever kind,” in practice this proved to be inaccurate insofar as Catholic universities welcomed a vast array of authorities “external to the academic community”—from government agencies like the

138. GLEASON, *supra* note 48, at 317.

139. *Land O’Lakes Statement: The Nature of the Contemporary Catholic University*, reprinted in AMERICAN CATHOLIC HIGHER EDUCATION: ESSENTIAL DOCUMENTS, 1967—1990, 7 (Alice Galin, O.S.U. ed., 1992).

140. *Id.* at 10.

141. *Id.* at 7.

U.S. Department of Health and Human Services and the Environmental Protection Agency to private organizations such as the National Collegiate Athletic Association.¹⁴² Instead, the statement seeks to exclude one particular “authority” from the life of the university, namely, the authority of the Catholic faith community itself—the authority of the Church.¹⁴³

The document goes on to say that “the Catholic university must be an institution (a community of learners or a community of scholars) in which Catholicism is perceptibly present and effectively operative.”¹⁴⁴ It insists that a Catholic university must maintain a theology department, and it encourages interdisciplinary conversations related to theology. Beyond this, however, the *Land O’Lakes Statement* makes no suggestion as to how a university’s Catholic identity might be realized. It offered no method, program, or strategy to manifest the Catholic presence that it declared was so essential.¹⁴⁵ It did, however, affirm and guarantee the “internal autonomy” of the different academic disciplines and respect for their “methods and methodologies,” and it further declared that “[t]here must be no theological or philosophical imperialism.”¹⁴⁶ Indeed, the *Land O’Lakes Statement* in no way suggests that a Catholic university may in any way limit a faculty member’s academic freedom as a way of ensuring its Catholic identity.

In practice, the *Land O’Lakes Statement* was drafted to serve as a position paper for the International Federation of Catholic Universities (IFCU) that planned to issue a more elaborate statement on the nature of a Catholic university. In 1972, the IFCU published a more lengthy exposition of the ideas set forth in the *Land O’Lakes Statement* entitled *The Catholic University in the Modern World*.¹⁴⁷ Although the document touched on many aspects of Catholic identity in higher education, the document’s passages on

142. James T. Burtchaell, *Part Four: External Authorities?*, CRISIS MAG. (July 1, 1999), <https://www.crisismagazine.com/issues/archive/1999/july-august-1999>.

143. James T. Burtchaell, C.S.C., *Out of the Heartburn of the Church*, 25 J.C. & U.L. 653, 655 (1999) (stating that the authors of the statement were indicating “that they now regarded their bishops and religious superiors as ‘outsiders’ to the work of Catholic education”).

144. *Land O’Lakes Statement*, *supra* note 139.

145. See JAMES T. BURTCHAELL, *THE DYING OF THE LIGHT: THE DISENGAGEMENT OF COLLEGES AND UNIVERSITIES FROM THEIR CHRISTIAN CHURCHES* 595 (1998) (“Apart from that wary welcome to theology, no other means to make Catholicism perceptibly present and effectively active is mentioned.”).

146. *Land O’Lakes Statement*, *supra* note 139, at 8.

147. *The Catholic University in the Modern World*, in *AMERICAN CATHOLIC HIGHER EDUCATION: ESSENTIAL DOCUMENTS, 1967–1990*, *supra* note 139, at 37. In addition to the *Land O’Lakes Statement*, other preparatory texts included the *Kinshasa Statement: The Catholic University in the Modern World* (1968), in *AMERICAN CATHOLIC HIGHER EDUCATION: ESSENTIAL DOCUMENTS, 1967–1990*, *supra* note 139, at 13, and the *Rome Statement: The Catholic University and the Aggiornamento* (1969), in *AMERICAN CATHOLIC HIGHER EDUCATION: ESSENTIAL DOCUMENTS, 1967–1990*, *supra* note 139, at 17.

academic freedom and autonomy became the central focus of debate as the document was considered by both educators and curial officials in Rome.¹⁴⁸

Like its predecessor, *The Catholic University in the Modern World* insists that “[t]o perform its teaching and research functions effectively a Catholic university must have true autonomy and academic freedom.”¹⁴⁹ The document makes explicit that the Catholic university’s autonomy in conducting its own affairs includes “freedom in student admission policy, in appointment of personnel, in teaching (with regard both to subjects taught and to methods), and in research.”¹⁵⁰ It grounds academic freedom in the nature of the university, “which is the pursuit and transmission of truth.”¹⁵¹ Moreover, it describes this freedom in near absolute terms: “Any limitation imposed on [the university] which would clash with this unconditioned attitude for pursuing truth would be intolerable and contrary to the very nature of the university.”¹⁵²

Notwithstanding this absolutist language, the document offers a more nuanced account in addressing the “delicate balance to be maintained between the autonomy of a Catholic university and the responsibilities of the Hierarchy.”¹⁵³ This delicate balance is necessary because the Church, too, is concerned with truth. The document acknowledges that the Church is “the guardian of revealed truth” and as such has “the right and duty to safeguard orthodoxy.”¹⁵⁴ The task of the theologian at a Catholic university is to “deepen the understanding” of the faith, whereas it is the task of the Magisterium to evaluate the work of a theologian, and to judge “its authentic catholicity, and its conformity with divine revelation.”¹⁵⁵ Those who teach Catholic theology at a Catholic university “must present the authentic doctrine of the Church.”¹⁵⁶ At the same time, the document claims that “theologians must be able to pursue their discipline in the same manner as

148. James Burtchaell notes that although the IFCU drafted *The Catholic University in the Modern World* as “an official policy statement” expounding upon the ideas set forth in the *Land O’Lakes Statement*, it was “adopted, not by the IFCU, where it encountered opposition, but by a Congress of the Catholic Universities of the World, in Rome.” Burtchaell, *supra* note 143 at 656–57. See also GALLIN, *supra* note 70, at 127–39 (detailing the often-contentious process of drafting the document and seeking its approval from curial officials). As with the *Land O’Lakes Statement*, Rev. Theodore M. Hesburgh, C.S.C., played a major role in the preparation of *The Catholic University in the Modern World*. For his thoughts on the process, see HESBURGH, *supra* note 57, at 213–21.

149. *The Catholic University in the Modern World*, in AMERICAN CATHOLIC HIGHER EDUCATION: ESSENTIAL DOCUMENTS, 1967–1990, *supra* note 139, at 43.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 53.

154. *Id.*

155. *The Catholic University in the Modern World*, in AMERICAN CATHOLIC HIGHER EDUCATION: ESSENTIAL DOCUMENTS, 1967–1990, *supra* note 139, at 54.

156. *Id.*

other research scholars.”¹⁵⁷ They must, it says, be free to question and to develop their hypotheses “with the full freedom of scholarly research.”¹⁵⁸

What a theologian presents as the truth may not be consistent with the teachings of the Church. When this happens, the document acknowledges that the Church’s hierarchy has the authority to intervene “when it judges the truth of the Christian message to be at stake.”¹⁵⁹ However, this authority “does not of itself imply the right of the Hierarchy to intervene in university government or academic administration.”¹⁶⁰ Instead, “Church authorities will deal with the individual involved only as a member of the Church.”¹⁶¹ That is, “unless statutory relationships permit it, [the hierarchy’s actions] will not involve a juridical intervention, whether direct or indirect, in the institutional affairs of the university.”¹⁶² A bishop may not order the dismissal of a theologian from the university, even if he concludes that the theologian’s work is heterodox. The bishop’s power is limited to “advising the person involved, informing the administration, and . . . declaring such a teaching incompatible with Catholic doctrine.”¹⁶³

For some, *The Catholic University in the Modern World* appears to square the circle of Catholic identity and academic freedom. It sets forth a maximalist conception of academic freedom for all university professors (including theologians) while offering a modest concession to one “outside authority,” namely, the Church’s magisterium. The document acknowledges the bishops’ authority “to judge and declare whether a teaching that is publicly proposed as Catholic is in fact such,” but says that this judgment will “normally be left to [the theologian’s] peers.”¹⁶⁴ Moreover, a bishop’s authority is limited to voicing criticism. He has no role to play in the governance or administration of the Catholic university. The document strictly maintains the university’s institutional autonomy. Even if the Church’s magisterium concludes that the work of a university faculty member is “incompatible with Catholic doctrine,” such notice is merely advisory. It remains the responsibility of the university to decide “the necessary and appropriate means to maintain its Catholic character.”¹⁶⁵

157. *Id.*

158. *Id.*

159. *Id.* at 55.

160. *Id.*

161. *The Catholic University in the Modern World*, in AMERICAN CATHOLIC HIGHER EDUCATION: ESSENTIAL DOCUMENTS, 1967–1990, *supra* note 139, at 59.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

4. *The Development of Academic Freedom at Loyola University Chicago*

Prior to Vatican II, Catholic colleges and universities sought to stake out a position supporting both the academic freedom of individual faculty members and the academic freedom of Catholic institutions of higher learning. Since the Council, almost without exception, Catholic colleges and universities have amended their policies to conform to the understanding of academic freedom set forth in the AAC and AAUP's *1940 Statement of Principles*. Today the statements and policies on academic freedom at Catholic colleges and universities are virtually indistinguishable from the analogous policies at secular schools. In this section, we examine these changes by looking at the policies on academic freedom set forth in the faculty handbooks of one Catholic university: Loyola University Chicago.

Loyola's first Faculty Handbook, published in 1948, was a tentative effort, or as Loyola President Rev. James T. Hussey, S.J., introduced it, an "experimental one."¹⁶⁶ The document was, he admitted, "very incomplete." Indeed, the Handbook contained no policy on academic freedom (though it is uncertain whether this omission was part of the incompleteness Hussey had in mind). It did, however, contain several pages describing Loyola's Chapter of the AAUP. The chapter was founded in 1935 and "reactivated in 1946 as the outgrowth of a request by the President of the University that a committee be selected by the lay faculty members to confer with him on matters of faculty welfare."¹⁶⁷ Although the document does not mention academic freedom, it does state that one of the purposes of the Loyola Chapter of the AAUP is "to further the general interests of Catholic education and the particular aims and purposes of Loyola University."¹⁶⁸

The first "non-experimental" version of the Loyola Faculty Handbook was published in 1962. Loyola has published a revised version of this Handbook on eight subsequent occasions: 1965, 1969, 1972, 1979, 1983, 1993, 2009, and 2015. Although later versions of the Handbook differ from the earlier versions in many important respects, the basic structure and contents can be traced back to the 1962 edition. To appreciate the significant changes in the University's policy regarding academic freedom, we will examine certain key subjects in the Handbook and how they were revised or eliminated in subsequent editions. These subjects address the University's formal policies on: (1) academic freedom; (2) the religious make-up of the University's faculty; (3) for-cause grounds for termination of a faculty

166. Letter from James T. Hussey, S.J. to all Members of the University Faculty and Staff (Sept. 1, 1948), LUC Archives, Office of the President, Rev. Raymond C. Baumhart, S.J., Acc. No. 82-19, Box 8 of 16, Location D/3A6.

167. THE FACULTY HANDBOOK, Loyola University of Chicago (1949) p. 49, LUC Archives, Office of the President, Rev. Raymond C. Baumhart, S.J., Acc. No. 82-19, Box 8 of 16, Location D/3A6.

168. *Id.*

member; and (4) the availability of books listed on the Catholic Church's *Index of Forbidden Books*.

a. Academic Freedom

Loyola University's policy on academic freedom has changed dramatically over the years, reflecting both developments in Catholic higher education and the Church more broadly.

Loyola's policy on academic freedom in its 1962 Faculty Handbook¹⁶⁹ is remarkable in that it reflects the University's dedication both to free inquiry and to preserving its Catholic identity. A number of features are particularly noteworthy. First, the statement grounds the University's commitment to academic freedom in its dedication to "truth," the communication of which is the "primary purpose of education."¹⁷⁰ From this purpose it follows that "[e]very teacher . . . in virtue of his office has not only the right but the duty to participate freely in the search for and the communication of truth."¹⁷¹ This is the foundation upon which the "[a]cademic freedom to discover and teach the truth is guaranteed to the teacher."¹⁷²

In itself, grounding the idea of academic freedom in the search for and communication of truth is not out of the ordinary. The AAUP's 1940 *Statement* does as much.¹⁷³ The difference is that the Loyola Faculty Handbook makes explicit its particular conception of truth—"the perceived relationship of conformity between the mind and its object."¹⁷⁴ It also defends truth as something that is objective and therefore mind-independent. Thus, truth is something that the "knower perceives," but "he does not produce it."¹⁷⁵ Similarly, the statement contends that "subjective conviction is not a criterion of truth."¹⁷⁶

Second, Loyola's statement on academic freedom reflects the traditional Catholic view on the unity of truth—that there is "only one objective truth"—but that there are "two different paths to [that] truth," namely, "reason and revelation."¹⁷⁷ This distinction, between truths that "can be arrived at by the use of natural powers" and "other truths which God has re-

169. LOYOLA UNIV. CHI., OFFICE OF THE PROVOST, FACULTY HANDBOOK 20–21 (1962) [hereinafter 1962 FACULTY HANDBOOK]. The full text of the statement in the 1962 Loyola Faculty Handbook is set forth in the Appendix. See Appendix *infra*.

170. 1962 FACULTY HANDBOOK, *supra* note 169, at 20.

171. *Id.*

172. *Id.*

173. 1940 *Statement*, *supra* note 33, at 14 ("Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free research for truth and its free exposition. . . . Freedom in research is fundamental to the advancement of truth.")

174. 1962 FACULTY HANDBOOK, *supra* note 169, at 20.

175. *Id.*

176. *Id.*

177. *Id.*

vealed,”¹⁷⁸ is a mainstay of Catholic teaching found not only in the Neo-Scholasticism still dominant at the time of the 1962 Handbook, but in the Church’s historic understanding of the relationship between reason and faith, philosophy and theology, nature and grace. The unicity of truth means that “whatever is learned by one method cannot be in contradiction to what is learned by another” and that “[a]ny opposition [between the two] is merely apparent.”¹⁷⁹

Third, the statement recognizes that “[a]cademic freedom . . . implies not only rights but correlative duties.”¹⁸⁰ The statement makes clear that the reality of truth and the fact that it can be sought and grasped by the human mind entails certain consequences for teachers and the legitimate scope of academic freedom. “No teacher . . . should ever teach anything that contradicts certain truth, whether that truth be known to him from its own evidence, from reliable human authority, or from the Catholic Church speaking within its legitimate scope.”¹⁸¹ Moreover, “[a]s a Catholic institution of higher learning Loyola expects all its faculties to exercise their right of academic freedom without teaching anything that violates doctrines of faith or morals of the Catholic Church.”¹⁸² Finally, the 1962 policy makes plain that serious consequences can follow from violating the University’s policy: “Any grave offense against these canons shall be considered just cause for dismissal from the Loyola faculty.”¹⁸³

The final paragraphs of the statement on academic freedom in Loyola’s 1962 Handbook are essentially an extended quotation from the *1940 Statement*. One of these quotations appears to contradict the earlier passages concerning the limitations that truth imposes on the exercise of academic freedom. Thus, the 1962 Handbook provides that a teacher “is entitled to full freedom in research and in the publication of its results, subject to the adequate performance of his other academic duties.”¹⁸⁴ To reconcile this claim with the apparent limitation on academic freedom quoted above, it must be the case that this “full freedom” in research and publication must be exercised “without teaching anything that violates doctrines of faith or morals of the Catholic Church.”¹⁸⁵

178. *Id.*

179. *Id.*

180. 1962 FACULTY HANDBOOK, *supra* note 169, at 20.

181. *Id.*

182. *Id.* Beyond the teachings of the Catholic Church, the statement also provides that a Loyola faculty member should not teach “anything that is contrary to the principles of American government as set forth in the Declaration of Independence and the Constitution of the United States.” *Id.*

183. *Id.* at 20.

184. Compare 1962 FACULTY HANDBOOK, *supra* note 169, at 21, with *1940 Statement*, *supra* note 33, at 14.

185. 1962 FACULTY HANDBOOK, *supra* note 169, at 20.

Again quoting from the *1940 Statement*, the 1962 Handbook further provides that when the teacher acts in his role as a “citizen” he is “free of institutional censorship or discipline.”¹⁸⁶ Nevertheless, in this role, he is subject to “special obligations”¹⁸⁷ because “the public may judge his profession and his institution by his utterances.” Accordingly, a teacher who speaks as a citizen “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 he is not an institutional spokesman.”¹⁸⁸ This same passage, regarding the freedom of Loyola faculty members as citizens, remained a part of Loyola’s Faculty Handbook in all subsequent editions until the 1993 edition.¹⁸⁹

Similar to its immediate predecessor, the 1965 Loyola Faculty Handbook identified the purpose of education as being “the free and unhampered communication of truth.”¹⁹⁰ But unlike the 1962 version, the 1965 version did not set forth an understanding of what “truth” is (*e.g.* as the correspondence of mind and object), nor did it state that truth was objective, or that it could be known through different paths (*i.e.* through the exercise of human reason and through revelation).

The 1965 edition defined academic freedom as “the freedom of the scholar to speak and write on the areas of learning in which he is competent.”¹⁹¹ Similar to the 1962 version, the 1965 edition guaranteed the right of a faculty member “to discover and teach truth within the areas of his competence” subject to the “scholar’s responsible and prudent judgment, and to the correlative obligation to recognize and to respect the rights and convictions of others, including the institution of which he is a part.”

Like its predecessor, the 1965 Handbook set forth a limitation on the right to academic freedom related to Loyola’s Catholic identity:

Academic freedom in church-related institutions of higher learning is universally understood within the terms of the religious beliefs of the church. The faculty of Loyola University, therefore, agrees in the exercise of academic freedom not to attack the teaching of the Roman Catholic Church regarding faith and morals.¹⁹²

With some slight variation, this same statement—excepting attacks on Catholic teaching from an otherwise capacious right of academic free-

186. Compare 1962 FACULTY HANDBOOK, *supra* note 169, at 21, with *1940 Statement*, *supra* note 33, at 14.

187. *Id.*

188. *Id.*

189. This passage remained in the Handbook through the 1983 edition. The 1993, 2009, and 2015 versions contain an abbreviated version of the same point.

190. LOYOLA UNIV. CHI., OFFICE OF THE PROVOST, FACULTY HANDBOOK 25 (1965) [hereinafter 1965 FACULTY HANDBOOK].

191. *Id.*

192. *Id.* at 25–26.

dom—was also a part of the 1969, 1972, and 1983 versions of the Loyola Faculty Handbook.¹⁹³ By providing notice of this limitation in its Faculty Handbook, Loyola sought to satisfy the conditions for the proper invocation of the Limitations Clause in the *1940 Statement* by stating clearly the “[l]imitations of academic freedom because of [the] religious . . . aims of the institution.”¹⁹⁴

Unlike the 1962 version, the statement on academic freedom in the 1965 edition no longer warned faculty that violating the policy would be “considered just cause for dismissal from the Loyola faculty.”¹⁹⁵ However, the significance of this omission can be easily overstated. As noted below, the 1965, 1969, 1972, 1979, and 1983 editions of the Loyola Faculty Handbook each contained language allowing for the dismissal of faculty, including tenured faculty, “for-cause” for attacking Catholic teaching.

The phrase excepting attacks on Catholic teaching from the scope of academic freedom at Loyola was eliminated in the 1993 edition of the Loyola Faculty Handbook. It replaced this exception with the following language:

Academic freedom in church related institutions of high learning requires application of the same principles mentioned above with regard to the authoritative teaching and tradition of the Church to which the University is related, in the case of Loyola University, to the Catholic Church.¹⁹⁶

Gone is the idea that Loyola faculty must agree not to “attack” Catholic teaching on faith and morals.¹⁹⁷ Instead, the restraints on the exercise of academic freedom “mentioned above” are now entirely internal and prudential—that a faculty member “should strive at all times to be accurate, exercise appropriate restraint and judgment, foster and defend intellectual honesty and freedom of inquiry, show respect for the rights of others to express ideas and opinions. . . .”¹⁹⁸ Whereas the 1962 edition demanded that a faculty member show restraint by not teaching “anything that contradicts certain truth,” including those truths taught by the authority of Catho-

193. The 1969, 1972, and 1979 Handbooks state that the Loyola faculty “agrees in the exercise of academic freedom not to attack universal Catholic doctrine.” LOYOLA UNIV. CHI., OFFICE OF THE PROVOST, FACULTY HANDBOOK 29 (1969) [hereinafter 1969 FACULTY HANDBOOK]; LOYOLA UNIV. CHI., OFFICE OF THE PROVOST, FACULTY HANDBOOK 36 (1972) [hereinafter 1972 FACULTY HANDBOOK]; LOYOLA UNIV. CHI., OFFICE OF THE PROVOST, FACULTY HANDBOOK 37 (1979) [hereinafter 1979 FACULTY HANDBOOK]. The 1983 Handbook states that the Loyola faculty “agrees in the exercise of academic freedom to respect authoritative Catholic teaching and tradition.” LOYOLA UNIV. CHI., OFFICE OF THE PROVOST, FACULTY HANDBOOK 38 (1983) [hereinafter 1983 FACULTY HANDBOOK].

194. *1940 Statement*, *supra* note 33, at 14.

195. 1962 FACULTY HANDBOOK, *supra* note 169, at 20.

196. LOYOLA UNIV. CHI., OFFICE OF THE PROVOST, FACULTY HANDBOOK 10 (1993) [hereinafter 1993 FACULTY HANDBOOK].

197. *See supra* notes 192 and 193.

198. 1993 FACULTY HANDBOOK, *supra* note 196, at 10.

lic Church, the restraint suggested in the 1993 edition was only a matter of etiquette—that a faculty member show “respect” for the opinions of others.

The most recent Loyola Faculty Handbooks, published in 2009 and 2015, dilute the language in the 1993 version even further:

The principles of academic freedom apply to church-related institutions of higher learning, such as Loyola, which take into consideration the authoritative teaching and tradition of the church to which the institution is related (in the case of Loyola, the Roman Catholic Church).¹⁹⁹

The latest Faculty Handbook does not explain what it would mean for a faculty member to “take into consideration the authoritative teaching and tradition of the church” in the exercise of academic freedom.

b. The Religious Make-up of the Faculty

The 1962 edition of the Loyola University of Chicago Faculty Handbook states that

[a]lthough Loyola University is a Jesuit University, there is no regulation requiring all members of the faculty to be members of the Catholic faith. A faculty member is expected to maintain a standard of life and conduct consistent with the philosophy and objectives of Loyola, and the integrity of the University requires that all faculty members shall maintain a sympathetic attitude towards Catholic beliefs and practices.²⁰⁰

The exact same language appears in the 1965 edition of the Handbook.²⁰¹

This language could be construed as a limit on academic freedom. The 1962 edition neither defined nor sought to illustrate what “maintain[ing] a sympathetic attitude toward Catholic beliefs and practices” would require. Similarly, the 1969 edition, which substituted the word “respect” for “sympathetic attitude” did not indicate what “respect” for Catholic beliefs would entail. An “attitude” denotes an internal disposition, but this raises the question as to how such an attitude could be discerned or measured. “Respect” may likewise indicate an internal disposition, though “respect” is often shown in outward signs and gestures. Given the practical difficulties in the non-arbitrary enforcement of such a norm, the function of this language may be expressive rather than juridical.

As noted above, the wording in the text was changed slightly in the 1969 edition to state that “[t]he integrity of the University . . . requires that all faculty members respect Catholic beliefs.”²⁰² The 1972 edition broad-

199. LOYOLA UNIV. CHI., OFFICE OF THE PROVOST, FACULTY HANDBOOK 39 (2009) [hereinafter 2009 FACULTY HANDBOOK]; LOYOLA UNIV. CHI., OFFICE OF THE PROVOST, FACULTY HANDBOOK 34 (2015) [hereinafter 2015 FACULTY HANDBOOK].

200. 1962 FACULTY HANDBOOK, *supra* note 169, at 19–20.

201. 1965 FACULTY HANDBOOK, *supra* note 190, at 25.

202. 1969 FACULTY HANDBOOK, *supra* note 193, at 28.

ened this, stating that “[t]he integrity of any university . . . requires that its faculty respect all religious beliefs.”²⁰³ The phrase was changed again in the 1983 edition to say that “[t]he integrity of this University requires that all its faculty members respect both the religious convictions of all and the Catholic and Jesuit tradition of their institution.”²⁰⁴

The entire passage was deleted from the Handbook beginning with the 1993 edition. Since that time, the Handbook has made no mention of either the religious composition of the faculty, or of the need for faculty to be “sympathetic” to or show “respect” for the Catholic faith.

c. For-Cause Grounds for Termination of a Faculty Member

The 1962 Loyola Faculty Handbook made clear that even a tenured faculty member could be dismissed for attacking the Catholic Church. “Any faculty member who in his teaching or professional activity is guilty of a grave offense against Catholic doctrine or morality or who is involved in a public crime or scandal may be dismissed immediately” by the ultimate authority in the University, the Jesuit Board of Trustees.²⁰⁵ The 1965 Handbook revised this language slightly, providing that “[g]rounds for dismissal include . . . attacking certain Catholic doctrine in teaching, lecturing, or writing.”²⁰⁶ This language was amended again in the 1969 Handbook which provided that a faculty member could be dismissed for “attacking universal Catholic doctrine in teaching, lecturing, or publishing when one specifically identifies himself as a member of the University faculty.”²⁰⁷ Nearly identical language appears in the 1972 and 1979 Handbooks.²⁰⁸ This ground for dismissal was somewhat altered in the 1983 Handbook which provided that a faculty member could be dismissed for “attacking and ridiculing authoritative Catholic teaching.”²⁰⁹ Ten years later, the 1993 Handbook completely eliminated this ground for dismissal, and no analogous passage has appeared in any subsequent edition.²¹⁰

The authors of these earlier versions of the Loyola Faculty Handbook seem to have believed that, as a Catholic institution, Loyola *stands for*

203. 1972 FACULTY HANDBOOK, *supra* note 193, at 36. The 1979 edition altered this slightly, replacing “any university” with “Loyola University.” 1979 FACULTY HANDBOOK, *supra* note 193, at 37.

204. 1983 FACULTY HANDBOOK, *supra* note 193, at 38.

205. 1962 FACULTY HANDBOOK, *supra* note 169, at 22.

206. 1965 FACULTY HANDBOOK, *supra* note 190, at 27–28.

207. 1969 FACULTY HANDBOOK, *supra* note 193, at 27.

208. 1972 FACULTY HANDBOOK, *supra* note 193, at 29 (providing for faculty dismissal for “attacking universal Catholic doctrine in teaching, lecturing, or publishing when functioning as or specifically identifying oneself as a member of the University faculty”); *accord* 1979 FACULTY HANDBOOK, *supra* note 193, at 29.

209. 1983 FACULTY HANDBOOK, *supra* note 193, at 32.

210. 1993 FACULTY HANDBOOK, *supra* note 196, at 28 (listing causes for dismissal); *accord* 2009 FACULTY HANDBOOK, *supra* note 199, at 62–63, 67; 2015 FACULTY HANDBOOK, *supra* note 199, at 55–56, 59.

something—a religious identity that makes truth claims about the world—and that the University cannot advance this identity with integrity if it provides a platform to those whose practice is to undermine it. Dismissal of a faculty member from a position with tenure is, of course, the most extreme act that an institution can take with respect to a professor with whom it is dissatisfied. As such, this passage would seem to represent a clear threat to academic freedom, traditionally understood. Nevertheless, the *1940 Statement* implicitly recognizes the legitimacy of such an action in the Limitations Clause.

d. Access to the Index of Prohibited Books

Beginning in the sixteenth century—at the peak of the Reformation and the creation of the Roman Inquisition—the Catholic Church maintained a list of forbidden books, the *Index Librorum Prohibitorum*, or simply “the Index.”²¹¹ The Roman curial office responsible for the Index did not, strictly speaking, censor the books listed. Rather, it maintained the list as a public notice to faithful Catholics to avoid certain materials that could be damaging to the faith. To knowingly read these materials was deemed sinful. Still, Church authorities made exceptions, granting permission to certain individuals for special reasons.

The 1962 Loyola Faculty Handbook refers to this practice:

Books on the Index. The President of the University is authorized to extend to Catholic members of the Faculty and to Catholic students permission to read books on the Index. These requests are to be made through the office of the Vice-President and Dean of Faculties.²¹²

The 1965 Handbook contained the same language but added that following a request to read materials on the Index, “[t]he professor may presume that the permission is granted twenty-four hours after returning the forms.”²¹³

Pope Paul VI abolished the Index in 1966. After the 1965 edition, no subsequent Loyola Faculty Handbook made any mention of the Index or restrictions on materials faculty and students might wish to read.

* * *

The developments regarding academic freedom in the Loyola University Chicago Faculty Handbook are representative of what took place at most Catholic institutions of higher learning during this period. The initial formulation of academic freedom was tied to a substantive conception of the truth, one that was part of the university’s pursuit of the truth sought and

211. Joseph Hilgers, *Index of Prohibited Books*, in 7 THE CATHOLIC ENCYCLOPEDIA 721, 721–22 (Charles G. Herbermann et al. eds., 1910), <https://babel.hathitrust.org/cgi/pt?id=nyp.33433070780311;view=1up;seq=785>.

212. 1962 FACULTY HANDBOOK, *supra* note 169, at 34.

213. 1965 FACULTY HANDBOOK, *supra* note 190, at 41.

affirmed by the Church. Over the course of the following three decades, Catholic universities shifted toward the AAUP conception of academic freedom, with little to no relationship to the faith community of which they were ostensibly a part.

5. *Ex Corde Ecclesiae and the Real Problem Plainly Stated*

In 1990, after more than a decade of deliberation and consultation between university leaders, bishops, and the Holy See, Pope John Paul II issued his Apostolic Constitution governing Catholic universities entitled *Ex Corde Ecclesiae*.²¹⁴ The document sets forth the characteristics that a university or college must possess and make present if it is to be authentically Catholic. Furthermore, it re-imagines the relationship between Catholic identity and academic freedom in a way that resolves what others had assumed to be an irreconcilable conflict.

Many Catholic universities describe their Catholic identity as a “Christian witness” or “Christian presence” or “Christian atmosphere” within the work of an otherwise generic university. *Ex Corde* eschews these descriptions and refers bluntly to “the higher truth that comes from the Gospel”²¹⁵ and “fidelity to the Christian message as it comes to us through the Church.”²¹⁶ In this way, the alleged tension between being Catholic and being a university is placed flatly on the table. The “tension” that other documents acknowledge²¹⁷ is no longer a matter of atmospherics—such as crucifixes on the wall and other devotional symbols on campus, or the number of Catholic personnel or members of the sponsoring religious order, or even the inclination to raise questions that address the moral dimensions of life—though each of these relates to the crux of what is at issue. The heart of the matter is that, as a Catholic institution, the Catholic university makes certain truth claims on topics that may be the subject of inquiry in the various disciplines within the academy.

But in contrast to the typical formulation, *Ex Corde* states this relationship not as a *tension* but as a *virtue*. As John Paul II states in the first few lines of the document: “A Catholic university’s privileged task is ‘to unite existentially by intellectual effort two orders of reality that too frequently

214. JOHN PAUL II, APOSTOLIC CONSTITUTION *Ex Corde Ecclesiae* (Aug. 15, 1990), http://w2.vatican.va/content/john-paul-ii/en/apost_constitutions/documents/hf_jp-ii_apc_15081990_ex-corde-ecclesiae.html [hereinafter *EX CORDE ECCLESIAE*].

215. *Id.* ¶ 46.

216. *Id.* ¶ 13.

217. When this acknowledgement takes place, it is often accompanied by the famous quote from George Bernard Shaw that a Catholic university is a “contradiction in terms.” See Theodore M. Hesburgh, C.S.C., *Introduction: The Challenge and Promise of a Catholic University*, in *THE CHALLENGE AND PROMISE OF A CATHOLIC UNIVERSITY* 4 (Theodore M. Hesburgh C.S.C. ed., 1994).

tend to be placed in opposition as though they were antithetical: the search for truth and the certainty of already knowing the fount of truth.”²¹⁸

Far from being antithetical, these “two orders of reality” complement one another. John Paul here quotes St. Augustine, “*Intellege ut credas; crede ut intellegas,*” explaining that “the united endeavor of intelligence and faith will enable people to come to the full measure of their humanity, created in the image and likeness of God.”²¹⁹ In his encyclical letter *Fides et Ratio*,²²⁰ John Paul II expands upon this point, arguing that these “two orders of reality” are in fact necessary accompaniments to one another. “*Credo ut intelligo*” (I believe so that I may understand). “*Intellego ut credam*” (I think so that I may believe). Thinking cannot take place without a starting point, without a belief, a firm place of departure from which one’s ruminations proceed. And, one cannot believe without thinking, for then belief would be not an intellectual act but an act of the will alone—a mere choice to treat the world as one wishes it to be,²²¹ a choice that may, by happenstance, coincide with how things are, but one that is not grounded in existence.

Bringing these two orders of reality together is essential for anyone who would seek to understand the universe, for anyone who would seek to know the truth of existence. That is, every exercise of reason, every intellectual act (including scientific inquiry) begins with an act of faith.²²² What distinguishes the Catholic university (and, in the first instance, the Catholic intellectual) is not *the fact* of such pre-ratiocinating conviction, but *the content* of the beliefs that are held, which form the starting point for rational thinking and which are themselves subject to the probing examination of rational thought.

218. EX CORDE ECCLESIÆ, *supra* note 214, ¶ 1 (quoting Pope John Paul II, *Discourse to the Catholic Institute of Paris* (June 1, 1980), http://w2.vatican.va/content/john-paul-ii/fr/speeches/1980/june/documents/hf_jp-ii_spe_19800601_institut-catholique.html). Marvin O’Connell describes the apparent tension in this fashion: “The Catholic church claims to be the repository of all truth. But a university exists on the assumption that truth, in its manifold and myriad manifestations, remains always to be discovered and refined. Therefore Catholicism and a genuine university experience are radically incompatible.” Marvin R. O’Connell, *A Catholic University, Whatever That May Mean*, in *THE CHALLENGE AND PROMISE OF A CATHOLIC UNIVERSITY* 233, 237 (Theodore M. Hesburgh ed., 1994).

219. EX CORDE ECCLESIÆ, *supra* note 214, ¶ 5.

220. John Paul II, Encyclical Letter *Fides et Ratio* ¶¶ 16–35 (Sept. 14, 1998), http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091998_fides-et-ratio.html.

221. For example, “I believe in unicorns because they are so beautiful and the world would be a better place with such creatures in it” or “I believe I will win the lottery because I really need the money.”

222. Joseph Ratzinger, later Pope Benedict XVI, has made this penetrating point on numerous occasions. See Benedict XVI, *Lecture of the Holy Father at Aula Magna of the University of Regensburg, Faith, Reason, and the University: Memories and Reflection* (Sept. 12, 2006), http://w2.vatican.va/content/benedict-xvi/en/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg.html (last visited Mar. 22, 2019).

Like other universities, a Catholic university has “the “honor and responsibility” to seek the truth. But unlike non-Catholic institutions, a Catholic university has the virtue of being able to think more fully and more widely, precisely because a Catholic university “is distinguished by its free search for the *whole truth* about nature, man, and God.”²²³ Indeed, John Paul makes what many undoubtedly see as an audacious claim, namely that, by its Catholic character, a university is *better prepared* to engage in the academic enterprise: that “by its Catholic character, a university is made *more capable* of conducting an impartial search for truth, a search that is neither subordinated to nor conditioned by any particular interests of any kind.”²²⁴ This is not simply an institutional advantage but one that extends to individuals. “The Christian researcher should demonstrate the way in which human intelligence is *enriched* by the higher truth that comes from the Gospel.”²²⁵

This is not, in fact, the view held by most American intellectuals. This is not the view embodied in the *1940 Statement*. That is, the *1940 Statement* reflects the fear that the dogmatic beliefs of a religious community will cripple the academic enterprise, restricting what can be thought and questioned, limiting the scope and direction of inquiry that can be pursued in the scholarly process. A closely held belief certainly can have that effect, but this is true of all belief, not simply religious belief. Moreover, this overlooks the unavoidable presence of belief in the exercise of reason in whatever field, and the liberating and illuminating function that belief can play in the scholarly process. Contrary to the *1940 Statement*, *Ex Corde Ecclesiae* contends that the Catholic university can engage in the search for truth in a way that is *superior* to its secular counterparts.

The document goes further and expresses the hope that the Catholic university will exert influence on academic culture generally and by extension the wider culture. By fulfilling its mission in the world, the Catholic university holds the promise of

affecting and, as it were, upsetting, through the power of the Gospel, humanity’s criteria of judgment, determining values, points of interest, lines of thought, sources of inspiration and models of

223. *EX CORDE ECCLESIAE*, supra note 214, ¶ 4 (emphasis added).

224. *Id.* ¶ 7 (emphasis added).

225. *Id.* ¶ 46 (emphasis added). The document then goes on to quote Pope Paul VI: “The intelligence is never diminished, rather, it is stimulated and reinforced by that interior fount of deep understanding that is the word of God, and by the hierarchy of values that result from it. . . . In its unique manner, the Catholic university helps to manifest the superiority of the spirit, that can never, without the risk of losing its very self, be placed at the service of something other than the search for truth.” See Pope Paul VI, Address to Delegates of the International Federation of Catholic Universities (Nov. 27, 1972), https://w2.vatican.va/content/paul-vi/fr/speeches/1972/november/documents/hf_p-vi_spe_19721127_universita-cattolice.html.

life, which are in contrast with the Word of God and the plan of salvation.²²⁶

Ex Corde Ecclesiae also recognizes the importance of academic freedom in the life a Catholic university, though this freedom is not without limits. The document provides that a Catholic university “possesses that institutional autonomy necessary to perform its functions effectively and guarantees its members academic freedom, so long as the rights of the individual person and of the community are preserved within the confines of the truth and the common good.”²²⁷ The Church recognizes and accepts “the academic freedom of scholars in each discipline in accordance with its own principles and proper methods, and within the confines of the truth and the common good.”²²⁸ Article 4 of the General Norms section of *Ex Corde Ecclesiae* requires all Catholic teachers “to be faithful to, and all other teachers . . . to respect, Catholic doctrine and morals in their research and teaching.”²²⁹

Ex Corde Ecclesiae is perhaps best known for its treatment of Catholic theology and academic freedom. *Ex Corde* provides: “Catholic theologians, aware that they fulfill a mandate received from the church, are to be faithful to the magisterium of the church as the authentic interpreter of sacred Scripture and sacred tradition.”²³⁰ The document then cites canon 812 of the *Code of Canon Law* which provides: “Those who teach theological disciplines in any institutes of higher studies whatsoever must have a mandate from the competent ecclesiastical authority.”²³¹ At the same time, *Ex Corde*

226. EX CORDE ECCLESIAE, supra note 214, ¶ 48 (quoting Pope Paul VI, Apostolic Exhortation *Evangelii Nuntiandi* ¶¶ 17–18 (Dec. 8, 1975), http://w2.vatican.va/content/paul-vi/en/apost_exhortations/documents/hf_p-vi_exh_19751208_evangelii-nuntiandi.html).

227. *Id.* ¶ 12. The accompanying footnote elaborates on this somewhat: “*Institutional autonomy* means that the governance of an academic institution is and remains internal to the institution.” *Id.* ¶ 12, n.15. This should allay the very real fears of Father Hesburgh and others, that ecclesiastical figures could directly interfere in the operation of the university in decisions regarding appointments of faculty. The footnote further explains that “*academic freedom* is the guarantee given to those involved in teaching and research that, within their specific specialized branch of knowledge and according to the methods proper to that specific area, they may search for the truth wherever analysis and evidence lead them, and may teach and publish the results of this search, keeping in mind the cited criteria, that is, safeguarding the rights of the individual and society within the confines of the truth and the common good.” *Id.*; see also *id.* Art. 2, § 5.

228. *Id.* ¶ 29. See also *id.* Art. 2, § 5.

229. EX CORDE ECCLESIAE, supra note 214, Art. 4, § 3. Just as the language requiring faculty to show “respect” toward Catholic faith and morals was not defined in the Loyola Faculty Handbook, *Ex Corde Ecclesiae* does not specify what “respect” for Catholic doctrine and morals entails. *Id.*; see also supra notes 180–199 and accompanying text. Nor does it explain the consequences for a Catholic teacher who fails to be faithful to “Catholic doctrine and morals in their research and teaching.” *Id.* It is easy to imagine that a scientist who failed to abide by a university’s policy on the treatment of human subjects by either endangering the life of an unborn child or by using fetal remains obtained through abortion could be subject to internal discipline, even perhaps dismissal. But *Ex Corde Ecclesiae* does not explain the consequences for a professor of moral philosophy who faithfully taught her students the Church’s teaching on contraception set forth in *Humanae Vitae*, and then proceeded to explain why that teaching was in error.

230. *Id.* ¶ 27.

231. 1983 CODE c.812.

states that theologians enjoy the same academic freedom as other faculty “so long as they are faithful to the[] principles and methods [that define theology as a branch of knowledge].”²³²

Although *Ex Corde Ecclesiae* provided a coherent and distinctive conception of academic freedom for Catholic universities, its impact on Catholic higher education has been modest. Beyond stimulating some needed conversations about the nature of Catholic identity in the context of university education, few if any institutions have modified their AAUP-based conception of academic freedom in response to *Ex Corde*'s challenging claims.

D. *Summary of the History of Academic Freedom in American Catholic Universities*

In sum, the history of academic freedom policies at Catholic colleges and universities in the United States was first marked by underdevelopment: the freedom of faculty to teach and conduct research was, as a general matter, not articulated in a formal policy but was observed in practice where it was assumed by all sides that faculty would not contradict Church teaching. In the 1960s, Catholic schools began to adopt formal policies that embodied the conception of academic freedom set forth in the *1940 Statement on Academic Freedom and Tenure*. They did so believing that true academic freedom was unavoidably in tension with their professed Catholic identity. In 1990, Pope John Paul II challenged this supposed tension, arguing in *Ex Corde Ecclesiae* that a robust affirmation of Catholic truth was entirely consistent with academic freedom, rightly understood. Although *Ex Corde* has encouraged some Catholic colleges and universities to once again reflect on the meaning of their Catholic identity, it has not prompted these schools to revise their policies with respect to academic freedom.

II. THE AAUP CONCEPTION OF ACADEMIC FREEDOM: AT BEST, QUESTION-BEGGING; AT WORST, INTERNALLY INCOHERENT

In the sections that follow, we critique the AAUP conception of academic freedom on two grounds: that it is unjustified and therefore question-begging, and that it is internally incoherent. This critique then lays the ground for Part III, where we provide a tentative articulation of a policy regarding academic freedom for Catholic universities today.

A. *The AAUP's Conception of Academic Freedom is (at Best and at Least) Question-Begging*

Any given conception of academic freedom is contingent upon a particular conception of the university in which this freedom is to be exercised. There is no such thing as a pure or pristine, unadorned thing called a “uni-

232. *EX CORDE ECCLESIAE*, supra note 214, ¶ 29.

iversity.” The university is not a natural kind.²³³ Instead, there are different conceptions and different instantiations of the university in history and throughout the world. These include, for instance, secular, public, Catholic, Jewish, thirteenth-century English, and nineteenth-century German universities, among many others.

The AAUP conception of academic freedom assumes that a secular university is the neutral or natural manifestation of a university. It identifies academic freedom as the freedom to pursue truth, as defined by the contours of each particular discipline which possesses its own methods and standards for the making of claims warranted within its field of study.²³⁴ A discipline’s members, as experts in these standards and methods, are best able to employ them and therefore to make epistemically warranted claims. For example, astronomers have the expertise to make epistemically warranted claims as defined by the terms of the discipline of astronomy. This famously included the hypothesis that the earth revolves around the sun, a hypothesis epistemically warranted because it more elegantly and comprehensively explained the observed movement of celestial bodies.²³⁵ By contrast, law professors may not make warranted astronomical claims²³⁶ because truth is discipline-specific, and those outside the discipline—such as experts in other fields of study and inquiry, administrators, and (especially for our purposes) religious authorities—cannot and should not interfere with the expert’s pursuit and articulation of epistemically-warranted truth within the discipline.

There are, however, other reasonable conceptions of the “university” with their own entailed conceptions of academic freedom. One of these alternative conceptions is the Catholic conception.²³⁷ Under this conception, the various disciplines within the university are discrete means of ascertaining the full and all-encompassing truth about reality, within the domain of and under the standards particular to each discipline. The Catholic university seeks to embody a vision that integrates the knowledge of the various disciplines within a single, unified vision of reality.²³⁸ So defined, the Catholic conception of the university is entirely compatible with the AAUP’s.

233. Cf. SAUL A. KRIPKE, *NAMING AND NECESSITY* (1991).

234. See MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* 54–61 (2009) (describing the theoretical foundation of academic freedom as the discipline-centric pursuit of the truth).

235. See THOMAS S. KUHN, *THE COPERNICAN REVOLUTION: PLANETARY ASTRONOMY IN THE DEVELOPMENT OF WESTERN THOUGHT* (1957).

236. At least those who are not trained astronomers.

237. For a particularly thoughtful perspective on the meaning of a Catholic university, see ALASDAIR MACINTYRE, *GOD, PHILOSOPHY, UNIVERSITIES: A SELECTIVE HISTORY OF THE CATHOLIC PHILOSOPHICAL TRADITION* (2009).

238. Cf. FRANCIS CARDINAL GEORGE, *OMI, A GODLY HUMANISM: CLARIFYING THE HOPE THAT LIES WITHIN* 135 (2015) (“The modern research university is characterized by departmentalization of knowledge. This departmentalization, more than any explicit intention, caused the secularization of the university, not in the sense that the university became explicitly nonreligious, but

The Catholic conception, however, adds a crucial element to academic freedom within the university. It identifies one discipline that is architectonic to the entire academic enterprise: philosophy.²³⁹ Philosophy identifies the relationship of the others disciplines to one another and polices the boundaries of the various disciplines. Philosophy identifies the domain of each discipline and its relative access to the truth. For example, philosophy identifies that the discipline of biology governs organic life and cannot make epistemically-warranted claims about the existence of God, the retrograde motion of Venus, or the causes of the Peloponnesian War. This role of defining disciplinary boundaries was first worked out in medieval universities. Philosophy identified the respective boundaries of theology and philosophy: theology's domain was defined as those conclusions rationally derived from revelation, whereas philosophy's domain was those conclusions derived from human reason unaided by revelation.²⁴⁰

Because of its structuring of the disciplines, the Catholic conception of the university entails a conception of academic freedom different from the AAUP's. We will describe this more fully in the next Part, but here, let us note that academic freedom in a Catholic university *may*—not *must*—justify the identification of common premises and assumptions from which that university's scholarship, teaching, and debate begins.

In the *1940 Statement* the AAUP does not identify, much less defend, its conception of the university upon which its conception of academic freedom is premised. The AAUP's conception of academic freedom is plausible and widely shared, but it is not the only possible—and certainly not the only reasonable—conception of academic freedom

B. The AAUP's Conception of Academic Freedom is Internally Incoherent

The AAUP's conception of academic freedom is internally incoherent because it declares that every idea must be subject to challenge and possible refutation, while simultaneously cordoning-off certain ideas—in particular, its conception of academic freedom—as unassailable and immune from criticism. As such, it “inconsistently exempts itself from its own verdict about all human thought.”²⁴¹

The idea that the academic freedom of a scholar within a given discipline subsists in a neutral, unbounded openness of thought—a limitless horizon of intellectual pursuit without fixed markers, recognizable landmarks, and defined boundaries—is fatuous. All thought, all inquiry, every theory

in the sense that there was now no organizing principle beyond the specialized disciplines, no complete and unified vision of reality.”)

239. MACINTYRE, *supra* note 237 at 62–95.

240. *See, e.g.*, I THOMAS AQUINAS, *SUMMA THEOLOGICA* q. 1, aa. 1–10.

241. LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 25 (1950) (commenting on historicism).

and chain of reasoning, is non-neutral in the sense that it presupposes something; it must begin with something that is taken for granted.

The *1940 Statement* declares that college and university professors “are entitled to full freedom in research and in the publication of results” and to “freedom in the classroom in discussing their subject.”²⁴² The *1940 Statement* argues that these freedoms are necessary because “[i]nstitutions of higher education are conducted for the common good” and “[t]he common good depends upon the free search for truth and its free exposition.”²⁴³

The conception of academic freedom set forth in the *1940 Statement* is notable for three characteristics: first, the goal of academic inquiry is “truth”; second, the pursuit of truth must take place in an atmosphere of “full freedom,” uninhibited by the restraints that others would impose. The only restraints on inquiry that should be operative are those voluntarily assumed by the scholar engaged in research within his or her discipline. Implicit within these notions of truth and freedom is a third characteristic, namely, the idea that the scholarly process is a neutral enterprise. That is, not only is the individual scholar impartial in conducting his or her research and indifferent to the results attained, but the methods employed in the inquiry do not prejudge or predetermine the conclusions that he or she will reach.

When these qualities of truth, freedom, and neutrality are examined in detail, however, one discovers that the conception of academic freedom championed by the AAUP is, at its root, internally incoherent. Indeed, the notions of truth, freedom, and neutrality that the *1940 Statement* relies upon contradict and undermine the very idea of academic freedom that these concepts are employed to defend. In short, the purportedly unbounded academic freedom championed in the *1940 Statement* is dependent upon specific beliefs about the nature of truth, freedom, neutrality, and the common good that the *1940 Statement* necessarily regards as fixed and unassailable.

This same point can be seen from a slightly different perspective. Conceptually, under the *1940 Statement*, does the modern university actually stand for something? Does it embody any substantive commitments? Its defenders might argue “Yes! It stands for truth and a fearless and unbiased commitment to the pursuit of truth!” But this claim is confused because it cannot be squared with the premises underlying the *1940 Statement*.

Under the conception of academic freedom advanced by the AAUP, every idea, concept, premise, and theory should be open to critique and refutation. There are no sacred cows in the modern university, no privileged points of view that are exempt from doubt and questioning. But this means that the undefined idea of “truth” that supposedly animates and defines the

242. *1940 Statement*, *supra* note 33, at 14.

243. *Id.*

modern university and academic freedom is itself subject to critique and refutation.

That is, there are different notions as to what “truth” is, differing conceptions competing within the modern university where everything is open to question (e.g., correspondence theory, coherence theory, semantic theory, pragmatist theory, deflationary theory, etc.)²⁴⁴ and among these, the correspondence theory of truth enjoys no privileged position. Yet the appeal of the claim that the modern university stands for “the free search for truth and its free exposition”²⁴⁵ hinges upon a particular conception of truth that, by the logic of the principle of academic freedom, must be subject to critique and refutation. Moreover, this conception of truth, upon which the appeal of the modern university and academic freedom itself depend, is unarticulated; it is tacit and assumed. That is, the champions of the AAUP’s *1940 Statement* are banking on the idea that the individuals they are trying to persuade will assume that “truth” means the correspondence theory of truth. As such, in practice, this theory of truth enjoys a privileged position. It is not open to question by those who champion the AAUP’s conception of academic freedom. In doing so, they contradict the very theory of academic freedom they seek to defend.

The same criticism holds for the other terms that the *1940 Statement* employs: freedom and the common good. These are contested concepts,²⁴⁶ but the *1940 Statement* seeks to persuade the public to support the principle of academic freedom not by pointing to their contested nature but by appealing to a fixed understanding that the public embraces.

Isaiah Berlin’s seminal essay, *Two Concepts of Liberty*, provides an especially prominent example of a “contested concept” in the realm of legal and political theory. In the essay Berlin argues that there are two basic ways of conceiving of human freedom.²⁴⁷ “Negative liberty” refers to the absence of restraint. According to this conception, one is “free to the degree to which no man or body of men interferes with my activity.”²⁴⁸ “If I am prevented by others from doing what I could otherwise do, I am to that degree unfree.”²⁴⁹ This conception of liberty is “liberty *from*; [the] absence of interference beyond the shifting but always recognizable frontier.”²⁵⁰ “Positive liberty,” by contrast, is “not freedom from, but freedom to—to lead one prescribed form of life.”²⁵¹ It is the freedom to realize some greater good by submitting to a truth and, in so doing, realize one’s “higher

244. See, e.g., ALEXIS G. BURGESS & JOHN P. BURGESS, *TRUTH* (2011).

245. *1940 Statement*, *supra* note 33, at 14.

246. W. B. Gallie, *Essentially Contested Concepts*, 56 *PROC. OF THE ARISTOTELIAN SOC’Y* 167 (1956).

247. ISAIAH BERLIN, *Two Concepts of Liberty*, in *LIBERTY* 166 (Henry Hardy ed., 2002).

248. *Id.* at 169.

249. *Id.*

250. *Id.* at 174.

251. *Id.* at 178.

nature,” one’s “true self.”²⁵² The “positive doctrine of liberation by reason” holds that a person is free when his actions are rational, when they “conform[] to the necessities of things.”²⁵³

Berlin notes that the first conception of freedom is the freedom of classical liberalism—the freedom to be left alone. The second conception of freedom includes the freedom of the great utopian political movements of the twentieth century: Fascism and Communism.²⁵⁴ Which conception of freedom is correct should, according to the principle of academic freedom embodied in the *1940 Statement*, be open to endless debate and disputation. Yet the *1940 Statement* champions the first conception and repudiates the second. As Berlin keenly observes, different “conceptions of freedom directly derive from views of what constitutes a self, a person, a man.”²⁵⁵ Thus, a particular understanding of freedom entails a particular understanding of man, a philosophical anthropology—a theory about what it means to be a human being. Thus, not only is the notion of academic freedom set forth in the *1940 Statement* dependent on a particular conception of freedom, but this conception of freedom is in turn covertly dependent upon a particular anthropology, neither of which is thought to be subject to refutation as the principle of academic freedom proposes.

In sum, the current formulation of academic freedom, which prescribes an absolute openness to the entertainment of all ideas, methods, and forms of reasoning, and which foreswears the use of any concept, method, or logic as essential to the academic enterprise, is itself dependent upon a set of fixed and unassailable ideas and forms of reasoning.

If this were not the case, then the proposition “[h]uman beings are capable of rational thought” should be subject to such inquiry. Indeed, according to the *1940 Statement*, this claim should not, in principle, be immune from critique and possible rejection. Yet it is difficult to conceive how one would go about proving that human beings are incapable of rational thought other than by making use of rational thought itself. As G.K. Chesterton remarked, commenting on the same idea: “There is a thought that stops thought. That is the only thought that ought to be stopped.”²⁵⁶

The fact that academic inquiry is dependent upon certain fixed and unassailable beliefs, and that the very notion of academic freedom trades upon these kinds of ideas, raises a critical question: Why do the champions of academic freedom single out religious beliefs for special—that is, negative—treatment? If all academic inquiry proceeds upon the assumption that certain beliefs are true, then why are religious institutions that promote an

252. *Id.* at 179.

253. BERLIN, *supra* note 247, at 190.

254. *Id.* at 190–91; see also PAUL JOHNSON, *MODERN TIMES: THE WORLD FROM THE TWENTIES TO THE NINETIES* (rev. ed. 1991).

255. BERLIN, *supra* note 247, at 181.

256. GILBERT K. CHESTERTON, *ORTHODOXY* 33 (Image Books 1959) (1908).

academic culture that expressly recognizes this dependence regarded as pariahs and threatened with being denied their due recognition as “real” universities?

The mind of every academic tightly clenches some set of unprovable dogmas, yet only religious dogmas are regarded as somehow obnoxious to the academic enterprise. Now, it may be the case that unassailable religious convictions are somehow different from other sorts of unassailable beliefs. But proof of this claim would require some substantial argument, not the categorical dismissal offered by the AAUP.²⁵⁷ Absent such argument (which, according to the *1940 Statement*, would itself be open to challenge and refutation), the different treatment accorded religious beliefs speaks of a kind of unprincipled distinction. Indeed, this inconsistency reveals the version of academic freedom promoted by the AAUP not as a principle of open mindedness and liberal neutrality for the conduct of scholarly inquiry, nor as a constituent rule for the organization of a “real” university, but as an ideology, the purpose of which is, at least in part, to shame and disparage those religious colleges and universities that seek to have their intellectual lives informed by the faith traditions they hold dear.

This is not to say that some robust version of the principle of academic freedom does not have a place in any institution that wishes to be considered a university. Surely it does. But such a principle must be explicated and defended on more nuanced and coherent grounds than what has been offered in the past by the AAUP.

A more elaborate exposition of the self-contradictory nature of academic freedom as defined by the *1940 Statement* can be found elsewhere. Here, we focus on three sources that fill out this critique: the section on academic freedom in the Founding Document of Thomas Aquinas College, and David Schindler’s and Alvin Plantinga’s commentaries on the liberal model of the university.

1. The Critique of Academic Freedom in the Founding Document of Thomas Aquinas College

Thomas Aquinas College is a four-year, liberal arts, Catholic college with a Great Books curriculum located in Santa Paula, California. The College was founded in 1970 when Ronald McArthur and several other faculty left St. Mary’s College, located outside of Oakland.

The Thomas Aquinas College Founding Document sets forth a cogent and sharply pointed critique of the concept of academic freedom as it is conventionally understood. The Founding Document begins by noting that “intellectual freedom is customarily defined by the mentality of free inquiry, the mentality which sees itself as not enslaved to any fixed conception but free to subject every doctrine to critical examination and possible

257. See Kilgore, *supra* note 40, at 369 and accompanying text.

rejection.”²⁵⁸ The AAUP’s stance on academic freedom typifies this perspective, and the AAUP regards religious doctrine at a religious college or university as a source of “institutional limitations” on academic freedom.²⁵⁹

The Founding Document responds to this conception of academic freedom with a number of trenchant criticisms. First, it makes clear that the logic of academic freedom as an absolute ideal of free inquiry is untenable. When academic freedom is proposed in this fashion, it must either be regarded as a dogma that is “immune to criticism,” or as merely one idea among the universe of ideas that may be criticized and rejected through the process of free inquiry.²⁶⁰ But the principle of free inquiry cannot justify its own exemption from the scrutiny it urges on other ideas, nor can it justify its own examination, precisely because free inquiry is the principle that “is presently under judgment and therefore [is held] in suspense.”²⁶¹

Second, the Founding Document notes that, according to the AAUP, academic freedom’s underlying rationale is service of “the common good,” and “[t]he common good depends upon the free search for truth and its free exposition.”²⁶² Indeed, the *1940 Statement* insists that “[f]reedom in research is fundamental to the advancement of truth.”²⁶³ The idea is that “[m]ore truths will be discovered, and more surely held . . . if all beliefs are subject to question and possible reversal.”²⁶⁴ But, the only way in which one could show that the principle of academic freedom had in fact contributed to the common good by arriving at some truth would be to treat the conclusions reached as securely held and immune from further questioning. However, the principle of free inquiry itself requires that such beliefs be held provisionally, and subject to refutation. Thus, “the principle of free inquiry would be nullified by the achievement of its stated purpose.”²⁶⁵

Third, the Founding Document acknowledges that a defender of the principle of academic freedom as free inquiry might seek to avoid this contradiction by positing that true knowledge “is simply unattainable.”²⁶⁶ But, this move does not avoid the contradiction of simultaneously holding that everything is subject to refutation and rejection, and that certain things may be regarded as true and not subject to rejection. This move is only an attempt to obscure a contradiction that cannot be avoided. This is because preserving the idea of free inquiry by denying the possibility of attaining

258. *A Proposal for the Fulfillment of Catholic Liberal Education*, THOMAS AQUINAS C. 1, 19 (1969), <https://thomasaquinas.edu/sites/default/files/a-proposal-forthe-fulfillment-of-catholic-education.pdf>.

259. *Id.* (citing the 1967 Report, Kilgore, *supra* note 40).

260. *Id.*

261. *Id.*

262. *1940 Statement*, *supra* note 33, at 14.

263. *Id.*

264. *A Proposal for the Fulfillment of Catholic Liberal Education*, *supra* note 258, at 20.

265. *Id.*

266. *Id.*

true knowledge would, as before, base the principle of free inquiry on a set of “particular and controversial philosophical theories, which as a consequence would be immune to criticism under the principle.”²⁶⁷

Fourth, the Founding Document notes that every criticism, every line of thought, “must finally be based on premises not subject to criticism.”²⁶⁸ This must be the case because

[I]f the premises of some criticism are themselves to be criticized, and the premises of this second criticism are in turn to be criticized, and so on, then either the process must rest on premises not subject to criticism, or all criticism is a game which begins anywhere and ends nowhere, advancing not a step towards the truth.²⁶⁹

Fifth, and finally, the Founding Document observes that, paradoxically, academic freedom understood as free inquiry eviscerates the idea of professional competence, and indeed the very concept of an academic discipline.²⁷⁰ Normally, competence is understood to refer to a scholar’s mastery of a given subject matter. A competent scholar within a discipline knows not only the methods of inquiry employed within his or her field but also the widespread substantive beliefs within it that function as standards of judgment. Yet academic freedom, understood as the principle of free inquiry, is supposed to govern decisions concerning the award of academic tenure. According to the principle of academic freedom, a “competent” scholar in a given discipline harbors no beliefs about what is true. Rather, such a scholar regards everything as subject to free inquiry and possible refutation. Thus, “competence” is no longer a matter of substantive knowledge within a given field and is instead a kind of bare abstraction.

It turns out, however, that scholars must apply standards that are more than bare abstractions when assessing the professional standing of their colleagues. In practice, they “fall back upon ‘accepted standards’ of competence.”²⁷¹ These accepted standards must either be so vague and general “as to be nearly useless as directives,” or they must “carry *in disguise* definite views of the true and the false in various disciplines.”²⁷² Of course, concealed beliefs that cannot be questioned contradict the principle of free inquiry in the same way that conspicuous beliefs do. In either case, the logic of academic freedom as the ideal of free inquiry again proves to be untenable: one cannot simultaneously hold: (1) that certain beliefs are true and that those beliefs function as the foundation of knowledge in a given field such that they cannot be subject to challenge and rejection, and (2) that in order

267. *Id.*

268. *Id.*

269. *Id.*

270. *A Proposal for the Fulfillment of Catholic Liberal Education*, *supra* note 258, at 20.

271. *Id.*

272. *Id.*

to be a true scholar, one must suspend one's belief as to the truth of any given proposition and subject it to challenge and possible rejection.

Perhaps even worse is that the "accepted standards" of a given academic discipline are treated as authoritative and enforced only because they are accepted, not because they are true. The scholar is not free to pursue the truth as such; freedom yields to the despotism of convention. Here, the full paradox of so-called "academic freedom" reveals itself: "the consistent application of academic freedom becomes by definition the very tyranny which it is supposed to prevent."²⁷³ Thus, in the absence of truth firmly held, "academic freedom" does *not* celebrate freedom, notwithstanding its name. Instead it demands conformity to a standard that is arbitrary—a matter of mere unexamined custom.

2. *David Schindler's and Alvin Plantinga's Critiques of Liberal Inquiry in the Modern Academy*

In his book, *Heart of the World, Center of the Church*, David Schindler offers an interpretation of the Church and the Christian mission in the world in light of the *communio* ecclesiology of the Second Vatican Council and the pontificate of John Paul II. This *communio* ecclesiology "brings with it a distinctive sense of the world as *imago Dei*: man, and in a certain sense, all of cosmic being are created in the image of the concrete trinitarian God manifest in Jesus Christ" such that "being receives its basic order and meaning from love." From this perspective, all of existence "from its beginning is ordered to, and invited in true analogous ways to share in, the *communio* whose reality in history is the Church."²⁷⁴

Schindler develops this thesis in a critique of what he calls "Catholic liberalism."²⁷⁵ By this term he does *not* refer to an assortment of commonly voiced positions on matters of controversy within the Church: a rejection of *Humanae Vitae*, support for the ordination of women, intercommunion with people of other faiths, and the incorporation of liturgical dance as an accepted part of the *Novos Ordo*. While those on the Catholic left are known to favor such positions, Schindler instead has in mind "the Catholic version of liberalism often termed 'neoconservatism.'²⁷⁶ This "Catholic liberalism" assumes that "the Catholic Church at the Second Vatican Council, especially in *Gaudium et Spes* and *Dignitatis Humanae*, made its peace with Western political liberalism," and that a similar peace with economic liberalism was reached in John Paul II's encyclical *Centesimus Annus*.²⁷⁷

273. *Id.*

274. DAVID L. SCHINDLER, *HEART OF THE WORLD, CENTER OF THE CHURCH: Communio Ecclesiology, Liberalism, and Liberation*, at xi (1996).

275. *Id.* at xiv.

276. *Id.* at 31.

277. *Id.* at 32.

The defining feature of each of these varieties of liberalism is freedom, mediated through institutions that are purportedly non-ideological in nature. Put another way, the freedom that liberalism promises is an “empty freedom,” “purely formal,” and “‘neutral’ with respect to the contents of all possible choices (or worldviews).”²⁷⁸ The gist of Schindler’s critique is that the invitation to embrace this allegedly purely formal and neutral view of freedom is a “con game” precisely because liberalism “already embodies a definite, though hidden, conception of human nature and destiny.”²⁷⁹ Moreover, those Catholic thinkers who have “defended the coupling of Catholicism with American liberal institutions”—in politics, economics, and academia—“have imparted—however unconsciously—a liberal worldview that always-already prevents the arrival of . . . the worldview proper to a *communio* theology.”²⁸⁰

The non-neutral quality of liberal freedom that Schindler describes can be found in the heart of the modern secular university. Schindler notes that, through the work of Notre Dame president Theodore M. Hesburgh, C.S.C., and others, the secular university became the defining model for Catholic institutions of higher learning. According to Father Hesburgh, a Catholic university “must be ‘first and foremost a university.’”²⁸¹ If this is not the case, the institution that the word “Catholic” describes may be many things, “but not a university.”²⁸² If the Church wants to enter the academic world, says Hesburgh, “the reality and the terms of this world are well established and must be observed.”²⁸³

This way of framing the issue, however, presupposes that there is such a thing as a “university” in pristine form, pure and unadorned—an idea that precedes any particular instantiation.²⁸⁴ Moreover, it presupposes that the standards of rationality and methods of inquiry employed by such a university in the academic enterprise are neutral with respect to the content of the conclusions reached. By contrast, Schindler contends “that the critical methods and scholarship of the contemporary academy do not embody a

278. *Id.* at 36.

279. *Id.* at 34.

280. SCHINDLER, *supra* note 274, at 35–36.

281. *Id.* at 143 (citing Theodore M. Hesburgh, C.S.C., *Introduction: The Challenge and Promise of a Catholic University*, in *THE CHALLENGE AND PROMISE OF A CATHOLIC UNIVERSITY* 4 (Theodore M. Hesburgh C.S.C. ed., 1994). Schindler slightly misquotes Hesburgh. The complete sentence from Hesburgh’s introduction to the book correctly reads as follows: “One may add descriptive adjectives to this or that university, calling it public or private, Catholic or Protestant, British or American, but the university must first and foremost be a university, or else the thing that the qualifiers qualify is something, but not a university.”)

282. *Id.*

283. *Id.*

284. See Richard J. Neuhaus, *The Christian University: Eleven Theses*, *FIRST THINGS*, Jan. 1996, at 20 (arguing that “[t]here is no such thing as a university pure and simple” and that “[a] secular university is not a university pure and simple; it is a secular university. Secular is not a synonym for neutral.”).

pure rationality: they are not neutral relative to competing worldviews.”²⁸⁵ Further, this non-neutrality “does not mean merely that mainstream contemporary universities often carry an ethos opposed to Catholicism on certain moral-social questions concerning the marginalization of the poor, abortion, gender, family, and the like.”²⁸⁶ Rather, “[t]he non-neutrality of the contemporary university toward . . . an authentically Catholic worldview lies already within the nature of its disciplines.”²⁸⁷

More precisely, the modern university is a manifestation of “liberalism” which Schindler says “embodies above all the claim of neutrality.” As operative in the university, this neutrality

[S]tands for a certain priority of method over content: it stands more for a way of approaching issues than for a definite outcome. Indeed, that is just the point: the critical methods of the academy, on a liberal reading, claim openness as their hallmark. Their precise intention is to avoid any *a priori* assumption of content which would, *ipso facto*, prejudice the (putative) pure openness of methods.²⁸⁸

The claim is that the university practices an “authentic rationality” that is pure “because it is, *a priori*, empty of any substantive content.” This pure rationality “affords the utmost in freedom, because no substantive content is imposed upon it in advance of the unfolding of its formal procedures.”²⁸⁹

The problem with liberalism as the mode of operation and animating spirit of the university, says Schindler,

[I]s that there are no instances of purely formal, hence neutral, methodological procedures, in the way claimed by liberalism: that, on the contrary, all methodological procedures, insofar as they claim to *mean* anything at all . . . imply and thus are shaped internally (if often tacitly) by metaphysical and theological presuppositions.²⁹⁰

According to Schindler, the worldviews that inform the scholarship and critical methods of the contemporary university are: (1) “mechanism”—a philosophy that limits reality to the purely material thereby denying the possibility of genuine immanence and the existence of formal and final causes, and (2) “subjectivism”—a philosophy that contends that reality is not mind independent, but instead regards the categories and structures of reality as constructs of the human mind.

Schindler concludes that these worldviews are incompatible with the worldview that should inform a Catholic university. That is, because the

285. SCHINDLER, *supra* note 274, at 145.

286. *Id.*

287. *Id.*

288. *Id.* at 153.

289. *Id.*

290. *Id.* at 154.

modern university today employs an understanding of rationality that is not neutral, because it uses a methodology that is not purely formal, because these substantive perspectives on the nature of the human person and reality as a whole inform the modern academic enterprise, a Catholic university cannot look to such a university as a model for how to proceed as an institution. Instead, what must identify “a Catholic institution *as a university*” is that it must think with “a Catholic mind.”²⁹¹

Liberalism, then, is not neutral but contains within it presuppositions about the nature of reality and the nature of the human capacity to know that reality. The principle of academic freedom as embodied in the modern university is the contemporary expression of liberalism *par excellence*. Thus, a Catholic university should promote a conception of academic freedom that avoids the liberal conceit of neutrality and reflects instead the metaphysical commitments of a Catholic worldview.

Alvin Plantinga, a philosopher whom Schindler cites, makes the point even more clearly. Plantinga identifies “three fundamental perspectives or ways of thinking about what the world is like, what we ourselves are like, what is most important about the world, what our place in it is, and what we must do to live the good life.”²⁹² The first perspective Plantinga identifies is “Christianity, or Christian theism, or Judeo-Christian theism.” The other two perspectives he identifies are “perennial naturalism” (which corresponds to Schindler’s “mechanism”) and “creative antirealism” (which corresponds to Schindler’s “subjectivism”).

Perennial naturalism holds that “there is no God, and we human beings are insignificant parts of a giant cosmic machine that proceeds in majestic indifference to our hopes and aspirations, our needs and desires, our sense of fairness or fittingness.”²⁹³ The form this perspective assumes in culture and in the modern university “is broadly evolutionary” in that we “try to understand basic human phenomena by way of their origin in random genetic mutation, or some other source of variability, and their perpetuation by way of natural selection.”²⁹⁴ From this perspective, all of human phenomena—including science, art, literature, music, mathematics, philosophy, and religion—are “to be seen as arising, finally, by way of the mechanisms driving evolution and are to be understood in terms of their place in evolutionary history, in terms of their contribution to present or past fitness.”²⁹⁵

291. SCHINDLER, *supra* note 274, at 147.

292. Alvin Plantinga, *On Christian Scholarship*, in *THE CHALLENGE AND PROMISE OF A CATHOLIC UNIVERSITY* 267, 269 (Theodore M. Hesburgh ed. 1994).

293. *Id.*

294. *Id.* at 270. For a book length critique of the philosophy of materialism in light of modern physics, see STEPHEN M. BARR, *MODERN PHYSICS AND ANCIENT FAITH* (2003).

295. Plantinga, *supra* note 292, at 271.

Creative antirealism, by contrast, posits that “it is we ourselves—we human beings—who are responsible for the basic structure of the world.”²⁹⁶ Whereas Schindler traces what he calls “subjectivism” back to Descartes, Plantinga traces “creative antirealism” back to Kant. According to this view, “[s]uch fundamental structures of the world such as those of time and space, object and property, number, truth and falsehood, possibility and necessity, and even existence and nonexistence” are not “found in the world as such . . . but are somehow constituted by our own mental or conceptual activity.”²⁹⁷

These perspectives, says Plantinga, are “seductive” and “widespread.”²⁹⁸ “We live in a world dominated by them; we imbibe them with our mother’s milk.”²⁹⁹ Yet “these perspectives are also deeply inimical to Christianity; these ways of thinking distort our views of ourselves and the world.”³⁰⁰ These non-neutral perspectives deeply influence the way in which academics teach courses, conduct research, and formulate conclusions in their particular disciplines. Yet the only perspectives that are singled out by the *1940 Statement* as being inimical to academic freedom are religious perspectives. Plantinga rejects this prejudice and challenges Christian scholars not to be cowed into “trying to understand things from a naturalistic perspective” but to “pursue these disciplines from a specifically Christian perspective.”³⁰¹

III. THE AAUP CONCEPTION OF ACADEMIC FREEDOM IS INCONSISTENT WITH UNIVERSITY PRACTICES

The fulsome conception of academic freedom reflected in the AAUP’s *1940 Statement* would seem to welcome a wide variety of perspectives, not only across disciplines, but within disciplines. Moreover, given that this conception of academic freedom is the norm in American higher education, one would expect university faculties to be communities of enormous intellectual diversity. The actual practice of academic freedom in American universities (private and public, secular and religious), however, indicates that few people actually believe in this version of the principle. These contrary practices, when coupled with the disparagement of religious universities that follow a different conception of academic freedom, suggest that the *1940 Statement* is not so much the articulation of a foundational principle of academic life as an ideology that serves ends other than those it purports to advance.

296. *Id.* at 269–70.

297. *Id.* at 273.

298. *Id.* at 291.

299. *Id.*

300. *Id.*

301. Plantinga, *supra* note 292, at 293.

On its face, the 1940 AAUP definition of academic freedom protects teaching, research, and public advocacy without any significant restraints. Given the AAUP's very broad conception of academic freedom, to which nearly all American universities adhere, one would expect that teaching, scholarship, and debate are unlimited, or nearly so. In practice, however, few if any universities allow their faculty members to engage in unrestrained teaching, unbounded research, and limitless debate. Contrary to the near absolutist vision of academic freedom in the *1940 Statement*, faculty members are subject to numerous restrictions in university life. Some of these restrictions reflect commonplace—and reasonable—judgments made by academic institutions on the best ways to pursue research, while others do not.

University life today is marked by an exclusion of certain points of view that is both surreptitious and in plain sight. Notwithstanding the claimed openness to different voices on university campuses, academic institutions and faculties embody significant restrictions on the points of view they are willing to consider and seek to advance: university speech codes, outside speaker policies, the demarcation of so-called “safe spaces,” and the restriction of free speech to certain confined locations on campus.³⁰² Although those restrictions on speech are important, the more significant exclusion of voices that we have in mind relates not to *outsiders*. Rather, it concerns the decision as to who will become an *insider*—who will become a faculty member.

The primary way in which restrictions on different points of view are enforced in academia (to the point where these restrictions become sewn into the fabric of institutions) is through the appointments process. Here, faculty members tend to replicate themselves, selecting new teachers and scholars who not only agree with them with respect to the most contentious issues in their given disciplines, but who largely mirror existing faculty members culturally and politically. What largely passes for diversity—indeed what is celebrated as the achievement of diversity—namely, the composition of a faculty marked by differences in race and gender—pays little to no attention to true intellectual diversity.³⁰³

Moreover, the AAUP clearly tolerates universities and faculties that work to exclude certain points of view from finding a home within their ranks. Faculties tend to replicate themselves. The new members who join, if not exactly like the current faculty in every respect, resemble them in the

302. To be clear, this is a problem that long precedes the current episodes making headlines on campuses from Yale to Berkeley, Middlebury to Missouri, Claremont-McKenna to Evergreen State, often involving intimidation and even the use of violence. Those episodes were largely student-driven protests directed at outside speakers. See KEITH E. WHITTINGTON, *SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH* (2018); ERWIN CHERMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* (2017).

303. See James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, 39 HARV. J.L. & PUBL. POL'Y 89 (2016) (describing the lack of intellectual diversity on law faculties).

views they hold within certain well-defined parameters of acceptability. Which views are acceptable does not need to be made explicit in the interview process, and are not spelled out in any official way. They are tacitly shared among individuals who received similar professional training and often attended the same schools.³⁰⁴ Even when they come from different parts of the country and different social and ethnic backgrounds, the candidates selected are thought to make a good “fit” with the existing faculty. Generally speaking, this means that the faculty members within a given academic unit do not hold wildly divergent views, either with respect to their discipline³⁰⁵ or with respect to the norms of political society.

It is the common practice of faculties to privilege certain beliefs—beliefs that they hold to be true but cannot prove (“priors”) but which are treated as immune from criticism.³⁰⁶ Moreover, these unprovable prior beliefs are operative in academic communities in that faculties employ them in the selection of their colleagues—where adherence to these same beliefs is deemed to be a necessary qualification for appointment. More often than not, however, these priors are employed in faculty selection in a covert fashion.³⁰⁷ This selection process leads to an overwhelming sameness.³⁰⁸ Rather than a coat of many colors, university life is lived in a beige room, with beige walls, beige carpeting, beige furniture, and beige curtains that filter the room in beige light.

The AAUP accepts this kind of placid uniformity—this stifling of diverse opinions—in the academy. Yet, it finds this uniformity unacceptable when the uniformity is religious in nature—when a religiously affiliated university hires faculty members to advance its religiously inspired mission. The source of this disparate treatment is the view that religion is irrational, anti-scientific, and anti-intellectual and, as such, has no place in the university—the temple of neutral reason.

304. Cf. Eugene H. Bramhall & Ronald Z. Ahrens, *Academic Freedom and the Status of the Religiously Affiliated University*, 37 GONZ. L. REV. 227, 241 (2001–2002) (“Every school fosters a climate hostile to certain ideas and amenable to others. Every workplace has within it a pressure to conform to certain standards; the academic community is no exception.”). As Bramhall and Ahrens note, “[f]ailure to comply with these unstated standards” can lead to the denial of career opportunities, and as such constitute a denial of academic freedom. *Id.*

305. Faculty members within a department may reflect some measure of diversity in that they may possess some special expertise within a sub-specialty of the discipline.

306. To be clear, our claim here is not that one should not believe what one cannot prove. One may have good and sound reasons to believe in the truth of propositions that fall short of proof.

307. Lindgren, *supra* note 303, at 128–35 (discussing the implications of the author’s description of law faculties’ lack of diversity and repeatedly noting the effect of hiring practices and policies).

308. See, e.g., Mitchell Langbert, *Homogeneous: The Political Affiliations of Elite Liberal Arts College Faculty*, NAT’L ASS’N OF SCHOLARS (Apr. 24, 2018), https://www.nas.org/articles/homogenous_political_affiliations_of_elite_liberal (sampling of 8,688 tenure track, PhD–holding professors from fifty-one of the sixty-six top-ranked liberal arts colleges in the U.S. News 2017 report, and finding that the Democratic-to-Republican ratio across the sample was 10.4:1, and that this ratio rose to 12.7:1 if two military colleges, West Point and Annapolis, were excluded).

Despite the rhetoric of academic freedom—that faculty should enjoy “full freedom in research and in the publication of the results” (1940 *Statement*), and that “the first condition of progress is complete and unlimited freedom to pursue inquiry and publish its results” (1915 *Declaration*)—restrictions on research at colleges and universities are commonplace. Moreover, these restrictions often reflect ethical judgments made by the institution—moral judgments that it imposes on its faculty and students regardless of their individual judgments to the contrary. Thus, for example, universities commonly have policies limiting or even prohibiting research on human subjects or animal subjects. Other restrictions include prohibitions on the use of nuclear materials, and policies that prohibit the use of vendors who do not subscribe to fair trade rules or environmentally protective “green” standards.

Presumably, these kinds of restrictions would be countenanced by the AAUP if notice were provided to the faculty member at the time of appointment. After all, the Limitations Clause recognizes that an institution may limit academic freedom “because of religious or other aims” so long as they are “clearly stated at the time of the appointment.”³⁰⁹ The issue would thus appear to be a matter of fairness.³¹⁰ Still, the singular focus of the Limitations Clause indicates that fairness in notice is not the AAUP’s real concern.

Imagine that a non-religious university has a policy prohibiting experimentation on animal subjects, and a newly hired faculty member is alerted to this restriction at the time of his appointment. Assume further that he agrees with the policy but later changes his mind when he receives a grant that will allow him to conduct animal research. When he engages in this research the university seeks to dismiss the professor for violating the policy. Presumably, the AAUP would approve of such an action. Now imagine that a person is hired at a religious school and is informed at the time of appointment of the institution’s commitment to its religious identity, and that this mission informs the institution’s approach to academic freedom. Imagine further that the person subscribed to the school’s mission but later changed his religious viewpoint and wrote scholarly articles *against* the faith of the institution. Presumably the AAUP would object if the university sought to dismiss the professor. What is not clear is what distinguishes the two cases.

The AAUP’s continued and dogged rejection of religious or theological contours for academic freedom, while permitting other kinds of limits, shows that something other than the pure pursuit of truth is operative. The AAUP only finds uniformity unacceptable when the uniformity is religious

309. 1940 *Statement*, *supra*, note 33, at 14.

310. Put to one side, the observation that notice of such restrictions may not be provided at the time of appointment, or is done so in the only the most cursory fashion (e.g. informing the new hire to read the faculty handbook).

in origin. On campuses that adhere to the *1940 Statement*, widespread university practice has in fact undermined the stated goal of the AAUP's conception of academic freedom by limiting the variety of perspectives that are heard in the pursuit of truth. Given this fact, it is difficult to see how a policy of academic freedom, formulated in light of a university's religious commitments, would be worse.

IV. A PRELIMINARY PRESCRIPTION FOR ACADEMIC FREEDOM IN CATHOLIC UNIVERSITIES

In the preceding parts, we argued that the conception of academic freedom set forth in the AAUP's *1940 Statement* is internally incoherent: it holds that every idea should be subject to searching criticism and possible refutation, yet it exempts the idea of academic freedom itself (and the concepts upon which it depends—"freedom," "truth," and the "public good") from this same judgment. The *1940 Statement* also suggests that a university's religious worldview is peculiarly obnoxious to the academic enterprise, while leaving unchallenged other beliefs of a secular nature. As such, we have argued that, in practice, the AAUP principle works not only to preserve the integrity of the academic enterprise, but to achieve certain ideological ends.

That the principle of academic freedom set forth in the *1940 Statement* is flawed does not mean that academic freedom has no place on the campus of a Catholic university. Here, we offer a still-tentative prescription for academic freedom in Catholic universities and the law schools they sponsor. We believe that the conception of academic freedom offered here is broad and capable of reasonably different instantiations. The practical challenge is to navigate how Catholic universities, as communities of scholars, can remain faithful to the truth professed by the Church, while giving their faculty members the freedom necessary to raise questions, conduct research, and participate in the pertinent disciplinary conversation that is the essence of the scholarly enterprise.

Normally, the arrangement between an employer and employee is a matter of private contract. The law proscribes certain interactions between contracting parties that are unconscionable or that are against public policy and so may not be the subject of a bargained-for exchange.³¹¹ Beyond these fairly well-defined areas of contract law, the parties are free to strike whatever bargain they wish.

The claim made by the AAUP in the *1940 Statement* is that the "public good" demands that the particular formulation of academic freedom championed by the AAUP must have a place in the relationship between em-

311. These include racially-restrictive covenants and contracts to commit crimes. *See, e.g.,* ALLAN FARNSWORTH, *CONTRACTS* §5 (3d ed. 1999); JOSEPH M. PERILLO, *CALAMARI AND PERILLO ON CONTRACTS* §22 (6th ed. 2009).

ployer and employee (university and professor) regardless of the specific employment arrangement reached between the parties. The *1940 Statement* provides that if the institution wishes to be considered a “real” university it must contractually relate to its faculty members in the way it prescribes. At the same time, the AAUP concedes that free private ordering between a university and its faculty member is legitimate. Indeed, the legitimacy of this arrangement is expressly recognized in the Limitations Clause to the *1940 Statement* and in the statements from the AAUP and AAC that preceded this language.³¹²

Seen from a secularist perspective, academic freedom in a religiously affiliated university is a problem of individual freedom pitted against a bureaucracy guided by religious dogma and bent on censorship. A secular bureaucracy that wished to silence debate and squelch certain points of view would be bad enough in its own right but, because religious dogma is a matter of faith, it is not subject to the modes of argumentation and the demands for evidence that apply in other areas of human inquiry.³¹³ Religion is beyond the pale of rational scrutiny, and as such, has no place in the academy, let alone in university administration.

Seen from a religious perspective, academic freedom in a religiously affiliated university is quite different. It is the relationship of two legitimate freedoms that are sometimes in tension with one another: the freedom of the individual faculty member and the freedom of the institution. From the religious perspective, the individual faculty member should enjoy a wide freedom to teach, to conduct research, to publish, and to speak on matters of public concern, but the individual should not possess the freedom to undermine the university’s mission of structured pursuit of the truth. And the university should not be compelled to provide institutional support to points of view that, in its judgment, would undermine the institution’s mission.

The AAUP *1940 Statement* clearly favors the individual over the institution. That is, the individual faculty member—not the faculty as a whole or the university as an institution—is the primary locus of the right of academic freedom. Indeed, in the estimation of the AAUP, insofar as the university enjoys institutional academic freedom, it is subordinate to the academic freedom of each individual faculty member.³¹⁴

312. For the historical antecedents to the Limitations Clause to the *1940 Statement*, see Matthew W. Finkin et al., *The “Limitations” Clause in the 1940 Statement of Principles*, *ACADEME*, Sept.–Oct. 1988, at 52.

313. For a recent book describing religion in this fashion, see BRIAN LEITER, *WHY TOLERATE RELIGION?* 33–53 (2013).

314. There is some irony in this, given that, as it first arose in the medieval university, academic freedom was a communal ideal that set the university apart from the local bishop, not an individual right that set the individual professor apart from the university. Jean Porter, *Misplaced Nostalgia: ‘Ex Corde’ & the Medieval University*, 128 *COMMONWEAL* 12 (Apr. 20, 2001) (citing HASTINGS RASHDALL, *THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES* (Frederick M. Powicke & Alfred B. Emden eds., 1936)).

Conceiving of the relationship in this fashion renders faculty members as independent contractors rather than as members of a community of scholars together pursuing the truth. Viewed through the prism of the *1940 Statement*, faculty members at a university do not really share anything in common intellectually; they share a location and they share in the use of the same campus facilities; they share in a brand and a source of income (namely, the university as a business and going concern that generates revenue through tuition, grants, and interest on endowment); and they share the students themselves. But according to the AAUP, they cannot share a set of intellectual premises and presuppositions except through voluntary assent that may be broken at any moment by any faculty member. The university can do virtually nothing to maintain an intellectual community as such.

An alternative way to envision academic freedom is as something that each *faculty* member possesses, but also as a *member* within the university community. Indeed, historically, the origin of academic freedom is a collective, institutional freedom of non-interference by the state and the Church in the affairs of the academic *community*.³¹⁵

The Catholic conception of the university is drawn from the Catholic intellectual tradition, and a Catholic university *as such* draws its intellectual identity from this tradition.³¹⁶ In this tradition, universities are rationally structured communities of inquiry pursuing the truth. Catholic universities possess three necessary characteristics: first, they engage in rational inquiry in pursuit of the truth; second, they understand the truth as unitary such that natural reason and religious faith—together and symbiotically—facilitate inquiry into a greater understanding of reality; and third, they regard the truth as objective—that it is independent of human cognition. In addition, as noted above, historically in Catholic universities the discipline of philosophy has organized the other disciplines, identified their respective relationships, and policed their respective boundaries.

The Catholic conception of the university requires academic freedom. Indeed, this freedom is necessary for faculty members to pursue the truth within their respective disciplines, be it physics, history, or law. The Catholic conception of the university also entails a range of plausible conceptions of academic freedom that differ from the AAUP version. For instance, in a Catholic university, theology is a relevant discipline that produces epistemi-

315. FINKIN & POST, *supra* note 234, at 19–20.

316. Margret O'Brien Steinfelds, *The Catholic Intellectual Tradition* (Aug. 3, 1995), in 1 OCCASIONAL PAPERS ON CATH. HIGHER ED. 3, 5 (1995) (“Catholic intellectual life is central to Catholic identity.”); Jude P. Dougherty et al., *The Secularization of Western Culture and the Catholic College and University*, 2 CURRENT ISSUES IN CATH. HIGHER ED. 7 (1981) (“The Catholic tradition is an intellectual one. It created universities as part of its perennial endeavor to continue the task of *fides quaerens intellectum*. It cannot confidently entrust to the modern non-Christian university the task of pursuing insight into the whole of what has been revealed. It cannot even be sure that secular universities will preserve and hand on the full range of cultural fruits thus far achieved by the Catholic tradition.”).

cally-warranted claims, and it would be inconsistent with that conception of a Catholic university to argue to the contrary.

The Catholic conception of a university does not prescribe a singular, mandatory version of academic freedom. It is indeterminate on how a particular institution instantiates academic freedom because there are reasonably different ways of effectuating academic freedom within a Catholic university. For instance, the fact that the Catholic conception of a university gives theology pride-of-place does not necessarily require that claims that contradict the Catholic faith be proscribed or treated one way rather than another. We believe that a range of reasonable options are available. At one extreme a Catholic university could adopt the AAUP standards in their entirety. At the other extreme a Catholic university could require a loyalty oath with respect to religious belief.³¹⁷ A Catholic university could adhere to a number of reasonable alternatives between these two extremes such as adopting a copious version of academic freedom similar to AAUP but with certain narrowly construed limitations related to its religious mission, or by seeking to ensure the university's Catholic identity not by penalizing faculty for the views expressed in their scholarly work following appointment, but by an exacting scrutiny of faculty candidates at the time of hiring.

Furthermore, there are potentially a wide variety of practical mechanisms that Catholic universities may utilize to protect and preserve their particular instantiations of academic freedom. The consequences of violating a university's policy on academic freedom could include: (i) dismissal from the university,³¹⁸ (ii) denial of financial support for the research or written work, (iii) denial of credit toward tenure or promotion for the research or written work, or (iv) denial of the right to vote on faculty appointments, among many others.

Relatedly, different Catholic universities could reasonably choose to structure their respective communities to provide different forms of academic freedom. Thomas Aquinas College structures academic freedom to privilege central facets of the Catholic intellectual tradition, while the University of Notre Dame "maintains respect for individuals as persons, and

317. Loyalty oaths are still used at a number of Evangelical Protestant colleges, and a select number of Catholic colleges. *See, e.g., Statement of Faith and Educational Purpose*, WHEATON COLL. (Oct. 17, 1992), <http://www.wheaton.edu/About-Wheaton/Statement-of-Faith-and-Educational-Purpose> (noting that the Statement of Faith is reaffirmed annually by the Wheaton College Board of Trustees, faculty, and staff); *Catholic Identity*, CHRISTENDOM COLL., <http://www.christendom.edu/about/catholic-identity/> (last visited Mar. 7, 2019) (noting that "[a]ll professors are Catholic and ALL of them make an Oath of Fidelity to the Magisterium and a Profession of Faith each year in the presence of the Diocese of Arlington's Bishop Michael Burbidge"). Loyalty oaths were employed at public institutions of higher learning in the mid-twentieth century as a way of promoting American political values and combating Communism. *See, e.g., Alexander Guerry, Teachers' Loyalty Oaths*, 23 AAUP BULL. 229 (Mar. 1937).

318. *Cf. Daniel Golden, A Test of Faith*, WALL ST. J. (Jan. 7, 2006, 12:01 AM), <https://www.wsj.com/articles/SB113659805227040466> (recounting how Wheaton College fired a philosophy professor, Joshua Hochschild, after he converted to Catholicism).

lives in the tradition of Christian belief,” but allows for criticism of that belief.³¹⁹

At this point, we do not have a firm view as to the best manner of effectuating the boundaries of academic freedom in the context of a Catholic university.

V. CONCLUSION

Catholic higher education in the United States has struggled with reconciling academic freedom and its commitment to participate in the Church’s mission. Although most Catholic universities have adopted the AAUP conception of academic freedom, it is inherently incoherent. Moreover, the AAUP conception is not the only one available. There are other reasonable conceptions of academic freedom, including conceptions that follow from the Catholic conception of university life. Catholic universities may instantiate academic freedom in a variety of reasonable manners. They should not slavishly adhere to the AAUP.

319. UNIV. OF NOTRE DAME, ACADEMIC ARTICLES 11, art. III, § 2 (2017), https://facultyhandbook.nd.edu/assets/276034/academic_articles_effective_october_1_2017.pdf. See also *Mission Statement*, U. OF NOTRE DAME, <https://www.nd.edu/about/mission-statement/> (last visited Mar. 7, 2019) (“What the University asks of all its scholars and students, however, is not a particular creedal affiliation, but a respect for the objectives of Notre Dame and a willingness to enter into the conversation that gives it life and character. Therefore, the University insists upon academic freedom that makes open discussion and inquiry possible.”).

APPENDIX

I. LOYOLA UNIVERSITY CHICAGO

The 1962 Faculty Handbook for Loyola University Chicago provided as follows:

The primary purpose of education is the free and unhampered communication of truth. Every teacher, therefore, in virtue of his office has not only the right but the duty to participate freely in the search for and the communication of truth. Academic freedom to discover and teach the truth is guaranteed to the teacher; freedom of learning is guaranteed to the student.

Truth, however, being the perceived relationship of the conformity between the mind and its object, must be understood to be its objective. The knower perceives the truth; he does not produce it. It follows that personal sincerity or even subjective conviction is not a criterion of truth or a safeguard against error.

It must be noted that truth is not restricted to positive and experimentally demonstrable physical facts. Over and above the truths which can be arrived at by the use of natural powers, there are other truths which God has revealed and which are even more certain since they are evidenced by the authority of God Himself.

As there can be only one objective truth and as reason and revelation are merely two different paths to truth, whatever is learned by one method cannot be in contradiction to what is learned by another. Any opposition is merely apparent. No teacher therefore should ever teach anything that contradicts certain truth, whether that truth be known to him from its own evidence, from reliable human authority, or from the Catholic Church speaking within its legitimate scope.

Academic freedom, consequently implies not only rights but correlative duties. As a Catholic institution of higher learning Loyola expects all its faculties to exercise their right of academic freedom without teaching anything that violates doctrines of faith or morals of the Catholic Church.

As an American institution it expects all to exercise their right without teaching anything that is contrary to the principles of American government as set forth in the Declaration of Independence and the Constitution of the United States.

Any grave offense against these canons shall be considered just cause for dismissal from the Loyola faculty.

The teacher is entitled to full freedom in research and in the publication of its results, subject to the adequate performance of his other academic duties; but research on other activities for pecuni-

ary return should be based upon an understanding with the University.

The teacher, as a citizen, is free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he 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 he is not an institutional spokesman.

When speaking or writing especially in controversial matters, members of the faculty should state explicitly that their viewpoints do not necessarily reflect the attitude of the University authorities.³²⁰

The statement on academic freedom in Loyola's 2015 Faculty Handbook provides as follows:

Academic freedom guarantees that the university shall not abridge the right of faculty to speak, write, teach, create art and conduct research. All faculty have the right and the duty to participate freely in the search for and the expression of knowledge and truth. It is the policy of Loyola to protect and encourage the academic freedom of all faculty, and to protect faculty members from pressure or influence that would restrict their academic freedom.

Loyola faculty are entitled to freedom in research/scholarship (including artistic accomplishment) and in the publication of the results. They are also entitled to freedom in the classroom in discussing the subject matter of the course, but should avoid persistently interjecting material that has no relation to the subject matter. Although a faculty member is free from institutional censorship or discipline in the exercise of his or her academic freedom, membership on the faculty at Loyola imposes certain obligations. As an educator and person of learning, a member of the faculty should strive at all times to be accurate, exercise appropriate restraint and judgment, foster and defend intellectual honesty and freedom of inquiry, show respect for the rights of others to express divergent ideas and opinions, and refrain from claiming to be an official spokesperson for the University.

Academic tenure helps sustain academic freedom. It contributes to the recruitment and retention of outstanding faculty and works to ensure excellence in the quality of Loyola's educational and research programs. The principles of academic freedom apply to church-related institutions of higher learning, such as Loyola,

320. 1962 FACULTY HANDBOOK, *supra* note 169, at 20–21.

which take into consideration the authoritative teaching and tradition of the church to which the institution is related (in the case of Loyola, the Roman Catholic Church).³²¹

II. CREIGHTON UNIVERSITY

Today, Creighton University has a policy on academic freedom much like the policy at most other universities. It states in part:

Creighton University recognizes that its faculty is entitled to enjoy and exercise, without penalty or fear of reprisal, all the rights of American citizens, and to seek the truth and to state the truth as the faculty member sees it for the advancement of knowledge and the free pursuit of learning by their students.

Freedom in research is fundamental to the advancement of truth. The faculty member is entitled to freedom in research and in the publication of the results, subject to the adequate performance of other academic duties.³²²

It used to be the case, however, that Creighton's Faculty Handbook was quite different in that it contained a "Credo of Creighton." A revised version of the statement is still available on the University's website.³²³ First drafted in 1942, the "Credo" was revised in 1974 and again in 1993. In its original form, the "Credo of Creighton" contained an important statement on academic freedom: "The Creighton University refuses to subscribe to the doctrine that 'academic freedom' may be used as a pretext to teach systems which destroy all freedom. We proudly boast that it has always taught and always will teach the following creed" The "Creed" that that Creighton set forth was more elaborate from 1942 to 1974 than it was in the decades that followed. The earlier version stated: "We believe in God. We believe in the natural right of private property We believe . . . in the teachings of Christ, who held that morality must regulate the personal, family, economic and international life of men if civilization is to endure."

The current version of the "Credo" testifies to the University's Christian, if not specifically Catholic mission and identity. The "Credo" expresses belief in "God, our loving Creator and Father" and in "the teachings and example of Jesus Christ."³²⁴ But the current version of "Credo of

321. 2015 FACULTY HANDBOOK, *supra* note 199, at 34. This is the ninth edition of Loyola's Faculty Handbook.

322. CREIGHTON UNIV., FACULTY HANDBOOK 1, 33 (2016), http://typo3.creighton.edu/fileadmin/user/GeneralCounsel/docs/Faculty_Handbook_2017__complete_.pdf.

323. *Credo of Creighton*, CREIGHTON U., <https://www.alumni.creighton.edu/s/1250/15/site/index.aspx?sid=1250&gid=1&pgid=582&sparam=credo&scontid=0> (last visited Mar. 7, 2019).

324. CREIGHTON UNIV., STUDENT HANDBOOK (2016) (the "Credo of Creighton" is printed on the inside cover of the handbook).

Creighton” no longer sets forth a qualification on the principle of academic freedom.

III. GEORGETOWN UNIVERSITY

Georgetown University, founded in 1789, is the nation’s oldest university operating under Catholic auspices. It’s current policy on academic freedom is set forth in the University’s Faculty Handbook. It provides:

Free inquiry and unconstrained publication of the results of inquiry are at the heart of a university. Our University commitment to academic freedom supports all faculty (and professional librarians) in research, teaching, and professional service in and beyond the University by protecting free inquiry and free expression. Faculty enjoy academic freedom in the classroom, the laboratory, the studio, the library, and all the domains of their academic activity. Academic freedom promotes intellectual honesty and requires respect for the academic rights of others.³²⁵

The Handbook goes on to say that academic freedom is further “reinforced by the institution of tenure.”³²⁶ The only mention of Georgetown’s religious identity with respect to the rights and responsibilities of faculty members is in a section titled “Religious Tolerance” which states that:

Faculty members have a responsibility to respect the religious beliefs and practices of all members of the Georgetown community, and to recognize and respect that Georgetown University is a Jesuit university that is committed therefore to Catholic principles and religious values. Faculty members are under no obligation to conform with respect to their personal beliefs or religious practices.³²⁷

What it means for a faculty member to “recognize and respect” that Georgetown is a Jesuit university committed to Catholic principles and religious values is unclear. Given that Georgetown faculty have, in recent years, been leaders in the movement for same-sex marriage,³²⁸ and advocates for legal protection for partial-birth abortion,³²⁹ “respect” would seem to include the overt repudiation of these principles and values. Furthermore,

325. *Faculty Handbook*, pt. III.C.1, GEORGETOWN UNIV., <https://facultyhandbook.georgetown.edu/toc/section3> (last visited Mar. 7, 2019) [hereinafter *Georgetown Handbook*].

326. *Id.*

327. *Id.* pt. III.C.11.d.

328. This includes Chai Feldblum, a “long-time gay rights activist.” Chai R. Feldblum, WASH. POST, https://www.washingtonpost.com/politics/chai-r-feldblum/gIQAYwUjAP_print.html?noredirect=on.

329. Numerous current Georgetown law faculty have written or advocated in favor of the legal protection of acts that the Catholic Church regards as gravely immoral, including abortion and same-sex relations. *See, e.g.* Robin L. West, GEORGETOWN LAW, <https://www.law.georgetown.edu/faculty/robin-l-west/>; David D. Cole, GEORGETOWN LAW, <https://www.law.georgetown.edu/faculty/david-d-cole/>; Susan Deller Ross, GEORGETOWN LAW, <https://www.law.georgetown.edu/faculty/susan-deller-ross/>

that faculty “are under no obligation to conform with respect to their personal beliefs or religious practices” means that a Jesuit priest *qua* University faculty member may not be disciplined as a faculty member for acting in a way that is contrary to the norms, practices, and beliefs of the Society of Jesus.

In 1995–96, a number of Georgetown faculty and administrators drawn from across University participated in a seminar on the nature and future of Georgetown’s Jesuit and Catholic identity. The seminar produced a document, *Centered Pluralism: A Report of a Faculty Seminar on the Jesuit and Catholic Identity of Georgetown University*³³⁰ in which it addressed the subject of academic freedom in the context of a discussion of Catholic identity. With understated candor, the report acknowledges that the number of scholars “who are willing and qualified to conduct research informed by Catholic thought and concerns . . . are less represented on the Georgetown faculty than they once were”³³¹ and that this has weakened the University intellectually. While forswearing the need to alter the composition of the faculty “in any dramatic way”³³² the document then offers a number of modest ways to increase the Catholic intellectual presence at Georgetown. But welcoming Catholic scholars “does not mean that Catholic ideas – or the people who advocate them – would be permitted to have a limiting influence on scholarly inquiry and discourse.”³³³ The document also describes academic freedom as “the foundation of academic life” and makes plain that “Georgetown cannot tolerate any attempt to silence voices arguing for controversial conclusions, including those that may be contrary to those of the Roman Catholic Church. Only by open and free discussion

Nan Hunter, GEORGETOWN LAW, <https://www.law.georgetown.edu/faculty/nan-hunter/>; Naomi Mezey, GEORGETOWN LAW, <https://www.law.georgetown.edu/faculty/naomi-mezey/>; Jill Morrison, GEORGETOWN LAW, <https://www.law.georgetown.edu/faculty/jill-morrison/>; Louis Michael Seidman, GEORGETOWN LAW, <https://www.law.georgetown.edu/faculty/louis-michael-seidman/>; Wendy Webster Williams, GEORGETOWN LAW, <https://www.law.georgetown.edu/faculty/wendy-webster-williams/>. Perhaps most scandalous of all, the late Robert Drinan, a Jesuit priest and long time Georgetown law professor, frequently spoke out in favor of abortion on demand, including partial-birth abortion, a point conceded by friends and critics alike. See Raymond A. Schroth, *Hyphenated Priest: Robert Drinan’s Mixed Legacy*, COMMONWEAL (April 19, 2010), available at <https://www.commonwealmagazine.org/hyphenated-priest>; Peter Sprigg, *Robert Drinan, Infanticide, and the “Unthinkable,”* FIRST THINGS (April 30, 2007). Tragically, Drinan wrote two editorials in favor of the legal right to kill an unborn child through a technique generally known as partial-birth abortion. See Robert F. Drinan, *Posturing on Abortion*, N.Y. TIMES (June 4, 1996), available at <https://www.nytimes.com/1996/06/04/opinion/posturing-on-abortion.html>; Robert F. Drinan, *Late-Term Abortion Veto Merits Analysis*, NAT. CATH. RPTR. (May 31, 1996).

330. Bruce Douglass, *Centered Pluralism: A Report of a Faculty Seminar on the Jesuit and Catholic Identity of Georgetown University*, reprinted in ENHANCING RELIGIOUS IDENTITY: BEST PRACTICES FROM CATHOLIC CAMPUSES 69–90 (John Wilcox & Irene King eds., 2000).

331. *Id.* at 76, ¶ 30.

332. *Id.* ¶ 31.

333. *Id.* ¶ 32.

of the most contentious topics can this University perform its scholarly function effectively.”³³⁴

In its “Policy on Speech and Expression,” Georgetown University cites to its commitment to the “Catholic and Jesuit tradition” as the reason for its commitment “to free and open inquiry, deliberation and debate in all matters, and the untrammelled verbal and nonverbal expression of ideas.”³³⁵ And so the University seeks to give faculty, students and staff “the broadest possible latitude to speak, write, listen, challenge, and learn.”³³⁶ Although members of the University community will often hold different, even contradictory views, “[d]eliberation or debate may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or ill conceived.”³³⁷ Rather, the role of the University in such an instance is to function as a neutral arbiter “[f]ostering the ability of members of the University community to engage with each other in an effective and responsible manner.”³³⁸ Although members of the community “are free to criticize and contest the views expressed by other members of the community, or by individuals who are invited to campus, they may not obstruct or otherwise interfere with the freedom of others to express views they reject or even loathe,” and “the University has a solemn responsibility not only to promote a lively and fearless freedom of deliberation and debate, but also to protect that freedom when others attempt to restrict it.”³³⁹

IV. UNIVERSITY OF NOTRE DAME

While similar to Georgetown’s, the University of Notre Dame’s Faculty Handbook, is different in several important respects. It describes academic freedom not simply as a right, but as a source of responsibilities, and it situates the exercise of academic freedom within the context of a self-consciously Christian university.

The Notre Dame Faculty Handbook declares that “[f]reedom of inquiry and freedom of expression are safeguarded by the University.”³⁴⁰ Although the “rights and obligations” [sic] of academic freedom take “diverse forms” for faculty, students, and staff, Notre Dame says that “these freedoms derive from the nature of the academic life and accord with the objec-

334. *Id.* ¶ 33.

335. Georgetown Handbook, *supra* note 325, pt. IV.L. The robust nature of the policy and the fact that it was recently adopted (June 8, 2017) appears to be Georgetown’s response to the recent interference with the rights of speakers to speak and audiences to hear them that have taken place on a number of college campuses (Middlebury, UC Berkeley, Claremont, etc.). Sadly, this interference has sometimes taken the form of physical assaults and other acts of violence.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. ACADEMIC ARTICLES, *supra* note 319, at 11, art. III, § 2.

tives of the University as a community that pursues the highest scholarly standards, promotes intellectual and spiritual growth, maintains respect for individuals as persons, and lives in the tradition of Christian belief.”³⁴¹

V. BOSTON COLLEGE

Boston College’s policy on academic freedom appears in the Statutes of the University. The policy provides:

All persons serving in instructional or research capacities, whether faculty members or adjunct faculty, whether serving under full-time or part-time appointments, are guaranteed the enjoyment of academic freedom. They have not only the right, but also the duty, to participate fully in the search for and the communication of truth. It is the policy of Boston College to encourage full freedom in teaching, discussion, research and publication and to protect members of the faculty, whether tenured or non-tenured, against pressures and influences from within or from outside the University which would restrict them in the exercise of freedom.³⁴²

At the same time, Boston College insists that scholars must exercise this freedom in a responsible fashion.

Academic freedom in no way lessens the responsibility of faculty members to the strictest canons of scholarship and respect for truth. In the classroom, a faculty member is entitled to freedom in instruction, but should not persistently intrude material which has no relation to his subject.

According to accepted standards of the academic profession, while faculty members speaking or writing as citizens should be free from institutional censorship or discipline, their special position in the community imposes special obligations. As scholars and educational officers, they should be aware that the public may judge their profession and their institution by their utterances. Hence, they should at all times be accurate, exercise appropriate restraint, show respect for the opinion of others, and make it clear when they are not institutional spokesmen.³⁴³

The language of Boston College’s policy on academic freedom is generic to a fault. It could have been lifted from the policies of any number of American universities. Moreover, the subsequent passage, reminding faculty that the exercise of academic freedom calls for responsibility, does not qualify the right in any meaningful sense. This is not a mother (alma mater) telling her son to obey the curfew or forfeit use of the car. This is

341. *Id.*

342. *The University Statutes*, BOSTON COLLEGE, ch. II, § 5, pt. A, <http://www.bc.edu/offices/bylaws/statutes.html#ch2sec5> (last visited Mar. 7, 2019).

343. *Id.* ch. II, § 5, pt. B.

instead a kind of avuncular advice—a friendly reminder borne from experience. The first reminder is that for the responsible exercise of academic freedom, scholars should look inward, adhering to “the strictest canons of scholarship and respect for truth.” The other “limitations” on the exercise of academic freedom are likewise prudential. A teacher should “at all times be accurate, exercise appropriate restraint, [and] show respect for the opinions of others.” A teacher may indulge in commentary outside of his field of competence, but “should not persistently intrude material which has no relation to his subject.”

VI. UNIVERSITY OF DAYTON

The University of Dayton’s policy on academic freedom is set forth in the University’s Faculty Policy and Governance Handbook. It provides: “All members of the faculty, whether tenured or not, are entitled to academic freedom as set forth in the *1940 Statement of Principles on Academic Freedom and Tenure*, formulated by the Association of American Colleges and the American Association of University Professors and endorsed by over one hundred other academic organizations.”³⁴⁴

Elsewhere, the Faculty Handbook describes Dayton’s Catholic identity in relation to academic freedom: “As a Catholic University, it accepts the validity of revealed as well as of reasoned truth and is committed to genuine and responsible academic freedom supported by proper respect for the Church’s Magisterium.”³⁴⁵ The policy does not specify what this mandated “proper respect” entails.

344. *University of Dayton Faculty Policy and Governance Handbook*, *supra* note 107, at 46.

345. *Id.* at 13.