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UNIVERSITIES AS KNOWLEDGE INSTITUTIONS: A REPLY TO PROFESSOR JACKSON

by: Tom Ginsburg*

I am grateful for Professor Vicki Jackson's engagement with my scholarly work, and I want to take this opportunity to react to some of hers in one of the areas in which our concerns overlap. As Professor Jackson describes, in recent years she has been working on the important topic of what she calls "knowledge institutions in constitutional democracy."¹ This focus is appropriate as it addresses a very central source of the current malaise plaguing many constitutional democracies around the world. The crisis of democracy in the 21st century is not only one of economic inequality, institutions, or political polarization: it is also epistemic.

Can democracy survive in the era of fake news, misinformation, disinformation, and weapons of mass distraction? As I write, the leading Republican candidate for President, Donald Trump, has cloaked himself in the Q-Anon conspiracy theory.² As we are flooded with bits and bytes of data, sorting what is accurate is a challenge to each of us and collectively as a society. The key intermediaries in society to help us with this process are knowledge institutions. Professor Jackson includes the free press, courts, bureaucracies like the Census Bureau, and higher education as being examples of institutions that are focused on producing data and information that is as accurate as possible.³ They play a critical role in democracy's endurance.

In this reply, I want to talk about one particular form of knowledge institution, the university. It is a central feature of what Karl Popper called "the open society."⁴ All knowledge in an open society is provisional, and it is the practice of continuous interrogation of settled truths that allows us to move knowledge forward. Progress is made by questioning received wisdom, both incrementally and sometimes by

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1. See, e.g., Vicki C. Jackson, *Knowledge Institutions in Constitutional Democracies: Preliminary Reflections*, 7 CANADIAN J. COMPAR. & CONTEMP. L. 156, 156 (2021).

2. David Klepper & Ali Swenson, *Trump Openly Embraces, Amplifies QAnon Conspiracy Theories*, AP NEWS (Sept. 16, 2022), <https://apnews.com/article/technology-donald-> [https://perma.cc/ZYD2-8RQE].

3. See Vicki C. Jackson, *Knowledge Institutions and Democratic Erosion: The Invaluable Contributions of Tom Ginsburg*, 10 TEX. A&M L. REV. 627, 661 (2023), <https://doi.org/10.37419/LR.V10.I4.5>.

4. See generally KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES (1945).

rejecting entire paradigms and developing new ones. Jackson quotes Peter Byrne, who argues that the idea of scholarship “presupposes a goal of truer knowledge,” which assumes that knowledge production is always contingent.⁵ While universities are not the only institutions capable of placing this vision at the center of their operations, truth-seeking is surely a core goal.

Are current universities in the United States up to this task? I am starting to wonder. Precisely because of the authoritative role that universities play in the production of knowledge and the training of young minds, they have become targets for forces in society that are not particularly interested in the discovery of truth. The very openness of universities, essential for them to accomplish their mission, means that they can hardly exclude those who seek a platform to perform political speech, unrelated to truth.

Political polarization threatens universities in several ways, and there is a reason we are seeing a rise in attacks on higher education in an era of divided politics. When political parties approach parity in a divided society, political combat becomes more intense, as even a small shift in votes can generate a winner-take-all outcome.⁶ Seeking every advantage possible, political actors seek toeholds in new spheres. Universities are both arenas in this regard, but also, more frequently, soft targets to use as punching bags to mobilize anger outside the ivory tower. In many countries, universities are seen as reflecting the particular values of particular groups, and this is no accident.⁷ The values held by universities as knowledge institutions naturally push them toward cosmopolitan and liberal norms because knowledge should be sought from whomever and wherever it inheres. This does not and should not translate into a political litmus test, and perhaps universities should take special care to incorporate the views of the modal citizen into the discussion, in order to serve the society of which they are part. But it does mean that those forces in society that oppose cosmopolitan and liberal values will distrust and perhaps even target universities.⁸ Since our era is one of populism that explicitly

5. Jackson, *supra* note 1, at 165 (quoting J. Peter Byrne, *Neo-Orthodoxy in Academic Freedom*, 88 TEX. L. REV. 143, 154 (2009) (book review)).

6. See, e.g., As Partisan Hostility Grows, Signs of Frustration with the Two-Party System, PEW RSCH. CTR. (Aug. 9, 2022), <https://www.pewresearch.org/politics/2022/08/09/as-partisan-hostility-grows-signs-of-frustration-with-the-two-party-system/> [<https://perma.cc/3HHZ-B7LR>].

7. See, e.g., Anthony Kuhn, *China Steps Up Crackdown on Liberal Universities*, NPR (Sept. 8, 2017, 4:30 PM), <https://www.npr.org/2017/09/08/549549998/china-steps-up-crackdown-on-liberal-universities> [<https://perma.cc/G5J2-FNCG>].

8. Cf., e.g., Michael T. Nietzel, *New from Pew: A Deepening Distrust of Higher Education and Other American Institutions*, FORBES (Aug. 20, 2019, 8:36 AM), <https://www.forbes.com/sites/michaelt Nietzel/2019/08/20/new-from-pew-a-deepening-distrust-of-higher-education-and-other-american-institutions/?sh=442cf4f145f3> [<https://perma.cc/8P9F-LWJG>].

frames itself against liberalism and cosmopolitanism, conflict is inevitable.⁹

To defend against the forces outside of knowledge institutions, some claim of autonomy is required. In the case of universities, that claim rests on the notion of academic freedom. This norm, which is found in different forms in many countries, holds that the university administration itself, and to some degree the society, must allow professional researchers and teachers to pursue knowledge wherever it takes them. Knowledge discovery is hard work, and requires questioning of orthodoxies. Those who undertake this task should be protected from retaliation and politicization of their work.

In the United States, the concept of academic freedom emerged during the Progressive era and was closely tied to the social sciences.¹⁰ Whereas natural sciences were seen as a zone free of political influence, social sciences by their nature dealt with issues that had distributive consequences for society. This meant that there was some risk of backlash from private donors who bankrolled some universities. In 1915, the American Association of University Professors (AAUP) issued a “Declaration of Principles,” which became a foundational text for a rapidly expanding higher education sector.¹¹ Other texts that have become touchstones of academic freedom are the American Council on Education’s 1925 *Conference Statement on Academic Freedom and Tenure*,¹² the AAUP’s 1940 *Statement of Principles on Academic Freedom and Tenure*,¹³ and its 1967 *Joint Statement on Rights and Freedoms of Students*.¹⁴ These statements confronted various waves of repression, many of which involved anti-communist sentiment.¹⁵

Today we face a new wave of threats, arguably the most severe since the 1950s. The sources of threat are threefold: growing state regulation, partisan threats to state funding, and growing demand that universities make social justice their central mission. Political polarization has led to an increasing deployment of state power to constrain discourse. Drawing on old currents of anti-intellectualism in the United States, politicians are proposing eliminating tenure, and passing bills

9. See, e.g., JAN-WERNER MÜLLER, *WHAT IS POPULISM?* (2016).

10. Joan W. Scott, *Knowledge, Power, and Academic Freedom*, 76 *SOC. RSCH.* 451, 451 (2009), <https://doi.org/10.1353/sor.2009.0029>.

11. See Edwin R. A. Seligman et al., *General Report of the Committee on Academic Freedom and Academic Tenure: Presented at the Annual Meeting of the Association: December 31, 1915*, 1 *BULL. AM. ASS’N U. PROFESSORS* 15 (1915), <https://doi.org/10.2307/40216731>.

12. *Academic Freedom and Tenure*, 31 *BULL. AM. ASS’N U. PROFESSORS* 113, 114–15 (1945) (reproducing the “1925 Conference Statement”).

13. *Id.* at 116–18 (reproducing the “1940 Statement of Principles”).

14. *Joint Statement on Rights and Freedoms of Students*, 53 *AAUP BULL.* 365 (1967).

15. See generally DANIEL GORDON, *WHAT IS ACADEMIC FREEDOM? A CENTURY OF DEBATE, 1915–PRESENT* (2022).

that seek to restrict discussion of certain controversial issues.¹⁶ These bills form a profound threat to academic freedom.

Regulation is not the only threat wielded by the state. Another threat is funding. Where will money come from to engage in the continuous and rigorous inquiry that defines universities? In the United States even private universities are quite dependent on government money, in the form of large grants from various research agencies in the federal government.¹⁷ The reality of state funding is even more stark for state-funded institutions. This dependence is a source of threat to the production of knowledge. Government actors naturally want funding for direct research which has applied benefits for the society, in the form of new businesses, new science, and new solutions to social problems, but the benefits of academic research are in many cases quite indirect.¹⁸ In some sense, the demand for applied knowledge risks distorting universities as knowledge institutions. Knowledge institutions must tell the truth, but whether that leads to instrumental benefits for society in specific cases is neither here nor there. Universities have a duty to steward civilizations' store of collected wisdom and to explore basic science, as well. Indeed, one might argue that the pursuit of knowledge for its own sake is what gives universities the credibility to serve as authoritative sources of information on policy-relevant questions.

Another source of threat in our era is the desire to turn the university from a knowledge institution into a social justice institution. I am as in favor of social justice as any other native of Berkeley born in the sixties, but there are ways in which the social justice agenda can conflict with the knowledge production agenda. When certain questions are taken off the table because they offend particular groups in society, universities lose their credibility as neutral producers of knowledge. Instead, they will be seen as beholden to groups that simply yell loudly. When journals announce that academic freedom has limits when it comes to the feelings of certain groups, they are foregoing the pursuit of truth for the comfort of ideological conformity. One recent example was an editorial published recently in *Nature Human Behaviour*, which began with the statement that “[a]lthough academic free-

16. See, e.g., Adam Barnes, *Texas and Florida Take Steps to Limit Professor Tenure at State Schools*, HILL (Apr. 21, 2022), <https://thehill.com/changing-america/enrichment/education/3274661-texas-and-florida-take-steps-to-limit-professor-tenure-at-state-schools/> [<https://perma.cc/NBN2-NXYW>].

17. See Emma Whitford, *States Spent \$2.68 Billion on Private Colleges in 2020*, INSIDE HIGHER ED. (May 27, 2021), <https://www.insidehighered.com/quicktakes/2021/05/27/states-spent-268-billion-private-colleges-2020> [<https://perma.cc/2HL3-X65Z>].

18. See generally Rachel Heyard & Hanna Hottenrott, *The Value of Research Funding for Knowledge Creation and Dissemination: A Study of SNSF Research Grant*, 8 HUMANS. & SOC. SCIS. COMM'NS, no. 217, 2021, <https://doi.org/10.1057/s41599-021-00891-x> (evaluating some of the indirect impacts of research).

dom is fundamental, it is not unbounded.”¹⁹ The editorial went on to argue that research (presumably otherwise strong enough to merit publication) would be withheld if it “could reasonably be perceived to undermine . . . the rights and dignities of an individual or human group on the basis of socially constructed . . . human groupings.”²⁰ While this might at first seem unobjectionable, note that it considers the harms, not to research subjects themselves, but to third parties.²¹ Rights and dignities are undefined but have potentially capacious application. It is not hard to imagine how research that comes up with the “wrong” results on matters of race, gender, and sexuality would be withheld by the prestigious journal in the interests of “protection.” In my own classes, would I be prevented from touching on the Israel-Palestine conflict because the topic is sensitive? If offense is a basis for taking inquiry into this conflict off the table, then no progress will be made, and the university cannot provide any knowledge of any use to our democratic deliberation. Examples could be multiplied: What are the sources of our wave of transgender-identifying individuals? Identity is a touchy subject. But identities are also always changing and multiplying, and that itself is an interesting topic of potential research.

I digress into the particular. To return to the general, Professor Jackson’s idea of knowledge institutions as important for democracy is clearly correct. There are important implications for the ways in which we manage the core knowledge institution closest to home, namely the modern university. Above all, that requires re-centering the pursuit of knowledge at the core of the mission. If we fail to do this, we should not be surprised if forces of repression ramp up their attacks, and that in turn has consequences for our democracy as a whole.

19. Editorial, *Science Must Respect the Dignity and Rights of All Humans*, 6 NATURE HUM. BEHAVIOUR 1029, 1029 (2022), <https://doi.org/10.1038/s41562-022-01443-2>.

20. *Id.* at 1030.

21. *See id.* at 1029.

