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The Personal Ethics of Academic Freedom: Problems of Knowledge and Democratic Competence

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Abstract

The following essay takes up Robert Post's influential account of academic freedom in order to consider the role of personal ethics in practices surrounding academic freedom. *Personal ethics* refers to the principles that guide our decisions independent of self-interest and independent of attention to legal constraint, including legal constraint regarding professional ethics. The essay begins by outlining and proposing some revisions of Post's account. It then considers three topics that are connected with academic freedom: the responsibilities of academics in extramural speech; in professional evaluation of research; and, finally, in tenure decisions. Drawing on the modified version of Post's account, as well as relevant empirical research, the essay argues that difficulties arise in each of these areas with respect to the nature and purposes of academic freedom. It goes on to contend that we may formulate concrete, personal ethical guidelines that would help academics resolve these difficulties.

Robert Post has articulated one of the most compelling and rigorous accounts of academic freedom in relation to the First Amendment.¹ The following essay takes Post's account as a starting point to consider some issues that are left out of a purely legal treatment of academic freedom. Its overarching contention is that the analysis; understanding; and, ultimately, even the practice of academic freedom would benefit from attention to personal ethics. By *personal ethics* I mean the principles we use to make decisions independent of self-interest and independent of attention to legal constraint. As this phrasing suggests, self-evaluation is the fundamental form of personal ethical evaluation. Only in more extreme cases does the evaluation of others

enter at all. Even then, it is distinct from legal requirements, including professional ethics (e.g., regarding plagiarism or sexual harassment), a topic treated by the AAUP and other bodies and subject to institutional enforcement.² (Having noted this distinction, I will for simplicity of expression use *ethics* alone to refer to personal ethics, because that is the focus of my analysis.) In keeping with this, in my usage, *personal ethics* does not refer to a means of inflicting nonlegal punishment, such as shame, on other people; that is more aptly termed *moralism*. My first and fundamental claim, then, is that academic freedom is not only judiciary and institutional. It is also a matter of individual ethical choice. In and of itself, that is not a terribly illuminating or consequential point. Its significance will, I hope, become clear in the ways that ethical considerations may be recruited to address some difficulties in the treatment of academic freedom.

Specifically, in the first section, I outline Post's account of academic freedom in relation to democratic competence and the procedures of academic disciplines. I go on to raise some objections to his account, suggesting that his appeal to competence may need to be broadened. Having sketched this account of rights in academic freedom, I turn to the issue of associated responsibilities, focusing on the assertion that, in extramural speech, academics have certain responsibilities correlative to their intramural academic freedom rights. This section takes up some commonly asserted responsibilities, arguing that they should be understood ethically, rather than legally. This has concrete consequences for disciplinary actions by universities with respect to faculty, including the Salaita case. The following sections of the essay turn to academic practices proper. The most obvious difficulties with Post's account have to do with its apparent acceptance of disciplinary ossification. This issue has consequences at the level of individual decisions about disciplinary evaluation processes (e.g., refereeing for publication, awarding of grants) and about institutional evaluation processes (e.g., retention and tenure). The third and fourth parts of the essay address ethical issues in these areas.

Robert Post on Academic Freedom

In Post's account of academic freedom, both free speech and academic freedom are underwritten by the needs of democratic self-government—government by the people. He distinguishes two kinds of need, or value, in this context. First, there is *democratic legitimation*. Post explains that “constitutional democracy in the United States seeks to instantiate this value [of self-government] by rendering government decisions responsive to public opinion.” It does this “by guaranteeing to all the possibility of influencing public opinion” (17). That guarantee serves to legitimate the claims of democratic self-government. More simply, it makes democratic self-government a genuine process of popular participation, or at least possible participation. This democratic legitimation is the function and therefore the legal justification of free speech

as guaranteed by the First Amendment. By its nature, this guarantee covers everyone, including professors. As Post explains, “If an expert chooses to participate in public discourse by speaking about matters within her expertise, her speech will characteristically be classified as fully protected opinion” (43).

Post differentiates democratic legitimation from democratic competence. He explains that “democratic competence refers to the cognitive empowerment of persons within public discourse, which in part depends on their access to disciplinary knowledge. Cognitive empowerment is necessary both for intelligent self-governance and for the value of democratic legitimation” (33–34). More precisely, the functioning of self-government requires that the people have access to the knowledge necessary to make their deliberations fit their goals. (I am slightly extending Post’s argument here. I take it that the extension is consistent with his view. However, the extension will also have consequences for my criticism and limited revision of Post’s account later on.) Specifically, in determining their political choices, people have certain broad goals. The relations between people’s goals and the representatives or policies they support are mediated by beliefs. These include beliefs guided by “expert knowledge,” as Post says—thus knowledge that requires systematic research to uncover. When their beliefs are mistaken, people may make democratic choices that do not reflect their goals. To take a simple example, I recently had to vote on a new sewage project for my township. I want a safe and ecologically friendly sewage system. But I am in no position to determine on my own whether the new proposal fulfills those goals. I need expert knowledge—from engineers, environmental scientists, public health experts, and so on. The availability of that knowledge is necessary for my democratic competence.

Post argues that this democratic competence is what undergirds legal protection for academic freedom. That academic freedom is not simply a matter of saying whatever one wants to say or believes is true. It is a matter of isolating a “venue outside of public discourse in which the need for producing reliable knowledge subordinates the egalitarian principle of democratic legitimation” (29). Specifically, it is a matter of separating academic research and its evaluation procedures from the mandatory openness of First Amendment guarantees. It is what allows, for example, geneticists to determine that some claims about heredity are illegitimate and others are well-supported or reliable. The reference to geneticists is not accidental. Once one separates a realm of expert knowledge, one is faced with the issue of identifying the experts. Post’s answer is that experts are people who have been institutionally recognized as a competent by recognized authorities in an academic discipline. Thus, expertise and expert knowledge are defined by academic disciplines. In consequence, academic freedom is, fundamentally, the freedom of disciplines to evaluate claims to expertise and claims of knowledge within the field covered by the discipline. In short, “academic freedom safeguards the creation of disciplinary knowledge within universities” (61).

This brief summary obviously loses the complexity and nuance of Post’s account, which I find compelling in many ways. However, I do wonder if the democratic competence criterion is overly limiting on

two grounds. First, it is not clear that all university disciplines really have the consequences for democratic competence that Post cites. Indeed, Post himself writes that we “require criteria to determine which disciplinary practices implicate the value [of democratic competence] and which do not” (96). It seems fairly clear that law and biology will satisfy such criteria (whatever they turn out to be). But what about literary study? Does a refereed argument that Wordsworth is always already self-deconstructing have any bearing on democratic competence? In “Debating Disciplinarity,” Post argues that the humanities operate through the usual forms of disciplinary structure and therefore contribute to knowledge (as defined by disciplines).³ That is certainly the case. But it does not really respond to the problem. The disciplinary structure is what tells us that a poem’s self-deconstruction is “knowledge” (i.e., it counts as knowledge within the conventions of literary study). But it does not indicate that such knowledge has bearing on democratic competence. Worse still, it is not clear that the entire discipline is included, even in cases where the discipline is relevant. For example, in biology it would seem that most of what biologists discuss really does not have much to do with democratic competence. The problem here is not simply that those of us in literary study want to be included in the big tent of academic freedom. The problem is that, legally, academic freedom has not been restricted in this way. Thus, a restriction to “democratically consequential” disciplines or parts of disciplines would not fit jurisprudence.

Post might reasonably respond to these challenges by saying that we must protect all genuine knowledge because we do not know beforehand which knowledge might have bearing on democratic competence.⁴ This makes sense, and is indeed important (even if one remains skeptical that there will ever be a situation in which democratic competence relies on the “knowledge” that Wordsworth’s poetry anticipated Derrida’s view of language). But there is a version of the challenge to which it almost certainly does not apply. That concerns the more esoteric parts of academic disciplines—which is to say, virtually anything that any academic is likely to be working on. Consider all the areas of the sciences that require advanced mathematics. It is simply not the case that advanced mathematics will, or even could, enter into the democratic competence of the vast majority of citizens. In consequence, it would seem that almost all actual disciplinary work is not protected by Post’s criterion.

Post could get around this problem by saying that the knowledge will at least affect the democratic competence of the relevant experts. That is true, and it does, to some extent, justify academic freedom for esoteric research. However, it is a very weak justification, because it would bear only on tiny minorities that would have virtually no direct influence on democratic self-determination. For example, the votes of the small number of experts in certain branches of genetics are very unlikely to have any individual or collective consequences in elections or referenda.

A perhaps more robust response to this problem would be to broaden Post's criteria in a way that is consistent with his general theory. Specifically, we may distinguish between democratic choice and democratic implementation. Democratic choice is, first of all, in the hands of the people. Democratic implementation is, however, largely in the hands of the people's representatives or the delegates of those representatives. Again, any process of democratic choice implies certain goals. Specifying and implementing those goals often require expert knowledge. Even when the electorate votes for a particular sewage project (as in the case of my township), the actual implementation of the project will face unanticipated issues that require decisions. In all such cases, the representatives or their delegates will require expert knowledge. Thus, expert knowledge is often necessary for the competence of the people in democratic decisions. This includes voting, as well as popular initiatives, such as ballot drives or other processes of petitioning or protest. (I will use *choice* as a neutral term for all such processes.) But expert knowledge is not confined to these processes. Such knowledge may also be necessary for the implementation of democratic choice, specifically an implementation that cognitive scientists would refer to as *distributed*. (Distributed knowledge is knowledge that operates across many individuals in their interactions, without any single individual having all the knowledge available in his or her memory.⁵ For example, in a university department, the administrative assistant knows how to fill out forms that the faculty members do not understand, while the faculty members know what constitutes satisfaction of the categories named in the forms.) We may retain a version of Post's terminology, referring collectively to choice and implementation considerations as *distributed democratic competence*.

An account along these lines goes a considerable way toward explaining and justifying academic freedom guarantees. However, it necessarily does not cover all aspects of the topic. Indeed, it raises pressing questions about some common issues in academic freedom. As already noted, the remainder of this essay will consider some of these issues, arguing first of all that the questions they raise are clarified and partially resolved by the introduction of self-evaluative or personal ethical considerations within the general framework proposed by Post, particularly in its modified form. Specifically, there seem to be at least three areas in which self-conscious differentiation among levels of ethical obligation and legal status would be valuable in thinking about academic freedom. One concerns the public sphere, the extramural speech of academics. This area is related to a set of responsibilities that are often viewed as correlative to the privileges of academic freedom. A second area concerns disciplines, which bears on the issue of dogmatism, or disciplinary rigidity. Finally, there are institutions. We need to consider the role of ethical deliberations in tenure decisions, because tenure is a fundamental institutional support for academic freedom and the advancement of disciplinary knowledge. Put differently, there are three kinds of academic role in which ethical concerns enter in relation to academic freedom: first, participant in the public sphere; second, participant in a discipline; third, participant in an

academic institution. In each case, we may distinguish legal rights from, roughly, responsibilities, or, more exactly, personal ethics. I will consider these in sequence.

Ethics of Extramural Speech by Academics

As already noted, Post's account of academic freedom removes academic speech from special treatment when it occurs in the public sphere. Such speech falls under First Amendment coverage, as it would for anyone. This seems unexceptionable. After all, we would hardly want to say that academics are somehow lesser citizens than anyone else, meriting fewer democratic protections and falling outside the realm of democratic legitimation.

On the other hand, many of us share the intuition that there are things that academics should or should not do. In other words, academics have responsibilities. At least academic freedoms are related to responsibilities in the sense that many individual cases are likely to activate concerns of both freedom and responsibility. It is not coincidental that there is a single committee of the Modern Language Association treating academic freedom and professional rights and responsibilities. The AAUP has codified such intuitions in the *Committee A Statement on Extramural Utterances* and elsewhere. Referring to the 1940 *Statement of Principles on Academic Freedom and Tenure*, the Committee A document asserts that faculty members have "special obligations" including the obligation "to exercise appropriate restraint" and "to show respect for the opinions of others."⁶ Most of us would agree that these are obligations, though it is not clear to me that they are "special" to faculty members. On the other hand, many of us would oppose establishing them as legal guidelines. For one thing, they are perniciously vague and thereby appear to allow a broad scope for the denial of academic freedom on the grounds of speech that is not "appropriate" or falls short in "respect for the opinions of others."

The Committee A document goes on to state that "an administration may file charges" against a faculty member "if it feels that a faculty member has failed to observe the above admonitions and believes that the professor's extramural utterances raise grave doubts concerning the professor's fitness for continuing service."⁷ This is a peculiar assertion. The first part seems to allow the filing of charges simply if an administration "feels" that a faculty member has not shown "respect for the opinions of others." But of course someone could "feel" this in cases of harsh critique, which may also appear to lack "appropriate restraint." The document does go on to say that the administration should in addition harbor "grave doubts concerning the professor's fitness for continuing service."⁸ However, the implications of the first part remain, at least informally suggesting that the feeling of disrespect or inadequate restraint may be grounds for formally investigating the faculty member's "fitness for continuing service." Even such an investigation would

have chilling effects on extramural speech.

The topic may be clarified by isolating different thresholds for different kinds of evaluation. The fundamental form of evaluation, with the lowest threshold, is ethical self-evaluation. It is important to have serious ethical standards for one's own "restraint" and "respect for the opinions of others." In other words, when monitoring our own ongoing behavior, we should be keenly sensitive to self-restraint and respect, generally modulating our speech when it is aggressive or disrespectful. It should take a greater lack of restraint and respect for us to condemn the behavior of *others*, even privately. Public dissociation from or disapproval of an individual's lack of restraint or respect should have a still higher threshold. Indeed, it is the most extreme case and should apply only when the ethical benefits of such dissociation are significant (e.g., outweighing the evident disrespect implied by the dissociation). For example, something along these lines is an official option in the University of Illinois "Statutes," which say that "the president may publicly disassociate the Board of Trustees and the University from and express their disapproval of" a faculty member's "objectionable expressions." This might have been invoked in the Salaita case, if the university administration determined that Professor Salaita's extramural speech was sufficiently harmful to the university's credibility or standing or might be confused with an official university position.

Of course, the president of the University of Illinois did not simply dissociate the university from Salaita's statements. The university engaged in severely punitive action. This shifts from *ethical*, as I consider it, to more strictly *legal* concerns. This seems to me not a matter of a still higher ethical threshold, but of a qualitatively different sort of judgment, one that should concern "fitness for continuing service" rather than "restraint." In keeping with this division, if I were writing the Committee A document, I would separate the admonitions toward restraint and so on from doubts about fitness. I would class the former as ethical considerations and the latter as legal issues. This would support the ethical force of the admonitions. But it would remove the possible suggestion that lack of "appropriate restraint" or "respect" provides *prima facie* grounds for initiating actions against a faculty member—not to mention simply terminating a position or withdrawing an employment offer without such investigation.

This still leaves open the question of just what constitutes restraint and respect. Self-monitoring is of no value if it is confined to empty platitudes. One is inclined to interpret these in emotional terms—for example, that one is not restrained if one is upset by the disagreement. But this seems unfair. Sometimes one should be upset by an argument, and cool derogation is hardly something we would wish to call restrained or respectful. Therefore, I propose the following practical guidelines: First, respect involves giving the benefit of the doubt to one's interlocutor. There are many ways in which one might construe an opponent's position or argument. One argumentative strategy is to interpret his or her view in such a way as to make it as stupid as possible, given what he or she has said. This is likely to be rhetorically effective. But it is intellectually disrespectful. A

respectful argument is one that construes an opponent's argument in such a way as to make it as reasonable as possible, given what he or she has said. The point is not to make up a position for him or her, but again to give him or her the benefit of the doubt in cases of ambiguity. Second, as to restraint, this should primarily mean intellectual restraint, which comprises the attempt to adequately articulate logical and empirical arguments in such a way that one's opponent may understand them and respond to them. (Note that one may succeed in being restrained in this sense even when upset and fail even when calm, though it is perhaps easier to succeed when one is calm and fail when one is upset.)

Ethics of Professional Decisions by Academics

The second area in which ethical considerations may benefit our thoughts about academic freedom is, in a sense, at the opposite extremity of academic discourse: our professional evaluations of professional speech—for example, in decisions about publication or the awarding of grants. It may appear that such decisions, protected by safeguards of academic freedom, do not involve academic freedom issues in themselves. However, on reflection it appears that these decisions do involve such issues at an ethical level. Indeed, they raise ethical issues that are in many ways parallel to those that arise in the context of extramural speech. Specifically, in academic publication and grant evaluations, we are, in part, making a determination regarding what speech will be allowed or institutionally supported and what will not be allowed or supported.

On the one hand, academic freedom is the guarantor of the preservation of disciplinary knowledge, as Post stresses. It is what keeps the church, the state—or, in principle, the corporate world—out of biology or literature, letting disciplinary matters be decided within the disciplines themselves. We might refer to this as *discipline-external academic freedom*. But there is a danger to academic freedom in making disciplinary knowledge too insular, too much the preserve of experts with their far-from-disinterested evaluations. Specifically, it risks turning common intradisciplinary ideas into dogma and undermining the intellectual benefits of academic freedom. In other words, it risks the suffocation of what we might call *discipline-internal academic freedom*.

The general idea is widely recognized. Judith Butler puts the point nicely when she writes, “When and if academic norms, understood as professional and disciplinary norms, become the legitimating condition of academic freedom, then we are left with the situation in which the critical inquiry into the legitimacy of those norms not only appears to threaten academic freedom but also falls outside the stipulated compass of its protection.” Basing academic freedom on disciplines would seem to “establish a conservative academic culture and even suppress disciplinary innovation.”¹⁰ Butler slightly overstates the case as the disciplinary commitments are procedural, rather than substantive. In other words, they are not commitments to a particular set of doctrines, but rather to a method—discipline-authorized peer evaluation. But the point is

that the procedural constraints will inevitably tend to favor established doctrines, as I will discuss. As Akeel Bilgrami puts it, dogmatism is “the most pervasive as well as the most insidious . . . form of threat to academic freedom.”¹¹ Post himself stresses that “there is thus a tension built into the core of academic freedom between, on the one hand, expanding the frontiers of existing knowledge, and, on the other hand, competently exemplifying existing disciplinary standards” (73).

The first point I would like to make here is, simply, that, as individuals, we face the issue of academic freedom in a specific context—when we encounter speech or writing with which we disagree. Our inclination to favor suppression of that speech increases as the disagreement becomes more cognitively extensive and more emotionally aversive. Leaving aside issues of honesty, this is problematic because our cognition and emotion are riddled with biases. Two such biases are particularly important here: in-group bias and confirmation bias. In-group bias is our tendency to judge the products, efforts, personalities, and values of people more favorably if we share a salient identity category (e.g., race, nationality, a theoretical school) with them and less favorably if we categorize ourselves in an opposed identity group.¹² Confirmation bias is our tendency to take evidence supporting our views as confirmatory while setting aside disconfirmatory evidence as merely exceptional.¹³ Both biases have debilitating effects on academic evaluation—as in studies where almost identical articles are accepted for publication when they fit disciplinary doctrine or come from a high-ranking university, but are rejected when they challenge disciplinary doctrine¹⁴ or come from a low-prestige institution.¹⁵ It seems evident that minimal considerations of fairness, as well as professional and intellectual commitments, prompt us to modulate these biases. To do that, we need simple, executable, algorithmic processes.

Of course, there is complexity here. We do not wish to count all alternatives equally. For example, most of us would not wish to count creationism and evolutionary theory as equally plausible simply to counter our biases against creationism. As Judith Jarvis Thompson noted, “We may be excused if we do not regard ourselves as obliged to supply germination space for what goes under the name ‘new ideas in astrology.’”¹⁶ Put differently, even granting the critiques of writers such as Post and Bilgrami, there is some merit to allowing greater scope of options in the “marketplace of ideas.” Good ideas may be dismissed for dogmatic reasons, and current doctrines are almost certainly wrong in some respects. However, the likely partial falsity of a preferred view does not imply that any given alternative is more likely to be true or that all alternatives are equally likely. The question is, how can we allow for giving greater weight to some options (e.g., evolution over creationism) without simply succumbing to cognitive and affective biases and thereby dismissing potentially valuable alternatives?

One simple, initial heuristic is to begin with a presumption that speech should be free and that the burden of proof lies on those seeking to restrict it—including in areas of academic evaluation. This general

presumption may be rendered more precise and rigorous by noting that there are different degrees of proof that might be required, depending on circumstances. In law, as is well known, the burden of justification generally increases when the speech restrictions at issue are not neutral with respect to the content or viewpoint of speech. Converging with these tendencies, the cognitive and affective research noted earlier suggests that we should require particularly strong arguments from ourselves in cases where the speech we are inclined to restrict is unconventional (thus likely to run afoul of confirmation bias) or derives from out-group members (thus contradicts in-group favoritism).

Of course, simply presupposing a burden of proof is insufficient because our cognitive and affective biases may reapply, leading us to overvalue our own debunking arguments. This difficulty may be partially overcome if we require that our argument for speech restrictions (e.g., an argument for rejecting an article) be rebuttable in principle. Allow me to illustrate with a personal example. A few years ago, I wrote an essay arguing that Rabindranath Tagore's stories show a recurrent pattern in which sex-based humiliation is used to make males empathically insensitive to other people's attachment needs. One person objected that everything I argued in the essay had been disproven by Judith Butler. This is not an argument, but a form of personified contradiction. Contrast, for example, an objection that my analysis relied on a natural sexual division that writers such as Butler have challenged. That would permit the response, among others, that my argument requires only that sex categorization, whether biological or social, occur prior to gender socialization. In other words, it presupposes only that there is some plausible sense in which one may refer to sex and gender as distinct, whether or not one takes them both to be socially constructed.

Thus, we have an ethical heuristic: When faced with speech that you are inclined to restrict, assume that the burden of proof lies with those favoring restriction and that this burden of proof increases when the speech presents nonstandard views or derives from an out-group member. Those supporting restriction should articulate their objections to the speech with adequate clarity and specificity so that the author could in principle, rebut those objections.¹⁷ Of course, here, as in other ethical self-evaluations, ethical and practical complications may enter. Perhaps most important in this context, the practical implications of particular knowledge claims may risk harm. As a general ethical principle, one should seek to reduce likely harm. This principle suggests a degree of caution in proceeding with challenges to prevailing beliefs in such areas as medicine (e.g., with respect to the effects of new drugs; of course, this is not simply an ethical issue but also a legal one). Presumably, one needs to be more conservative depending on the practical implications of the putative knowledge. The "burden of proof" criterion will still apply here. But what has to be proven is much less—perhaps that the speech at issue (e.g., an article on the effects of a new drug) has not sufficiently

established the benefits and risks involved in practical applications of that putative knowledge (e.g., in the use of the drug).

Undoubtedly, these heuristic principles will be insufficient to rectify in-group, confirmation, and other biases. That is partly because the guidelines are presumably incomplete (i.e., there are other mechanical procedures that would be beneficial, but I have not thought of them). However, there is also a general insufficiency in ethical guidelines. They rarely outweigh institutional or social-group problems, which require some systemic response. This is where the tenure system enters. Referring to the tension between reproducing disciplinary doctrine and innovating, Post notes that “the tension is practically mediated by the distinction between untenured faculty, who are closely scrutinized for competence, and tenured faculty, who are awarded a generous presumption of competence to facilitate the academic freedom necessary for creating new knowledge” (73). This is, of course, true, at least in principle. However, it raises at least two sets of questions. One set concerns the place of contingent labor in the analysis of academic freedom. That is a complicated issue on which I have nothing useful to say at the moment, beyond the obvious assertion that universities should rely far less on non-tenure-track faculty.¹⁸ The second set of questions concerns the nature of evaluation for retention and tenure. One risk of tenure determinations is that they will eliminate not only incompetent but also simply nonstandard thinkers. And insofar as publication decisions restrict faculty to repeating the clichés of the profession (as just discussed), retention determinations across the probationary period are likely to become powerful means of fostering not simply competence but also conformism.

Ethics of Institutional Evaluation by Academics

In “The Ethics of Tenure Decisions,” I argue that we should only hire people into tenure-track positions with a presumption of tenurability.¹⁹ In other words, it is dishonest—an act of bad faith—to hire someone who we assume will not be tenurable after the probationary period. If we fulfill our ethical obligations during the hiring process, then the presumption of tenurability should remain in force throughout the probationary period unless we have positive reason to change our evaluation. In other words, the burden of proof lies not with the tenure candidate but with the committee or department that would deny the candidate retention or tenure. For example, if one expected a book manuscript by the candidate’s third year, one might alter one’s evaluation of the candidate if he or she has not produced such a manuscript at that time. On the other hand, one might add to this the requirement that the initial expectation of the candidate should be reasonable. For example, suppose a candidate published the entirety of his or her dissertation in articles before being hired in a particular position. It may be unreasonable to expect that the person would be able to publish the dissertation as a book, given the prior publication of the chapters as articles. Similarly, it may be unreasonable to expect that the candidate would produce an entirely new book in that period.

These are ethical decisions that bear on tenure. However, they are largely independent of issues of academic freedom. Issues of academic freedom enter here, as they do in the case of publication or grant decisions, with deliberations on speech and judgments about speech as extending knowledge. The two sets of issues are, however, related. If I am right about the presumption of tenurability (not as a legal constraint, but as an ethical guideline) and also right about the ethical value of heuristic responses to bias in publication evaluation, then a set of heuristic processes would also seem appropriate to our ethical self-regulation in retention and tenure determinations.

Here, as in so many other areas, the fundamental ethical principle is one of self-criticism. This enters most clearly when the candidate's work has achieved professional acceptance, but is at odds with one's own evaluations. For example, a candidate's book manuscript has been accepted by an academic publisher. However, one's own response to the book is quite negative. Here, the presumption of tenurability and the self-criticism that responds to confirmatory bias suggest that one should discount one's own evaluation, deferring to the professional procedures that have established the work as competent by professional standards. This is probably relatively uncontroversial. Cases of tenure committees or administrators dismissing professional judgments are far from unknown. But these are just the sort of cases that are paradigmatic of academic freedom issues.

More controversially, in retention and tenure cases, one should, I believe, extend the ethical compensation for cognitive and affective biases. Specifically, in these cases, one needs to recognize that the profession as a whole is pervaded by confirmatory and other biases. In consequence, there should be *professional* as well as *individual self-criticism*, a degree of skepticism about the judgments of one's profession. Here, we come to the converse of the situation with academic publication decisions. Rather than questioning our own negative response to a work, we should restrain our tendency to question our own positive response to a work.

More precisely, members of a tenure committee or the tenured faculty of a department may read a candidate's manuscript that has been rejected by university presses. In reading the manuscript, they may agree with the evaluation of the referees for those presses. In that case, no reason to question professional standards arises. (This concurrence may, of course, still be mistaken. However, one gives up on evaluation entirely, and thus on eliminating incompetence, if one does not require any positive response to a candidate's work.) The more significant case arises when one reads a candidate's rejected manuscript and thinks that the rejection was misguided. Despite professional evaluations, one judges the manuscript to be a valuable contribution to knowledge. One's inclination in that case is likely to be one of rejecting one's own evaluation in favor of professional standards. However, recognizing the pervasiveness of professional conformism

should lead one to take seriously one's own positive response in this case. In other words, one should be self-consciously, ethically self-critical about one's spontaneous, conformist self-criticism.

Of course, biases do not only negatively affect evaluation. They may also positively affect evaluation. Thus, one should not simply assert one's positive views dogmatically. The ethical principle of self-criticism applies again here. But it applies in a correlate of the second heuristic principle enumerated above—the articulation of rebuttable criticisms of the work one is rejecting. Here, that heuristic bears not on rejection but on acceptance, thus not on a negative assessment of the work, but on a positive assessment. Specifically, when faced with a professionally disparaged work that we admire, we should give a *prima facie* authority to that admiration. But we should also test our response by our ability to articulate rebuttable arguments that the work does advance knowledge, despite the rejection by referees. Those arguments may themselves include a rebuttal of the referees' judgments or a demonstration that the referees' claims do not constitute rebuttable arguments, but are, say, mere vituperation.

These principles apply first of all to members of a tenure committee or tenured members of the tenure candidate's department, since they all presumably share some degree of professional competence in the field. The same general principles apply up the administrative chain of decisions. In consequence, it should be very difficult for administrators to overturn decisions by faculty in the relevant discipline, with the overturning of positive decisions being much rarer than the overturning of negative decisions (perhaps contrary to actual practices).

In sum, we once again find that ethical procedures of self-monitoring have an important relation to academic freedom, in this case the institutional part of academic freedom that bears on tenure and related decisions. Specifically, we once again find the ethical principles of giving the benefit of the doubt to opponents while engaging in correlated self-criticism and articulating one's opposition in clear and rebuttable terms. The difference in this case is that the self-criticism applies twice and in different ways. First, it applies to one's own response in the case of negative evaluation (as is always the case). Second, and more unusually, it applies to one's inclination to reject one's positive response for conformist reasons. In each of these cases, our ethical self-monitoring is a response to cognitive and affective biases that would otherwise have deleterious effects on the advancement of knowledge. In this way, these ethical procedures derive their relevance to academic freedom from grounding of academic freedom in the advancement of knowledge for democratic competence. This is, perhaps, particularly clear if such competence is understood in the slightly extended sense that encompasses both democratic choice and the implementation of democratic choice. As one would expect, in certain cases these procedures must be supplemented by more general ethical principles, such as minimizing harm, when the evaluations are not confined to abstract knowledge, but have direct, practical consequences (e.g., for medical treatments).²⁰

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Notes

¹. See Robert Post, *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State* (New Haven: Yale University Press, 2012). Unless otherwise noted, citations of Post refer to this work.

². See AAUP, "Statement on Professional Ethics" (1966), <http://www.aaup.org/report/statement-professional-ethics>. I should note that personal ethics is also different from the "ethical practice" treated by Joan Scott. Scott takes up ethics in the very broad sense of what "defines a distance between what is and what ought to be." (Joan Scott, "Academic Freedom as an Ethical Practice," in *The Future of Academic Freedom*, ed. Louis Menand [Chicago: University of Chicago Press, 1996], 164.) Scott is quoting Michel de Certeau, *Heterologies: Discourse on the Other*, trans. Brian Massumi (Minneapolis: University of Minnesota Press, 1986), p. 199.

I should also note that invoking ethics in the application of academic freedom to other people, as I am doing here, is different from Ronald Dworkin's project. Specifically, Dworkin seeks to justify academic freedom by an appeal to the ethical autonomy of the individuals exercising that freedom. See his "We Need a New Interpretation of Academic Freedom," in Menand, *The Future of Academic Freedom*, 181–198.)

³. Robert Post, "Debating Disciplinarity," *Critical Inquiry* 35 (2009): 749–70.

⁴. In saying this, I am drawing on Post's response to this question in a personal communication.

⁵. See Edwin Hutchins, *Cognition in the Wild* (Cambridge, MA: MIT Press, 1995).

⁶. AAUP, "Committee A Statement on Extramural Utterances" (October 1964), <http://www.aaup.org/report/committee-statement-extramural-utterances> (members-only content).

⁷. Ibid.

⁸. Ibid.

⁹. "Statutes," University of Illinois, last modified January 24, 2013, <http://www.bot.uillinois.edu/statutes>, sec. X.2.c.

¹⁰. Judith Butler, "Critique, Dissent, Disciplinarity," *Critical Inquiry* 35 (2009): 774, <http://www.egs.edu/faculty/judith-butler/articles/critique-dissent-disciplinarity/>.

¹¹. Akeel Bilgrami, "Truth, Balance, and Freedom," in *Chomsky Notebook*, ed. Julie Franck and Jean Bricmont (New York: Columbia University Press, 2010), 340, <http://www.3quarksdaily.com/3quarksdaily/2011/04/truth-balance-and-freedom.html>.

¹². On identity group prejudices, see, for example, John Duckitt, *The Social Psychology of Prejudice* (New York: Praeger, 1992), 68–69.

¹³. See, for example, Richard Nisbett and Lee Ross, *Human Inference: Strategies and Shortcomings of Social Judgment* (Englewood Cliffs, NJ: Prentice-Hall, 1980), 238–42.

¹⁴. See Michael Mahoney, "Open Exchange and Epistemic Progress," *American Psychologist* 40 (1985): 29–39.

¹⁵. See Douglas Peters and Stephen Ceci, "Peer-Review Practices of Psychological Journals: The Fate of Published Articles, Submitted Again," *The Behavioral and Brain Sciences* 5.2 (1982): 187–95.

¹⁶. Judith Jarvis Thompson, "Ideology and Faculty Selection," *Law and Contemporary Problems* 53.3 (1990): 158.

¹⁷. In response to an earlier version of this essay, Robert Post worried that academic freedom should not be invoked in relation to peer review. Post is referring to a concern that such invocation might undermine serious academic evaluation. See his discussion of Stanley Fish in Robert Post, "Why Bother with Academic Freedom?," *FIU*

Law Review 9 (2013): 9–20.. <http://ecollections.law.fiu.edu/lawreview/vol9/iss1/4/>. For some problems with Fish's view of academic freedom, see Patrick Hogan, "Academic Freedom and the Purposes of Universities (Reflections on a Talk by Stanley Fish)," *Philosophers for Change*, October 11, 2012, <http://philosophersforchange.org/2012/10/11/academic-freedom-and-the-purposes-of-universities/>. However, I have tried to draw the guidelines for personal ethics of peer review in such a way that, rather than impeding the goals of academic evaluation, they further those goals—the very epistemic goals that justify academic freedom legally, by a Postian account. There is a separate question of whether the term *academic freedom* is best confined to legal usage. If so, then the preceding heuristics are not a matter of academic freedom as such, but, again, they are a matter of serving the same goals, which would appear to come to the same thing. Thus the terminological issue does not seem to be a substantive matter, though it still might have rhetorical or related consequences.

¹⁸. Readers interested in the topic of academic freedom and contingent labor may wish to consult Jan Clausen and Eva-Maria Swidler, "Academic Freedom from Below: Toward an Adjunct-Centered Struggle," *Journal of Academic Freedom* 4 (2013): 1-26, <http://www.aaup.org/sites/default/files/files/JAF/2013%20JAF/ClausenSwidler.pdf>.

¹⁹. Patrick Colm Hogan, "The Ethics of Tenure Decisions," *Higher Education Review* 30.3 (1998): 23–41.

²⁰. I am grateful to Robert Post for comments on an earlier version of this essay. Part of this essay was presented at a Committee on Academic Freedom and Professional Rights and Responsibilities panel at the 2015 convention of the Modern Language Association of America, in Vancouver, BC.