PRIESTS OF OUR DEMOCRACY

The Supreme Court, Academic Freedom, and the Anti-Communist Purge

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This book is dedicated to the memory of Robert Pascal Boalch

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To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens.

—Justice Felix Frankfurter, *Wieman v. Updegraff*

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PART V: POLITICS, REPRESSION, AND THE FUTURE OF ACADEMIC FREEDOM

Introduction

New York, 1952

Harry Keyishian was a junior at Queens College, New York City, in the fall of 1952 when the Senate Internal Security Subcommittee came to town. Investigations of suspected communist or ex-communist teachers were nothing new by this point in America's Cold War history, but by 1952 they had reached such a pitch of intensity that the Senate subcommittee (commonly known as the SISS) was just one of multiple government and private bodies competing in a crowded field of political investigators. One of the subcommittee's primary purposes in coming to New York was to persuade the local Board of Higher Education (the BHE) to be more aggressive in rooting out allegedly subversive faculty from the city's free public colleges.

The first Queens professor to be called before the SISS was the economist Vera Shlakman, an officer in the left-wing Teachers Union, whose campaigns against low pay, poor school maintenance, and racially biased textbooks had antagonized city officials since the early 1930s. Shlakman was the author of a much-praised book, *Economic History of a Factory Town*, and had been at Queens since 1938, after a PhD at Columbia, a research fellowship at Smith College, and a teaching stint at Sweet Briar. She had found the college "wonderful" when she arrived—the faculty full of European intellectuals, refugees from Nazism, and the students diligent and eager.[1] Like many beleaguered academics in the early 1950s, she objected to legislative probes into her political beliefs, and when the time came, she refused to tell the SISS whether she had ever been a Communist Party member. Despite her 14-year tenure at Queens, the BHE fired her two weeks later.

Harry Keyishian, who wrote a column for the student newspaper recounting humorous bits of campus news, and who had up to this point been more interested in girls than politics, joined a committee to protest the peremptory firing of a popular professor.[2] From this modest beginning, Keyishian became, 15 years later, a protagonist in the U.S. Supreme Court's most important ruling on academic freedom. But now, in 1952, he was just one puzzled

and indignant member of the protest committee, whose faculty advisor, the literature scholar Oscar Shaftel, was to be the second person fired from Queens.

The SISS, a subcommittee of the Senate's powerful Judiciary Committee, was back in Washington, D.C., when Shaftel testified in February 1953. Like Shlakman, he refused to answer questions about his political beliefs or activities, but he did tell the SISS that he thought communists could be competent teachers: "I cannot imagine an academic administrator of any sense and magnitude and dignity saying to Sean O'Casey, who has been generally associated with Communists, 'You may not teach the drama,' or tell Picasso, 'You cannot teach art.'"[3] The BHE scheduled a meeting to vote on firing him, a campus newspaper condemned the attack on "a well-loved, respected professor,"[4] and students distributed leaflets protesting another imminent dismissal.

At the BHE meeting in March 1953, Shaftel lectured board members on the importance of intellectual freedom and the malignancy of their "surrender to expediency" in following the SISS's commands. He concluded by quoting from John Milton's poem "Lycidas":

> Blind mouths! that scarce themselves know how to hold
> A sheep hook, . . .
> What recks it them? What need they? They are sped; . . .
> The hungry sheep look up, and are not fed,
> But, swollen with wind, and the rank mist they draw,
> Rot inwardly, and foul contagion spread.[5]

Neither Shaftel's erudition nor his students' protest saved the jobs of professors caught in what has often, without exaggeration, been called the witch hunt of America's Cold War years. It was not until the early 1980s that the BHE apologized to Shlakman, Shaftel, and five other then-elderly professors (and the estates of three who had died) and offered compensation for what were by then recognized to be unjust dismissals.

Academic Freedom from *Adler* to *Keyishian*

Well before the SISS arrived in Manhattan in 1952, there had been years of debate all over America—in the courts, in educational institutions, and in the press—about whether the First Amendment principle of free speech protected suspected communists and, more specifically, about whether the concept of academic freedom barred political inquisitions against teachers and

professors. Libertarians urged that laws and policies that disqualified communists from teaching were direct assaults on freedom of inquiry; those who supported loyalty programs insisted on just the opposite: that all communists were mental slaves of Moscow and therefore incapable of independent thought; hence, it would only advance academic freedom to get rid of them.

The Supreme Court confronted the question in a case that challenged New York State's 1949 Feinberg Law, which required detailed procedures for investigating the loyalty of every public school teacher and ousting anyone who engaged in "treasonable or seditious acts or utterances" or joined an organization that advocated the overthrow of the government by "force, violence or any unlawful means." It was a typical Cold War–era loyalty law; hence, *Adler v. Board of Education*, the Supreme Court's 1952 decision upholding it, had nationwide repercussions.

In *Adler*, a majority of the Supreme Court found no First Amendment problem with the Feinberg Law. Embracing the anti-communist fervor of the time, the Court said that teachers have no right to their jobs; and because they work "in a sensitive area" where they shape young minds, the authorities are entitled to investigate their political beliefs. "They may work for the school system upon the reasonable terms laid down by the proper authorities. . . . If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."[6] The decision did not suggest any limit to the power of public employers to hire and fire based on political views. Instead, it followed the simplistic philosophy articulated many decades earlier by Oliver Wendell Holmes, Jr., when he was a justice on the Massachusetts Supreme Judicial Court, that a man might have "a constitutional right to talk politics" but does not have "a constitutional right to be a policeman."[7]

Even at this unfortunate moment for free speech, however, the Court was not unanimous: Justice William O. Douglas wrote a fiery dissent in the *Adler* case. Douglas said the Feinberg Law "proceeds on a principle repugnant to our society—guilt by association"; furthermore, it "turns the school system into a spying project," with the ears of students, parents, and administrators "cocked for tell-tale signs of disloyalty." The law would "raise havoc with academic freedom," he predicted; "a pall is cast over the classrooms."[8] Fifteen years later, in 1967, Justice William Brennan borrowed Douglas's image of a pall hovering over education, in a case that overturned *Adler* and invalidated the Feinberg Law.

That 1967 case began at the Buffalo campus of the State University of New York (SUNY). The SUNY trustees had decided to make all employees sign a "Feinberg certificate" affirming that they were not members of the

Communist Party and that if they ever had been, they had disclosed this fact to the state university president. The Feinberg certificate was a classic "test oath"—that is, a demand for political or religious loyalty as a test of job fitness. Test oaths are usually worded in negative terms, as denials or disclaimers of disfavored associations or beliefs, but affirmative oaths—to support the king, the church, or in more modern times, the Constitution—are also tests of loyalty.[9] Although condemned by the Supreme Court after the Civil War, disclaimer oaths such as the Feinberg certificate were a common feature of the Cold War landscape.

In the fall of 1963, some 300 SUNY-Buffalo professors voted their opposition to the Feinberg certificate. But *Adler* was still the ruling precedent, and despite the protest, caution and the desire for job security prevailed. In the end, only four faculty members refused to sign the certificate; a fifth, the poet George Starbuck, declined to answer a question about subversive associations on a civil service form. The five rebels were aware of the ruling in *Adler* but hoped that both the times and the Supreme Court had changed; in 1964, they filed suit to challenge the entire Feinberg Law.

Harry Keyishian, who since his graduation from Queens College had attended graduate school, served in the navy, and started his professional life as an English instructor at Buffalo, was one of the five. He jumped at the chance to challenge the system of loyalty purges that had cost his alma mater valued professors a decade before; it would be his "revenge on the '50s."[10] He became the lead plaintiff in *Keyishian v. Board of Regents*.

Some Supreme Court decisions over the previous decade had cautiously chipped away at loyalty programs, but Justice Brennan, writing in *Keyishian*, rejected wholesale the idea that restrictions on expression, ideas, and political associations are permissible under the First Amendment as conditions of public employment. And because the Feinberg Law targeted teachers, Brennan had particular words to say about education. "Our Nation is deeply committed to safeguarding academic freedom," he wrote, "which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[11]

What had happened in the 15 years between *Adler* and *Keyishian*? Of course, the political landscape had changed: the "haunted '50s"[12] had given way to the more libertarian '60s. The toll taken on public and private life by two decades of loyalty programs and blacklists was palpable. Popular opinion had finally rejected the demagoguery of opportunists like Senator Joseph McCarthy of Wisconsin, who had jumped on the already speeding anti-communist bandwagon in 1950 and given his name to the recklessness that

characterized much of the Cold War Red Scare. And liberal Supreme Court justices had replaced more conservative ones, although even in the heady year of 1967, *Keyishian* was decided by a narrow 5–4 vote, over a blistering dissent by Justice Tom Clark.

Ornery Professors, Then and Now

Why did Vera Shlakman, Oscar Shaftel, and hundreds of others refuse to cooperate in the political inquisitions of the witch-hunt era? After all, the totalitarian Soviet Union was a threat to U.S. security; some American communists had passed classified documents or otherwise engaged in espionage for the USSR.[13] If you were an honest citizen, so the argument went in the 1950s, you had nothing to hide. If you had been a communist during the tumultuous 1930s, when the poverty of the Depression, the ruthless racism of the American South, and above all the threat of fascism in Europe inspired people to join the Party, but you had since seen the error of your ways, you should admit it, instead of hiding behind claims of constitutional privilege which all too often seemed disingenuous and evasive.

Certainly, some teachers—like others who refused to cooperate—were communists, and truthful answers would likely have cost them their jobs. For others, who had been Party members in the past, self-interest was mixed with principle: cross-examining citizens about their reading habits and political beliefs, as legislative committees and educational boards inevitably did, was a disturbing spectacle. If a witness was not sufficiently hostile to the USSR or sufficiently supportive of U.S. forces in the Korean War or was favorable to racial integration or had marched in a May Day parade, these were all grounds for suspicion. The questions not only violated privacy; they intimidated the population and persuaded all but the most intrepid to avoid politically progressive activities.

There was another unseemly aspect to cooperation. Even those who were willing to go through the ritual of professed repentance for their communist past usually did not want to identify others they had worked with on political issues or seen at meetings or on picket lines. Yet many inquisitors believed that "naming names" was the only good evidence of a sincere break with communism. This presented profound moral dilemmas not only for ex-communists but for liberals and "fellow travelers" of the Party who had been active in civil rights and other causes of the 1930s and '40s and who thus inevitably came into contact with the communists who shared in and often led these campaigns. The saga of five New York City teachers who admitted their own communist pasts but refused to name names (told in chapter 9)

is a cautionary tale about the excesses of heresy hunting and its sometimes unintended effects.

Many people who had made the difficult break with communism, or who had never been communists, simply did not want to collaborate in the Red hunt—its super-patriot rhetoric, its methods of exposure and disgrace. Harry Keyishian and his fellow plaintiffs in their challenge to the Feinberg Law exemplified this disinterested objection to the loyalty oaths and investigations that warped American political life during the Cold War. Even fervent anti-communists at the time were embarrassed by the crudeness and stupidity of some legislative inquisitors such as the House Committee on Un-American Activities (HUAC); they wanted a kinder, gentler witch hunt. Others understood that it was not possible—that it was the very nature of the enterprise that threatened the free speech on which democracy depends.

The fates of Vera Shlakman, Oscar Shaftel, and hundreds of others affected by loyalty programs in academia, both in New York and nationwide, may seem like ancient history. But these events, and the Supreme Court's eventual recognition of First Amendment academic freedom in response, are stories with resonance today. Battles over free speech on campus, and over the purpose and meaning of education, continue to bedevil our national politics. Today's war on terrorism has replaced Cold War anti-communism as a justification for limiting civil liberties, both on campus and off. Although contemporary fears of a return to the repressive zealotry of the late 1940s and early '50s—the legislative inquisitions, loyalty investigations, and test oaths—are overblown, we do face threats to academic freedom in the 21st century, both institutionally and in the courts. Often, these threats arise from a habit of mind, long prominent in American politics, that seeks simple answers to complex problems, that shuts out nuanced or radical critique, and that demonizes dissent, especially from the left. It was this habit of mind, in large part, that allowed the anti-communist purge of the 1950s to flourish as long and intensely as it did.[14]

The Meaning of Academic Freedom

The Supreme Court in *Keyishian* spoke of academic freedom as a "special concern of the First Amendment" but did not define the term or delineate its scope. In the next few decades, judges often applied the language of *Keyishian* broadly, leading one scholar to complain that, "lacking definition or guiding principle," First Amendment academic freedom "floats in the law, picking up decisions as a hull does barnacles."[15] As the federal courts became more conservative, this "hull-and-barnacles" critique gained adherents.

Courts began to view the First Amendment concept of academic freedom, if they recognized it at all, as a right belonging to the university as an institution, not to individual professors. And some commentators began to argue that academic freedom, although important as a principle of educational policy, has no basis in the Constitution. After all, they pointed out, the First Amendment, like the rest of the Bill of Rights, generally only stops government entities—legislatures, boards of education, public university trustees—from abridging "the freedom of speech," but academic freedom should apply at private and public institutions alike.[16]

Obviously, academic freedom has limits, with or without its First Amendment baggage, and William Brennan's stirring words in *Keyishian* left myriad questions unanswered. Professors must teach the subjects assigned, for example, and not spend their time in a chemistry class lecturing about history or literature (which does not mean they should be punished for occasionally straying from the assigned topics). There are limits, too, on how unconventional or provocative their speech can be: how, for example, do we balance rules forbidding sexual and racial harassment against the freedom to express controversial views? Is the teacher who uses the term *wetback* in the course of describing U.S. attitudes toward Mexicans discriminating or simply exercising academic freedom? (The question arose in 2007, when Brandeis University declared a professor guilty of harassment for using the word and placed a monitor in his classes.)[17] Does a public university that demotes a professor who made anti-Semitic remarks at an off-campus event violate his First Amendment rights? (A court in 1994 said yes but later revised its opinion in response to a Supreme Court decision that cut back on public employees' free-speech protection.)[18] What about a professor whose writings deny the Holocaust or the theory of evolution—can she be fired on grounds of incompetence? Or is she protected by the First Amendment as long as she does not try to teach her misguided views in class?

And what of Professor Ward Churchill, who was fired by the University of Colorado because of an essay he wrote after September 11, 2001, in which he attacked the stock traders who worked at brokerage firms in the World Trade Center as "little Eichmanns" because, he argued, they were part of a "technocratic corps at the very heart of America's global financial empire" and were complicit in the damage caused by American military operations?[19] The university understood that the First Amendment protected his hyperbolic remarks and so, responding to pressure to get him off the public payroll, searched for other reasons to fire him. It found some instances of alleged "research misconduct"; a jury concluded that they were pretexts; but the trial judge decided that Churchill should lose his case in any event, because the

university committee that recommended his firing was immune from suit.[20] Such are the consequences, even in the courts, when professors engage in angrily provocative speech.

But why should the university have had to look for pretexts? Should Churchill's constitutional right to express his political views with an outrageous metaphor have protected him from academic retribution? More broadly, should academic freedom even be a special concern of the First Amendment or of educational policy? Are teachers an élite, with free-speech rights greater than everybody else's? They are not, but as Justice Felix Frankfurter explained in a 1952 case that invalidated a test oath required of professors in Oklahoma, teachers are "the priests of our democracy" because it is their "special task . . . to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens."[21] The point was that academic freedom is necessary not because teachers are smarter or better than the rest of us but because they impart the skills to think critically and thus to participate meaningfully in the great, if often flawed, American experiment in political freedom.

Chief Justice Earl Warren reprised this theme in 1957, in an opinion voiding the contempt conviction of a Marxist scholar who had refused to answer questions about a lecture he had given. Warren noted "the essentiality of freedom" in universities and the dangers of "an atmosphere of suspicion and distrust." Teachers and students cannot be put in "an intellectual strait jacket," he said; they "must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding."[22] It was the same vision of academic freedom that Brennan was to celebrate a decade later in *Keyishian*.

In none of these cases, though, did the Court say whether—and if so, how—academic freedom should apply below the college level. In *Keyishian*, Justice Brennan made no distinction between schools and universities when he spoke of "a pall of orthodoxy over the classroom." Many high school students are on the verge of adulthood, and it would shortchange them, their teachers, and the community to relegate their education to rote learning and to eliminate free inquiry from the mix. As the American Association of University Professors (the AAUP) points out, high school is, for virtually all Americans, the necessary prerequisite to college, and students will surely be limited in their ability to pursue higher learning "if their previous education has ill-prepared them."[23]

Yet public schools *are* different from universities; one of their purposes is to inculcate civic values. Conflicting philosophies—inculcation (or indoctrination) versus free inquiry and critical thinking—continue to drive battles in the United States over educational policy. In the late 1960s, the Supreme

Court leaned toward free inquiry, remarking in one famous case that students are not merely "closed-circuit recipients of only that which the state chooses to communicate,"[24] but more recently, the courts have drastically narrowed that principle and have stripped students and teachers below college level of almost all First Amendment rights in the context of school activities. This book argues for renewed constitutional protection for free inquiry not only in universities but in public schools.

The Arc of the Narrative

Priests of Our Democracy traces the political, cultural, and legal events that gave rise to academic freedom as "a special concern of the First Amendment." It shows how loyalty purges at schools and universities during the worst years of the Red Scare eventually produced monumentally important Supreme Court decisions. Although some of this history transpired before the Cold War, and there is also much to recount after 1967, a natural framework for the book's central chapters is the Supreme Court's response to teacher loyalty programs in the 15 years between its 1952 decision in *Adler* to uphold the Feinberg Law and its 1967 decision in *Keyishian* to strike it down.

These were years when the Court evolved from a generally passive body, approving oppressive loyalty regimes, to an activist one, applying the Bill of Rights to limit government overreaching. Although the Supreme Court led by Earl Warren has been much criticized, and its role in the "rights revolution" of the '60s may be a rare exception to the traditionally conservative stance of the judiciary, in times of political crisis courts are critical players not only in protecting free speech but in enriching the literature of democracy. So, while we should not ignore academic freedom as a matter of good educational policy governing private as well as public universities, I argue that we must also defend the First Amendment principle of academic freedom as a limit on what government officials, including administrators of public institutions, can do to their teachers and students. The history I recount—the inquisitions of New York professors and teachers, the Supreme Court's response, and its eventual dismantling of loyalty programs in *Keyishian*—will show where First Amendment protection for academic freedom comes from and why it remains important.

But *Priests of Our Democracy* is not simply a legal history. Indeed, the Supreme Court does not become a major player in the story until chapter 4. The book aims to tell social and human stories, to connect the policy issues and the court cases to the people who lived them—those who were targeted by the witch hunt, those who pursued them, and those who started, like

Harry Keyishian, as bystanders but eventually found a way to participate. The characters in this saga range from radical intellectuals like Oscar Shaftel and Vera Shlakman, impassioned about their scholarship and teaching, to public school teachers like Irving Mauer and Julius Nash, who could not find it in their consciences to "name names" of former comrades and were punished by the New York City Board of Education for 18 years thereafter. There are energetic Cold Warriors like Harry Gideonse, the truculent head of Brooklyn College, ambivalent ones like Ordway Tead, head of the BHE, and aggressive inquisitors like Saul Moskoff, who directed the Board of Education's investigations of elementary and high school teachers and engaged his subjects in heartrending debates about the meaning of justice under Jewish law. There are conscientious objectors: Quakers and other non-communist protesters whose refusal to sign loyalty oaths led to major Supreme Court decisions. There are people caught in excruciating dilemmas—professors who chose to perjure themselves before New York State's Rapp-Coudert investigating committee in 1941 when their legal arguments against the inquisition failed. All were complicated individuals; none were angels; all gave flesh and context to the legal rulings that emerged from their struggles.

In New York City and State, these struggles were particularly intense. The overwhelming majority of left-wing teachers and professors targeted by the Boards of Education and Higher Education were Jewish; so were some of the leading inquisitors. Anti-Semitism, Jewish-Catholic tensions, battles over educational policy and race discrimination, and turmoil within the city's Jewish community provide the background against which the courts and the state's administrative apparatus wrestled with questions of free speech, union busting, and ultimately, the Board of Education's unseemly policy of requiring teachers who admitted past CP membership to "name names" or lose their jobs.

In the nation's largest, most ethnically diverse city, the passion and idealism of radicals eager for social justice clashed with legions of both super-patriots and liberals. The super-patriots wanted to use anti-communism as a wedge against progressive reforms; the liberals either were trying to prove their anti-communist credentials, and so undermine Republican Party claims to monopolize the issue, or were so fiercely hostile to communism that they were willing to condemn people who had once been attracted to radical causes unless they publicly and lavishly recanted past enthusiasms. New York plays a special part in the story not only because the Supreme Court's Feinberg Law cases arose there but because, as one scholar said, "no other state has shown so continuous a sense of insecurity" about revolutionary