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## The Racialism and Erasure of Academic Freedom

Nick J. Sciullo \*

Academic freedom is the cornerstone of democratic education. A vigorous defense of academic freedom demands a vigorous investigation of freedom's limitations. Today we grapple with the lingering legacies of the USA PATRIOT Act,<sup>1</sup> NSA spying,<sup>2</sup> and aggressive law enforcement surveillance regimes. The unfettered libertarian freedom many lionize is at best elusive. While the question of what constitutes academic freedom should be of central interest to academics, the related question of how academics mitigate academic freedom is perhaps more interesting.

Professor Stanley Fish and Dean Robert C. Post passionately demonstrate the need for academic freedom's vigorous defense.<sup>3</sup> Their recent texts and talks illustrate a salient debate about what it means to be an academic, and what it means to be free. Fish's recent discussion in the *Opinionator*, the online opinion companion of the *New York Times*, demonstrates both the value of academic freedom as well as, based upon the comments section, the healthy debate that supports and occludes this freedom.<sup>4</sup> But, more interesting yet, is the ways in which race elides careful examination in academic freedom discussions.

Race (still) matters. Over fifty-five years ago, Ralph Ellison warned of the blindness in United States culture that obscured difference, in favor of a complex politics of colorblindness.<sup>5</sup> He feared black people were at risk of "becoming quite dull and grey."<sup>6</sup> Discussions of academic freedom often suggest a blindness that occludes considerations of the ways in which

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<sup>1</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>2</sup> Heidi Kitrosser, "Macro-Transparency" as *Structural Directive: A Look at the NSA Surveillance Controversy*, 91 MINN. L. REV. 1163, 1163-64 (2007).

<sup>3</sup> See STANLEY FISH, *SAVE THE WORLD ON YOUR OWN TIME* (Oxford University Press 2008); ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (Yale Univ. Press 2013); MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF ACADEMIC FREEDOM* (Yale Univ. Press 2011).

<sup>4</sup> Stanley Fish, *Academic Freedom Vindicated in Brooklyn*, N.Y. TIMES (Feb. 11, 2013, 9:00 PM), <http://opinionator.blogs.nytimes.com/2013/02/11/academic-freedom-vindicated-in-brooklyn/>; Stanley Fish, *Academic Freedom in Brooklyn: Part Two*, N.Y. TIMES (Feb. 25, 2013, 9:00 PM), [http://opinionator.blogs.nytimes.com/2013/02/25/academic-freedom-in-brooklyn-part-two/?\\_r=0](http://opinionator.blogs.nytimes.com/2013/02/25/academic-freedom-in-brooklyn-part-two/?_r=0).

<sup>5</sup> RALPH ELLISON, *THE INVISIBLE MAN* 435-36 (Vintage Int'l 1995) (1947).

<sup>6</sup> *Id.* at 436.

academic freedom discussions affect people of color and those who research and write in critical race paradigms.

While the expansion of law reviews and online companions has opened doors to more critically engaged scholarship, as well as non-traditional scholarship, one must remember much critical race scholarship still appears in less prestige law reviews. Even if critical race scholarship is seen as more mainstream now, there remains a view that positions critical scholarship as somehow less worthy than traditional doctrinal and theoretical scholarship.

Promotion and tenure committees often view race scholarship as lesser quality than First Amendment, property, or M&A work. Detrimental as well is the loss of personal satisfaction from placement in top journals. Indeed, the ways in which any placement affects a scholar's chance at tenure is no small consideration. Scholars may be stigmatized as "crits" or "not serious scholars." Without expanding the ways in which scholarship is considered relative to promotion and tenure as well as general epistemological orientations and contributions to law and the academy, much critical race scholarship might remain marginalized. How free are academics, particularly non-tenured academics, to pursue their research when race scholarship is maligned?

In closing, we should ask not only what academic freedom means today and how we protect it, but also how academic freedom may be experienced differently by scholars of color and those writing from critical race perspectives.