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Academic Freedom and Tenure

Ernest van den Haag*

The institutions of higher learning which in the Middle Ages developed into universities, originally were schools of theology, attended by students seeking to be trained as priests, or, later, ministers. Soon these schools came to include research and instruction in canon and secular law. As medicine became a profession it, too, was cultivated and taught.¹ Although for a long time institutions of higher learning confined themselves to theology, jurisprudence, and medicine, jurisprudence came to include many subjects which later separated from law, such as philosophy, geography, chemistry, history, and astronomy.² As these subjects became independent, full fledged universities developed.

Scholars and scientists wanted to investigate and teach free from interference by political and ecclesiastical authorities. In time princes as well as church leaders recognized, however grudgingly, that it was in their own interest, in the long run, to have institutions of higher learning independent of any outside authority, for this enabled scholars to do objective research and make impartial judgements.³ Independence—academic freedom—was neither invented nor recognized at one fell swoop. It grew cumulatively, with many setbacks, as a custom more than as a legal right.⁴

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1. 2 JAMES BOWEN, *A HISTORY OF WESTERN EDUCATION* 105-37 (1975); see also WILLIAM BOYD & EDMUND KING, *THE HISTORY OF WESTERN EDUCATION 1874-1962*, at 125-58 (11th ed. 1980) (discussing the rise of the university system).

2. JOHN S. BRUBACHER & WILLIS RUDY, *HIGHER EDUCATION IN TRANSITION: A HISTORY OF AMERICAN COLLEGES AND UNIVERSITIES, 1636-1968*, at 6 (1968).

3. *Id.* at 7; Theodore M. Benditt, *The Research Demands of Teaching in Modern Higher Education*, in *MORALITY, RESPONSIBILITY, AND THE UNIVERSITY* 93, 93-96 (Steven M. Cahn ed., 1990).

4. See 1 HAROLD E. MITZEL, *ENCYCLOPEDIA OF EDUCATIONAL RESEARCH* (5th ed. 1982).

Although most continental European universities were, and are, financially and legally dependent on the government,⁵ in the 19th Century academic freedom came to be well established and recognized throughout the world.⁶ Academic independence came about despite the material dependence of universities. It involved *Lehrfreiheit* (freedom to teach) and, as implied thereby, *Lernfreiheit* (freedom to learn).⁷ Both are meant to allow scholars, scientists, and their apprentices to pursue truth and disseminate their conclusions free from interference.⁸ To make these freedoms operative, tenure (immunity from dismissal) was required.⁹ Professors cannot be free to teach as they feel truth demands, if they can be dismissed when authorities are offended or displeased by their teaching,¹⁰ and when their teachings are not allowed to violate established dogmata.¹¹ Hence, tenure was required for the sake of academic freedom. However, until fairly recently, academic freedom presumed common beliefs and shared basic values, while permitting free debate and investigation of problems regarded as not central.¹² Thus, in the past, atheism could not be proclaimed; and many institutions were linked to churches whose dogmata could not be violated.¹³ Originally this did not present much of a problem, because the inviolable tenets were so universally shared that few were tempted to violate them.¹⁴

5. BOWEN, *supra* note 1.

6. BOYD & KING, *supra* note 1.

7. WALTER P. METZGER, *ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY* 109-33 (1955).

8. *Levin v. Harleston*, 770 F. Supp. 895, 925 (S.D.N.Y. 1991), *aff'd in part*, 966 F.2d 85 (2d Cir. 1992).

9. Tenure is defined, legally, as "stature afforded to teacher or professor upon completion of trial period, thus protecting him or her from summary dismissal without sufficient cause or economic reasons. A faculty appointment for an indefinite period of time." BLACK'S LAW DICTIONARY 1469 (6th ed. 1990).

For academic definitions of tenure see *Levin*, 770 F. Supp. at 925 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)); 1 CLIFFORD P. HOOKER, *ENCYCLOPEDIA OF EDUCATION RESEARCH* 5 (1978).

10. *Levin*, 770 F. Supp. at 927 (citing *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 598 (2d Cir. 1990)); Andrew Oldenquist, *Tenure: Academe's Peculiar Institution*, in *MORALITY, RESPONSIBILITY, AND THE UNIVERSITY*, *supra* note 3, at 62.

11. LOUIS JOUGHIN, *ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS* 41 (1967).

12. HOOKER, *supra* note 9.

13. See BRUBACHER & RUDY, *supra* note 2, at 5-7, 309.

14. HOOKER, *supra* note 9, at 12.

Tenure has been altogether abolished in English universities. Fellows in world renowned Oxford and Cambridge colleges as well as professors in these and in all other government supported English universities no longer have tenure. Although nominally independent, most institutions of higher learning in England are financially and otherwise dependent on the government which has used its power to abolish tenure, overriding all contractual arrangements to the contrary.

English academic life so far appears unchanged. Even without tenure, English universities are unlikely to fire those hired with the understanding that their position would be permanent, even if they develop unpopular opinions. However, the abolition of tenure should make it easier to bring pressure on unfit faculty members to resign.

In the United States, the traditions that culminated in tenure are not as old or robust as they are in England. Further, there are far more private universities large and small which are quite independent of the government.¹⁵ Professors have needed, and still need, protection of their academic freedom against attacks of trustees (now rare) or, more frequently, by fellow professors, administrations and, not least, by students overly devoted to political ideologies.

Unlimited academic freedom has made it nearly impossible for universities as corporate entities to stand for any values, moral or other. The university's main value, "the pursuit of truth" excludes but untruth. Yet values, such as chastity or the (alleged) sanctity of life, or the alleged right to pornographic self-expression, or pacifism, or patriotism are neither true nor untrue. Individual professors may well hold such values, but the classroom is not for advocacy of any value or ideal but, at most, for analysis. As an institution the university owes allegiance only to truth. This leaves disappointed many who look

15. Although private universities may be independent of the state and federal governments, the federal government has been successful in imposing "affirmative action" rules, and other federal requirements, even when it did not subsidize the institutions. Courts have held that federal rules can be imposed as long as the students receive federal aid, even if the institution does not. *See, e.g., Grove City College v. Bell*, 465 U.S. 555 (1984) (holding that the college was subject to the statute prohibiting gender discrimination because some of its students received federal grants, even though the college itself did not receive any direct federal assistance).

on universities as custodians of traditional values, or, pioneers of revolutionary ones.

There are some obvious limits to academic freedom. Professors who commit serious crimes should not remain tenured;¹⁶ nor those who use their position to blackmail students to do their extracurricular bidding, or who are otherwise corrupt.¹⁷ Adherents of totalitarian ideologies might fall into this class if they display this adherence in their academic activities. But with the disappearance of Nazis and Communists as organized political groups, this class has become rather "academic" (ambiguity intended). In the past, people who admittedly wanted to use academic freedom to destroy academic freedom were considered dangerous and disruptive. Today, however, such persons are viewed as merely foolish and, sometimes, evil.

The assumption underlying academic freedom, currently somewhat obscured by talk about professorial rights,¹⁸ is that the independent research of competent scholars and scientists will lead to the discovery of new knowledge which may be put into the service of humanity.¹⁹ It is hard to imagine modern civilization without the independent pursuit of truth cultivated in universities protected by academic freedom and tenure.

Still, questions arise about aspects of academic freedom and tenure. Should tenure be used to protect immoral behavior?²⁰ Incompetence? Alcoholism? Plagiarism? Criminal conduct? Perceived immoral conduct? What are the desirable limits? Above all how do we determine who is to be protected by tenure? Ideally it is to be granted only and always to the worthy and never to the unworthy. But in practice we cannot avoid protecting what and who is unworthy together with the worthy. Nor can we make sure that, once tenured, scientists and schol-

16. See Robert O'Harrow, Jr., *GMU Professor to Plead No Contest in Sex Case: Student Accused 18 Year History Teacher of Assaulting Her*, WASH. POST, Oct. 3, 1993, at B2.

17. *Id.*

18. Professors claim a right to economic benefits such as promotions or salary increases. Academic freedom is meant only to protect their rights to independence as researchers regardless of incidental benefits.

19. JOUGHIN, *supra* note 11, at 48-49.

20. *Silva v. University of N.H.*, No. 93-533-SD, 1994 U.S. Dist. LEXIS 13281 (D.N.H. Sept. 15, 1994); William H. Honan, *Professor Ousted for Lecture Gets Job Back*, N.Y. TIMES, Sept. 17, 1994, at A9.

ars engage in research and pursue truth and do not use their tenure as a sinecure to engage in self-serving pursuits, or as a platform for partisan advocacy, rather than impartial investigation. Tenure may be used also by dogmatists to exclude new ideas or by the persons suspected of having them. Against all these dangers the integrity of decision makers is the only protection. It is not always sufficient.

Originally academic freedom created an oasis of freedom and free speech in societies that had neither. However, in the United States, freedom of speech has never been confined to universities. It was constitutionally guaranteed to all citizens and residents and quite vigorously practiced. Professors did not need, or get, freedom of speech as a special privilege, since it was guaranteed to all. Thus, tenure, protection against dismissal, rather than freedom of speech, became the distinguishing element of employment by universities. It protected professors, not so much against direct interference by outside political or religious authorities, but against interference by trustees, administrators, and fellow professors.²¹ While the danger of interference by trustees has receded, administrators still occasionally violate the freedom of instructors to hold displeasing opinions, as well as the freedom of students to verbally oppose feminism, homosexuality, or persons of different races and cultures.

Students and instructors who express unfashionable views often have a hard time. Some colleges even have prescribed codes which must be followed to obtain the consent of students for amorous activity.²² Such institutional invasions of privacy are usually disguised as protection for imaginary victims. There is no end in sight to administrative silliness.

Administrators also tend to prescribe professorial conduct and speech with regard to gender and to race.²³ Occasionally they have hindered research fearing that it may lead to unwelcome results.²⁴ The difficulties experienced by Professor Arthur

21. Judith Wagner DeCew, *Free Speech on Campus*, in *MORALITY, RESPONSIBILITY, AND THE UNIVERSITY*, *supra* note 3, at 32-34.

22. See generally ARATI R. KORWAR, *WAR OF WORDS: SPEECH CODES AT PUBLIC COLLEGES AND UNIVERSITIES* (1994).

23. ROBERT KIMBALL, *TENURED RADICALS* xv-xvii (1990).

24. See generally *Levin v. Harleston*, 770 F. Supp. 895 (S.D.N.Y. 1991), *aff'd in part*, 966 F.2d 85 (2d Cir. 1992).

Jensen in California, the late Professor Richard Herrnstein at Harvard, and more recently, by Professor Philippe Rushton in Canada, illustrate this matter. All were attacked by students, administrators, or colleagues as "racists" for having investigated I.Q. with unwelcome results. All survived in their positions protected by tenure.²⁵

In some places administrators also have tried to dictate "politically correct" vocabularies to both professors and students. Sometimes professors as a group, or groups of professors, have interfered with the freedom of individual colleagues to express unpopular views deemed not politically correct. Groups of students also have tried to silence these professors for ideological reasons. Some professors have been ordered to attend silly, humiliating, and unproductive classes to increase their "sensitivity," because some students claimed to have been

25. Professor Arthur Jensen argued that I.Q. tests yield a reliable measure of mental ability, and that blacks in the United States on average score lower on the tests than whites. He also argued that the differences in I.Q. were mainly biological in origin. David Hawkins, *Grading the Tests*, N.Y. TIMES, July 6, 1980, § 7, at 6. Jensen's theories brought him death threats in the mail. Gil Sewall & Elliot D. Lee, *Jensen's Rebuttal*, NEWSWEEK, Jan. 14, 1980, at 59.

At the University of Delaware, faculty members and university officials attempted to hinder the research projects of Professor Linda Gottfredson into correlations between race and intelligence. See Gwen Florio, *Two Del. Professors Win Fight to Go On with Research on Race and Intelligence*, PHILA. INQUIRER, May 18, 1992, at B1. The research was funded by the Pioneer Fund, an organization established in 1937 "to conduct or aid in conducting study and research into the problem of heredity and eugenics in the human race generally . . . and study into the problems of human race betterment with special reference to the people of the United States." Terence Samuel, *"Bell Curve" Trial Leads to an Outfit with a Racial Bent*, PHILA. INQUIRER, Nov. 27, 1994, at E3. The university's decision refusing to allow the Pioneer Fund to underwrite research on campus was reversed by an arbitrator in August 1992. Florio, *supra*, at B1.

The late Professor Richard Herrnstein argued that as opportunity has become more equal in America the country is becoming a "meritocracy" based on intelligence. Intelligence and therewith success are unequally distributed among individuals and racial groups. For these theories Herrnstein was subjected to vilification campaigns which included calls for his dismissal. Charlotte Allen, *Gray Matter, Black-and-White Controversy*, WASH. TIMES, Jan. 13, 1992, at 4. His views have since been explained fully in the book he co-wrote with Charles Murray, RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994).

Canadian psychologist Philippe Rushton was forced from the classroom and made to teach by video tape for a semester for his study "assessing cranium and gonad sizes and I.Q. distribution among Blacks, Whites and Asians." Peter Lenon, *Mind Games—The Pioneer Fund*, GUARDIAN, July 18, 1992, at 4.

upset or offended by remarks made in class. Such compulsory "therapy" has been used to "correct" students speech as well.²⁶ Since offensiveness, actual or imagined, is not a disease, there can be no treatment for it, and the "therapy" ordered is but another name for punishment. It might be more productive to give therapy to those who choose to be upset—even if to do so may not be politically correct. Two cases illustrate the continuing usefulness of tenure in protecting against infringements of administrators and students or the free speech of professors.

In *Levin v. Harleston*,²⁷ Professor Michael Levin, a philosopher at City College of the City University of New York, was charged with having published, in an Australian journal, *Quadrant*,²⁸ an *obiter dictum* mentioning that the average I.Q. of blacks in the United States is below that of whites.²⁹ He was not accused of having made this or any other "offensive" remark in his classroom. This alone should have immunized him against attacks by the university administration. Nonetheless the administration tried to harass him. Levin sued and won his case in court. Actually his controversial dictum was correct (and agreed to by the vast majority of psychometricians).³⁰ But Levin would have been entitled to publicly state his opinion, even if it had been incorrect.

The case of Professor Leonard Jeffries,³¹ Chairman of the Black Studies Department of the City College of the City Uni-

26. The University of Pennsylvania requires incoming students to attend a "diversity-education" program in which appropriate and inappropriate behaviors related to race, gender, and sexual orientation are acted out in skits. A general discussion then follows. Robin Williams, *Colleges' Anti-Harassment Policies Bring Controversy over Free-Speech Issues*, CHRONICLE OF HIGHER EDUCATION, Oct. 4, 1989, at A39.

27. 770 F. Supp. 895 (S.D.N.Y. 1991), *aff'd in part*, 966 F.2d 85 (2d Cir. 1992).

28. Michael Levin, *The Trouble with American Education*, QUADRANT, Jan.-Feb. 1988 (reviewing E.D. HIRSCH, *CULTURAL LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW* (1987) and ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1988)), *cited in Levin*, 770 F. Supp. at 900-01. Professor Levin published two other writings that were the subject of controversy: *Howard Beach Turns a Beam on Racial Tensions*, N.Y. TIMES, Jan. 11, 1987, § 4, at 30; PROCEEDINGS OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION, Jan. 1990, *cited in Levin*, 770 F. Supp. at 899-900.

29. *Levin*, 770 F. Supp. at 899-900.

30. See, e.g., HERRNSTEIN & MURRAY, *supra* note 25, at 272-95.

31. *Jeffries v. Harleston*, 828 F. Supp. 1066 (S.D.N.Y. 1993), *aff'd in part, vacated in part*, 21 F.3d 1238 (2d Cir.), *cert. granted*, 63 U.S.L.W. 3066 (Nov. 14,

versity of New York, is quite dissimilar, except that the administration attacked him too on improper grounds (thinly veiled in his case) and deservedly lost in court. Jeffries made anti-Semitic, racist and silly remarks in a public speech.³² This led to pressure to remove him from his post as department chairman, although he was a tenured professor. The court held that a public speech could not yield legitimate grounds for dismissal from a tenured position.³³ Jeffries was reinstated. The administrators who named Jeffries to a tenured position without any proof of competence, and kept him in that position for many years, despite proof of incompetence, should have been severely sanctioned. They were not. Stupidity may be a sufficient ground for not granting tenure; indeed it should be. Yet once tenure has been granted, stupidity is no ground for dismissal.

The two cases—*Jeffries* and *Levin*—were dissimilar inasmuch as Levin had numerous highly regarded publications to his credit and was generally known as a competent philosopher fully deserving his tenured position. He was not accused of using his classroom for anything other than teaching philosophy. In contrast, Jeffries, a Professor of Black Studies, had never published a scholarly paper, and he taught his totally unsubstantiated racist theories in his classroom.

How is it to be determined that an instructor should be tenured? There are reasonable criteria such as competence, publications, and professional references.³⁴ Yet the decision to grant tenure, usually vested in a group of peers, and approved ultimately by trustees, will always to some degree remain subjective. After all, the quality of research must be judged by colleagues who may differ in considering the comparative merits of candidates. All such judgments are fallible. Still, on the whole, the system has worked fairly well, and there are no alternatives promising better results—even if, as in the Jeffries case, tenure leads to, or permits, bizarre results.

1994) (No. 94-112) (remanded for reconsideration in light of *Waters v. Churchill*, 114 S. Ct. 1878 (1994)).

32. Professor Jeffries spoke at the Empire State Black Arts and Cultural Festival on July 20, 1991. See *Jeffries*, 828 F. Supp. at 1023.

33. *Jeffries*, 828 F. Supp. at 1071.

34. See AAUP, *Recommended Institutional Regulations on Academic Freedom and Tenure*, 69 ACADEME: BULL. OF THE AAUP 15a (Jan.-Feb. 1983), reprinted in AAUP POLICY DOCUMENTS AND REPORTS 21, 22 (7th ed. 1990).

Tenure exists to protect the ability of professors to freely pursue their researches.³⁵ However there are brilliant researchers who are not good teachers, just as there are good teachers who are unable, or unwilling, to do original research. Since tenure is granted to protect the independence of research by protecting that of researchers, it should be available only to those doing research—not to administrators or teachers, however able.

Yet universities have two functions, research and teaching, and the two needed abilities do not always coexist in the same person although ideally they should.³⁶ Currently, university policies grant tenure after a probationary period only to promising researchers. Instructors who do not achieve tenure based on their research are dismissed. Indeed tenure should be granted only to promising researchers. However good teachers also are needed. Therefore scholars who are good teachers should be retained even if they do not publish. They should enjoy all the legal protections granted employees as well as the free speech protections granted all citizens and residents while the special protection of tenure continues to be reserved for researchers for whose sake it was invented.

Note that current tenure practices often compel gifted teachers who are not gifted as researchers to produce papers that waste everyone's time. They must publish to keep their jobs. It would be better if they were permitted to keep their jobs as scholar teachers even if not producing research.

Tenure is often granted to secondary and primary school teachers and administrators. This perverts the concept.³⁷ High school teachers transmit the knowledge created by university faculties. It is not part of their job to do research which needs to be protected from interference. Nor are they free to teach what they wish since curriculum is prescribed by school boards. Primary and secondary schools educate the students by helping them to acquire accepted knowledge. Teachers and administrators may well arrange the same kind of employment contracts

35. See AAUP, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, 76 *ACADEME: BULL. OF THE AAUP* 37 (May-June 1990), reprinted in *AAUP POLICY DOCUMENTS AND REPORTS* 3-7 (7th ed. 1990).

36. Benditt, *supra* note 3, at 99-107.

37. HOOKER, *supra* note 9.

and the same degree of employment security that workers or managers in other industries enjoy. However, neither academic freedom nor tenure are relevant to non-research institutions.

Is tenure still as necessary as it was in the past? A market for the services of university professors has developed since tenure was created. Professors find it easier than in the past to pursue research elsewhere if they are dismissed from a particular institution. Still, the recent surge of "political correctness" and the numerous pressure groups which try to influence and restrict the conduct and the speech of professors, suggest that tenure still has a role to play. The protection tenure grants is still needed even though it protects the worthy as well as the unworthy and gives great power to those ensconced for years in their positions. They may use their power to stifle new and sometimes worthy ideas; or views of expressions that are unfashionable. We should remember that when, in the 19th Century, the basic theories and inventions of the Industrial Revolution first took hold in England, they took hold not in, but despite, the universities. Oxford and Cambridge did not foster empirical science. They were wedded to Aristotelian categorizations. They grudgingly accepted empirical science only when the evidence produced outside compelled them to. Had they had the power, universities might well have strangulated scientific progress. Tenure protects whoever is in office, for better or for worse.

Thus tenure may well retain a useful function, even if abused at times. Yet, if tenure were abolished professors would be protected by the laws that currently protect all employees. The existence of that extra protection of tenure however, may reduce the temptation for administrators to engage in arbitrary actions and strengthen the position of individuals and faculties. Tenure is not as important let alone as indispensable as is often alleged to be but it remains useful enough to retain.