

TENURE AND ACADEMIC FREEDOM*

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ABSTRACT

Using a foundation of the judicially defined policy supporting the public interest in maintaining academic freedom, the author analyzes the operation of both tenure and first amendment protections in the public and private sectors of the academic community. The right to academic freedom is examined in three contexts: in the classroom where the professor has the freedom to expound upon ideas; in the community where the professor, as a citizen, has the ability to exercise her civil and political rights in the community; and in the institution, where the faculty, collectively, can determine the conditions of employment within its sphere of influence. The development of these doctrines is discussed against an historical backdrop and an analysis of the way these processes function, both independently and as they intertwine, is provided. The author concludes that both constitutional and tenure protections are necessary to assure the integrity of acquiring knowledge and the advancement of intelligent debate in a free society.

The words "tenure" and "academic freedom" are so embedded in American thought that a speaker rarely seems to feel the need to define them. Not many question the benefits derived from maintaining academic freedom. Tenure, however, is sometimes perceived as a mechanism that prevents accountability and responsibility, and its advantages are often overlooked. This article explores the relationship between tenure, academic freedom and the First Amendment to the United States Constitution and their place in a democratic society.

*The author presented this article at the 1990 Labor and Employment Conference of the New York Bar Association.

ACADEMIC FREEDOM

The best context within which to understand the somewhat amorphous concept of academic freedom is one in which its absence is manifest. This necessarily occurs where the freedom of individuals to express their ideas is a limited one. Indeed, the historical development of the doctrine began in the 16th century with the Reformation. Before then, although universities were, for the most part, privately operated, the Church and Crown were intimately involved with their affairs. Academic thought was narrowly channeled and deviations from dogma were thought of as heresy.

After the Reformation, the involvement of the Church was significantly lessened, although the role of the Crown continued in a modified form [1, pp. 267-268]. Having achieved less restrictive governance and having been exposed to German higher education institutions, where academic freedom was given greater room for growth, the English system began "to search for and to teach the truth, free of constraints of their immediate superordinate or by government" [2, p. 205]. The definition of academic freedom began to evolve.

In the United States prior to the Civil War, higher education was still devoted to training men in "religious piety" and "mental discipline." Universities were primarily devoted to the preparation of men for service in the clergy and professions such as law and medicine [1, p. 269, n.1]. The "search for truth" was restrained. Debate as to the societal roles universities should play, not too dissimilar to that of today, began during Reconstruction. Some wished the universities to be patterned on the German system in which the curriculum was primarily devoted to research and specialization. Others argued that practical skills necessary to support the growing needs of an industrial society should form the basis for scholarship [1, p. 251]. Beginning in the antebellum period, the goal of training the aristocracy to perpetuate that class as the elite lost influence as large-scale industries mushroomed and the concomitant powers of the bourgeois and proletarian classes increased. Thus, the boards of private universities, whose trustees had been mainly professionals and clergyman, began to appoint business and government leaders as trustees. The institutions of higher learning then designed new curricula to produce the trained specialists necessary to teach increasingly technical subjects, although traditional subjects were still taught to future clergymen and professionals in the undergraduate institutions [1, p. 270]. Thus began the formation of universities as we know them today.

Academic freedom cannot be analyzed as a single concept with direct application to a given set of facts. It has been suggested that it be divided into three separate components: classical, personal and corporate [3, pp. 25-26]. The classical relates to the specific work of the professor. The second is personal and recognizes the right of the professor to exercise the same civil and political freedoms in the community as other members of the general population. The third

right, thought of as corporate, is that of the faculty collectively to control the conditions of employment within its sphere of influence. This involves the right to choose what should be taught and who should teach it in accordance with criteria that the faculty alone determines. Were these freedoms absolute, the academic community would have no limitations imposed by the government, the community, or the institution. This, of course, is not the case, and it certainly could be argued that absolute freedom would be totally chaotic and unworkable.

Controls on academic freedom have been implemented in many ways and to varying degrees. Limitations imposed depend on the academic level of the institutions involved, the desires of the community as reflected in the exercise of power by its government, the structure of the institution, the collective strength of the faculty, and ultimately, the interpretation and application of the Constitution of the United States. Tenure, an almost universal component of the academic order at all levels, is inextricably tied to the exercise and limitation of academic freedom in the United States. As the handmaiden of academic freedom, tenure is its protector, maintaining the creative spirit, thinking and achievement.

TENURE

Tenure can be defined as a contractually¹ won protection against discharge of a faculty member from employment for arbitrary or capricious reasons. A dismissal of a tenured professor, therefore, may warrant a written notice of the reasons for the dismissal, an adversarial hearing before neutral decision makers, and several levels of appeal.² To those involved in the non-academic labor community tenure is not an earth-shattering concept because they deal with a similar doctrine of “just cause” for discharge on a daily basis. It is also not surprising that the presence of tenure in academic contracts is a direct result of concerted activity by faculty at academic institutions.³

¹ This section addresses the contractual rights of tenured professors without consideration of any statutory or constitutional rights which may be present (as when state institutions are the employers). The relationship between contractual rights and constitutional rights will be discussed *infra*.

² The extent of the review of the decision to terminate a faculty member may be contractually or statutorily driven or may have to meet constitutional due process standards, depending on the nature of the institution [4,5]. Where contractually driven, courts have tended to relax due process requirements in a forum which is often seen as collegial instead of adversarial. Administrative tribunals do not always observe the technical rules of evidence including rules governing the admission of documents [6] and the right to cross-examine witnesses.

³ In 1913 some professors at Johns Hopkins University organized professors of equal rank at nine other schools in order to form a national association for the purpose of supporting the interests of professors through collective action. The resulting American Association of University Professors (AAUP) is still functioning today and publishes influential policy papers on issues pertaining to the profession [8].

There are deep divisions both in academia and in the general population about the advisability of continuing tenure rights. The forces attempting to compel the elimination of tenure argue that tenure offers too much protection for the slothful and incompetent. While it may often be true that the protection offered by tenure rules has come “to resemble that underlying Civil Service philosophy . . . [that] employment was guaranteed” [8], it is not necessarily true that a significant number of tenured teachers do not live up to the professionalism required by their jobs after tenure is granted. Tenure is not easily gained. There are strict academic requirements, including the publication of original research. The decision to grant or deny tenure is administered differently depending on the structure and control in each facility.

In private institutions, tenure requirements and decisions are often implemented by a board of directors (or trustees) upon recommendation of the president and faculty committee(s). If the labor force is organized, the union most likely has some responsibility for the system’s design. In state-financed universities, a similar system might be in place, but in many instances the state legislatures determine the tenure system through the enactment of statutes. In New York State, tenure decisions in part of the state-financed system of higher education are controlled by boards of directors, but in other divisions are controlled through legislation.

Peer review, and in some cases student input, is often a significant component of the final decision. Probationary periods last upwards of five years in a large portion of institutions of higher learning, and in others, as long as seven years. The extraordinarily long probation permits a screening period not found in other labor sectors, where six months is often the norm. If tenure is not granted at the end of this period, the professor must leave the institution and find work elsewhere.

Proponents of tenure assert that the disadvantage of protecting the small number of individuals who survive the process, slip by and continue inept teaching, does not offset the advantage gained by leaving tenure rights in place. While one advantage of the tenure system, namely job security, inures to the individual teacher, the primary benefit to society generally is the protection of academic freedom.

It is well recognized that “[i]t would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living. . . . Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned” [9].

Yet, insofar as public institutions are concerned, the need for tenure is questioned, especially because of its relationship with and the protections offered by the First Amendment.

CONSTITUTIONAL GUARANTEES OF ACADEMIC FREEDOM

Depending on the circumstances in an individual case, the limitations on academic freedom can be imposed by a government, by a community or by an employer. The extent that this freedom can be circumscribed is a function of whether the institution is a public or private school from elementary grades through the university structure.⁴ For purposes of determining the presence or absence of constitutional guarantees, the analysis in this article is confined to the premise that conduct emanating from purely private institutions will not be limited by the First Amendment.⁵ Government-run institutions, whether they be school boards, enforcement agencies or courts, however, cannot perform acts violative of the Constitution. Since much of the educational process takes place in publicly financed and controlled institutions, constitutional protections often enure to a large portion of the professional labor market. The anomaly thus exists that faculty with and without tenure employed in state-operated institutions have protection of constitutional dimensions against infringements of their right to academic freedom. Professors in the private sector, however, teaching the same curriculum, generating the same ideas, using the same words, may or may not have any protection at all. If they have any right to academic freedom, it will be a contract right contained in an agreement with the institution, but then, only if their status is not provisional and tenure has been earned.

It is suggested that the validity of any argument that tenure is outmoded, unnecessary or detrimental should be prefaced by an analysis of whether or not academic freedom is preserved when tenure is absent. Further, the analysis must include the application of this proposition to the classical, personal and corporate segments of the totality we call academic freedom.⁶ Finally, in the area of classical and corporate academic freedom, it is suggested that the courts are not necessarily equipped "to enforce traditional academic freedom as a legal norm . . . [but rather, to provide] useful protection for individual faculty members" [1, p. 288].

⁴ Principles of academic freedom can easily be extended to libraries, art galleries, museums, theaters and book and music stores. Most recently, these facilities have had highly publicized limitations placed upon their right to present the expression of ideas to the public. For ease of analysis, this article excludes institutions not confined to purposes that are purely educational.

⁵ Circumstances exist where the extent of government control through financial contributions (and the power to withhold them) in otherwise private institutional settings can be tantamount to the state action required to activate constitutional protections. For ease of analysis, these situations are eliminated from discussion in this article.

⁶ To suggest that tenure only protects academic freedom as it is referred to in this article would be misleading. Once tenure is earned, the professor is also provided with many traditional rights found in labor agreements in the nonacademic sector.

The First Amendment Guarantee

Since 1957, academic freedom has often been included when defining First Amendment protections [10]:⁷

[The First Amendment incorporates] freedom of speech, freedom of political association, [and] freedom of communication of ideas, particularly in the academic community.

While giving credence to the need for academic freedom to perpetuate the democratic form of government, it was defined only in terms of its functions and its effects, rather than in a traditional “dictionary” format [10, p. 250 (emphasis added)].

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot be made. . . . Teachers and students must always remain free *to inquire, to study and to evaluate, to gain new maturity and understanding*; otherwise our civilization will stagnate and die.

Thus, whether the teacher is the actor in the classroom or in the community, or where the institution is itself is involved, so long as state action is present a court will scrutinize limitations on academic freedom regulating who is teaching, what is taught, how it is taught, what is said and to whom it is taught.

Personal Right to Academic Freedom

The First Amendment clearly gives citizens the right to express their opinions outside the workplace regarding the conduct of public institutions. There are, of course, laws which place limitations on this speech, e.g., factual allegations must be truthful, violent overthrow of the government cannot be advocated, etc. The remedies for such breaches, however, rarely if ever involve a loss of employment because of an opinion expressed by an employee. Except, perhaps, if the employee is a teacher.

When a school bond issue was to be voted on, a teacher wrote a letter, which was printed in the local paper, criticizing the school board’s handling of a prior bond issue proposal as well as its subsequent allocation of the funds. The board dismissed the teacher for writing and publishing the letter. The Court found

⁷ It was recognized in *Sweezy* that the Court, in a concurring opinion, first recognized academic freedom as warranting constitutional protection [10].

it necessary to balance the “interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees” [11]. Since the topic of the letter was one of legitimate public concerns requiring free and open debate to permit informed decision making by the electorate, and because it was deemed that teachers are “the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent,” the Court found it “essential that [teachers] be able to speak out freely on such questions without fear of retaliatory dismissal [11, p. 572]. The Court ordered reinstatement.

It appears that in balancing the state’s interest against the teacher’s right to speak, it found in favor of both. The state’s interest ultimately considered was that of having an informed electorate. This interest coincided with that of the teacher’s right to inform. The state’s interest as an employer was given only cursory attention. Yet, had this been a private employer, no constitutional protection would have been operative. Both the teacher’s right to free speech and the public interest in open debate would have been left unsatisfied. But tenure protections might have been able to protect the same interests that the Court recognized.

In another case, *Mount Healthy City Board of Education v. Doyle* [12], Mr. Doyle, a nontenured teacher at a public school called a Cincinnati radio station to comment on the substance of a proposed new dress code under discussion at his school. When his contract was not renewed, this communication was cited as one of the reasons. The district court found that the speech was protected by the First Amendment and ordered reinstatement. The Supreme Court affirmed in part, agreeing that the speech was protected.⁸

It is curious to note that the relationship of the circumstances in this case parallels other situations that might occur in different settings. Public employee Doyle did not have tenure protection, yet his academic freedom was protected. Had Doyle been nontenured and working in a private school, his speech would have been unprotected. Tenure comes into play only in a third instance: if Doyle had been tenured in a private school it is quite conceivable that he would have been reinstated after the hearing, perhaps on public policy grounds.

There are obviously concerns in the academic community that have no parallel in other fields. Tenure protection is particularly designed to cope with these problems.

⁸ Since the communication was only one alleged cause for the nonrenewal, the Supreme Court remanded the case to the District Court for further findings, to wit, whether Doyle’s contract would not have been renewed for other reasons cited by the school board if the communication with the radio station had not been considered [1].

Classic Academic Freedom

Much of the law on academic freedom developed during the McCarthy era, which “represented a democratic assault on elite institutions as much as a demagogic persecution of radicals” [1, p. 313]. In response to McCarthy’s challenge, both state and federal governments instituted policies and passed legislation to remove Communists and Communist sympathizers from employment in government jobs.

Not surprisingly, the universities were the focus of inquiries because of the general openness of thought that existed there; precisely the very openness that academic freedom seeks to protect. *Sweezy* [10] was the first case to mention academic freedom within the scope of the First Amendment, albeit in the concurring opinion. Following were a series of fact-specific cases, leading to conflicting holdings. To the extent that *Sweezy* addressed the content of classroom curricula, the concurring opinion of the Court suggested protection under the First Amendment.

In *Sweezy*, the State of New Hampshire attempted to compel testimony about the content of a lecture the professor had been asked to give. *Sweezy*, although he had answered the vast majority of numerous questions, declined to respond to questions about the substantive contents of the lecture. The state claimed its inquiry was justified in because it had a statement from an attendee at the lecture stating, “His talk this time was on the inevitability of the Socialist program. It was a glossed-over interpretation of the materialistic dialectic” [10]. In a concurring opinion, Justice Frankfurter, joined by Justice Harlan, rejected both the justification offered by the state and the claimed interest of the state in discovering the answer. Justice Frankfurter observed [10, pp. 261-262]:

When weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate. . . . For society’s good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. . . . This means the exclusion of governmental intervention in the intellectual life of a university.

Sweezy notwithstanding, courts remain reluctant to interfere with determinations made by school administrations. It is thus often left to the processes prescribed by tenure rights to address issues of academic freedom.

For example, in a recent case before the Commissioner of the State Education Department of the University of the State of New York, *Board of Education of the Malverne Union Free School District v. Janet Morgan* [13], the Petitioner, Janet Morgan, a tenured teacher with 13 years experience, had written a letter published by a local newspaper commenting on the firing of Jimmy (the Greek) Snyder by

CBS for racially motivated remarks about black athletes. Ms. Morgan then developed a lesson for her eighth grade students incorporating three letters, including her own, expressing different points of view. The students were then given a homework assignment that sought their opinion on the propriety of Synder's discharge. The complaints of at least one parent caused the administration to order Ms. Morgan to cancel the assignment and when this became impossible, to omit grades for the assignment. Ms. Morgan refused. She was suspended for this alleged insubordination in addition to some unrelated conduct. Ms. Morgan appealed to the Commissioner from an adverse decision of the panel convened to hear the charges. The Commissioner sustained some of the charges against her, but on the charge of insubordination found that the administration's conduct was impermissible [13, p. 5]:

[B]ecause I find the assignment consistent with a teacher's role in eliciting student opinion and providing assignments which strengthen analytic skills, I conclude that the district's directives which attempted to interfere with the teacher's right to give the homework assignment or assign a grade constitute an unreasonable intrusion into the teacher's academic freedom.

As will be discussed *infra*, courts are reluctant to intervene in these disputes. Without tenure rights, there would have been very little, if any, recourse for Ms. Morgan. The chilling effect, with which the labor community is so familiar, would surely have taken its toll. The existence of constitutional protection of academic freedom is, in reality, applicable in so few instances that it can hardly be said to replace the need for tenure in the academic setting.

Corporate Academic Freedom

An academic institution's right to academic freedom is often circumscribed by the community. This is especially true in the elementary and secondary schools. However, institutions of higher learning are not exempt from these pressures. State universities are particularly concerned, not only with their public image, but with actions of the legislatures that attempt to restrict their freedom.

In the early 20th century, Nebraska passed legislation forbidding the teaching of modern foreign languages in public and private schools. The Supreme Court struck the law as being in violation of the First Amendment [14]. And in 1968 the Court again found unconstitutional an Arkansas law prohibiting the teaching of the Darwinian theory of evolution in any state-supported school [15]. While recognizing "the right to receive ideas [which] ineluctably flows from the *sender's* First Amendment right to send them . . . and necessarily the right to receive [them] [16], some on the Court would have limited the application of the First Amendment when the government acts as an educator .

[A]ctions by the government as educators do not raise the same First Amendment concerns as actions by the government as sovereign [17].⁹

This is especially true at the elementary and secondary school levels where it is “permissible and appropriate for local school boards to make educational decisions based upon their personal social, political and moral views” [17 at 909].

The courts are, thus, unlikely to interfere with limitations placed upon the institutions themselves, although there have been some significant exceptions. For example in *Board of Education v. Pico* [17], members of a school board obtained a list of books considered impermissible from a conservative organization. They then ordered these books removed from the school’s library shelves without reviewing them. A plurality of the Court saw the removal of the books as distinguishable from the placement of books in the library. It held such a removal of books as motivated for the sole purpose of suppressing exposure to ideas was “absent sufficiently compelling reasons” and violated the First Amendment [17, p. 453]. The books should not have been removed. Unfortunately faculty are subject to similar limitations emanating from above. It is in this context that tenure protections may make little difference and constitutional protections, must be relied upon.

CONCLUSION

If one concedes the need for academic freedom as a fundamental component in a democratic society, the question must be raised whether the First Amendment alone is sufficient protection of this right. Aside from the absence of recourse for violations of the private sector academic community’s right to academic freedom, there is also the distinct problem of using the courts to correct abuse. Aside from the expense, there is also the difficulty of proving one’s case to the satisfaction of a court under circumstances where a state is charged with violating the Constitution. Plaintiff has a difficult burden to overcome.

Tenure rights, on the other hand, operate in the public and private sectors, the defense is not expensive, and the balance of burdens of proof favors the academic. (In a disciplinary hearing, the state carries the burden of proof and the standard of proof approaches “clear and convincing.” In court, the employee carries the burden of proof, although the standard is a preponderance of the evidence. Where an employer charges an employee with misconduct in a situation which might contain a violation of the employees’ right to academic freedom, it is much more

⁹ *Board of Education v. Pico*, (Rhenquist, J., Joined by Powell, J. and the Chief Justice, dissenting.) Because of the current composition of the Court, the possibility exists that this dissenting opinion will become the opinion of the majority in subsequent cases [17].

difficult for the employer to sustain a discipline which violates academic freedom than for the employee to prove in court that the discipline violates the First Amendment.)

The greatest protection of academic freedom necessarily occurs when the rights of the aggrieved are prescribed in both the Constitution and a contract providing for tenure.

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