

The University and Free Speech

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ABSTRACT

Free speech is a necessary condition for the growth of knowledge and the implementation of real and rational democracy. Educational institutions play a central role in socializing individuals to function within their society. Academic freedom is the right to free speech in the context of the university and tenure, properly interpreted, is a necessary component of protecting academic freedom and free speech.

KEYWORDS

free speech, knowledge, democracy, academic freedom, tenure

A complete discussion of free speech must consist of five distinct aspects: definition, history, justification, relation and implementation. Definition, of course, is central for specifying the exact nature of the concept under discussion, ideally giving necessary and sufficient conditions for the use of the concept. The historical aspect is simply a survey of the temporal evolution of the concept; this usually provides suggestions for its justification. Justification refers to the arguments or reasons necessary to rationally assent to the validity of the alleged right, which, in normative discourse is usually made in terms of some moral theory from which the right is presumably entailed. The notion of relation concerns the role the right under discussion plays with respect to other rights or moral categories. Finally, implementation addresses the problem of the proper institutional or legal structures necessary to apply and protect the right in actual social circumstances. Let us consider these questions in turn.

As a first approximation, the right to free speech will be defined here as a right that others refrain from restricting the *content* of speech. That is, there is no idea or opinion that is forbidden by law. In addition, there must be no limit on the *scope* of speech, i.e., no restriction on the size, timing or location of the potential audience. This first approximation which presents the right to free speech as absolute and totally unrestricted is modified when its relation to other rights and interests is brought into the discussion. It will be assumed that free speech can be limited in

order to prevent harm to others. Traditional examples of justified limits on speech include such cases as falsely yelling “fire” in a theater, libel, to protect minors, as against pornography, etc.

Historically, the right to free speech has had a long if checkered career. Its origins probably go back to Socrates’ defense of the freedom of thought in Plato’s *Apology*. There, Socrates argued, among other things, that he had a higher duty to the gods to pursue knowledge which he believed would ultimately benefit Athens as well benefit him. Liberal thinkers such as Locke and later Mill use various arguments to justify free speech as a human right. However, it is generally agreed that special protection for the right to free speech for faculty members as academic freedom (see below) was first fully implemented in Germany in the nineteenth century.

For our purposes, the justification of the right to free speech can be based on the necessary conditions for the growth of knowledge and the nature of democracy. This justification can be made in utilitarian or non-utilitarian terms. A non-utilitarian defense of free speech grounds it in some conception of individual autonomy and dignity. A utilitarian approach such as that of J. S. Mill views free speech as a necessary condition for the rational growth of knowledge.¹ Mill argued that only if all individuals can criticize existing beliefs and propose new ones can knowledge increase.

Free speech is also a necessary condition for democracy. For persons to rationally choose their representatives, they must have access to the most complete and objective information, especially if political power is to be distributed by the informed consent of the governed. Without the right to free speech, political power could not be acquired in a competitive and rational manner, nor would the electorate be able to hold accountable individuals who already possess political power. The right to free speech, then, has a double foundation: as a necessary condition for rationality and the growth of knowledge, and for the maintenance of a democratic government.

The right to free speech, like any other crucial right, must have an institutional implementation. That is, it must have social structures that define and interpret it (e.g. courts), expand and publicize it (e.g. the press), as well as promote and nourish it (e.g. educational institutions). Educational institutions perform at least four central functions in a democratic society: the socialization (inculcating of the community’s beliefs values and customs) of new members, the training and certification for the various roles and professions, the development of individual potential and knowledge and the development of a critical perspective. That is, in a democratic society, educational institutions do not merely passively transmit the

existing beliefs and values but also seek to evaluate and criticize them and to promote the development of more adequate ideas and a more rational society.²

It is assumed here that rationality is a desirable trait for any society to have, but it is especially desirable in a democracy. Rationality is desirable, first, in that it means partly to take the most appropriate means to achieve the given goals (instrumental reason). This sense of rationality would seem to be of cross-cultural value. The other aspect of rationality involves a general critical attitude and questioning of means and ends. A community that accepts both aspects of rationality should be called an 'open society' or one based on free inquiry. Such a society is typified by the assumption that no society is perfect in knowledge or moral virtue and that this fallibility and imperfection are corrigible by rational inquiry and criticism.³ Some communities, however, may be typified by obtaining and maintaining beliefs by appeal to what they consider a sacred and infallible person, or text, or tradition. These communities would value rationality in its instrumental dimension (means-ends) but not in its overall critical dimension. The question of academic freedom is relevant only in a society that accepts rationality in both senses.

The institutionalization of the promotion and development of free speech and free inquiry occurs primarily in the context of educational institutions. The socializing and training function is performed at every level of education, but the development of the critical attitude, which is necessary for an open and free society, is primarily performed at the college and university level. Because of the knowledge of the faculty and their role as educators of new generations, institutions of higher learning are the logical loci of systematic and open inquiry and of the initiation of social reform. To be sure, not all colleges and universities have the overriding dedication to the pursuit of knowledge; some are committed to political, religious or other ideologies in a dogmatic or noncriticizable way. Undoubtedly, such institutions have a right to exist in a free society, but if all educational institutions were of this type, a free society would cease to be free.

Open and free inquiry in academia has traditionally been protected by the development of what is termed "academic freedom." Academic freedom means that tenured professors cannot be terminated or penalized in any way for exercising their right to free speech and inquiry, inside or outside the college (including research, teaching and publication). This is a privilege distinct from the general civil right to free speech that citizens of a democracy have, since other citizens working in the private sector may be legally fired or penalized in some way for expressing opinions displeasing to their employers. A direct implication of this understanding of academic freedom is that decisions concerning an academic's work can only be made on the basis of competence as understood in that profession, not whether one agrees

or disagrees with his or her ideas. If agreement were a condition for hiring, tenure and promotion, new ideas and free inquiry would be stifled. Decisions concerning the appointment, tenure and promotion of professors must be made by their peers; peer evaluation is crucial if authority over academics is to be exercised in a manner consistent with free inquiry and the growth of knowledge. However, as it exists presently, only 'tenured' professors have this protection: let us consider this concept of tenure.

Academic freedom has been institutionalized through the practice of tenure. Tenure means that once a teacher has served a probationary period (usually no more than seven years), he or she is granted guaranteed employment until retirement and can be dismissed only for failing to perform specified duties, or for moral turpitude, for financial exigencies which require the elimination of a tenure slot in the department, or because of the elimination of the department itself. The idea of tenure is related to the nature of the responsibilities of professors. These responsibilities include the function of socialization, professional training, the development of critical reason (teaching), and the growth of knowledge (research), as well as the support and maintenance of the educational institution itself (service). Hence, tenure has been usually decided by determining to what extent one has successfully promoted the goals of teaching, research and service to the university. The American Association of University Professors also claims that tenure serves the purpose of providing economic security which in turn will attract qualified individuals to the profession.⁴ Academic freedom, then consists of three essential concepts: the commitment of educational institutions to the pursuit of knowledge per se (not the propagation of some dogma or ideology), the exercise of authority over academics must be only by peers, and the security against termination or tenure.

Though the theory of tenure as sketched above may not seem obviously problematic, in practice, several problems seem to have emerged.⁵ Firstly, tenure does not protect junior faculty during their probationary period. This is a significant factor for it seems plausible that junior faculty are at least as likely and probably more so to introduce new and unpopular ideas than older and more established colleagues. However, since untenured faculty usually seek to achieve tenure there will be a tendency to avoid controversial issues that might alienate and antagonize older members of the department who will later make the tenure decision. Consequently, the present system of tenure may filter out the very individuals and ideas it was meant to protect. In addition, it creates a high level of anxiety in junior faculty who must function at their best under this same stress. Secondly, the brief probationary period puts pressure on individuals to publish

quickly and in quantity which may reduce the quality of the publications. Thirdly, once a professor has been denied tenure, universities usually do not help in finding alternate employment. Fourthly, to the extent the present system under protects junior faculty it may overprotect the tenured faculty in the following way. In theory, tenured professors can be terminated for failing to adequately carry out their duties, but in practice, the present system allows individuals to continue teaching while meeting only minimal standards of competence. This is the problem of so-called “deadwood” which many feel exists because of the difficulty of removing individuals who are tenured because the security of guaranteed employment removes incentives for a high level of performance. Tenure also reduces the financial and academic flexibility of colleges and universities since it is difficult to terminate individuals for economic reasons or for reasons of new staffing and teaching needs.⁶

Some have argued for the abolition of tenure and its replacement with a system of renewable contracts.⁷ This would involve the right to due process by peers with the burden of proof not to renew a contract resting with the institution. Contracts could not be denied renewal if it meant the violation of academic freedom. In addition, contracts must specify the exact terms of employment and conditions for renewal.

This proposal is problematic for several reasons. First, the theory of the present system of tenure does not preclude the termination of any individual who is failing to perform his or her duties, whether teaching, research or service. Short of termination, of course, other measures can be used to provide incentives for better performance, measures such as raises, promotions, sabbaticals, and course load variations. More importantly, one must ask “Incentives for what?” To amass a long bibliography of mediocre value or to publish only if one has something of importance to say? True, in the past there may have been a reluctance on the part of universities to terminate professors, but this is an institutional weakness, not an intrinsic problem with tenure.⁸ Tenure will not be abused if steps are taken by faculty, administration and students to protect their rights and ensure that teachers live up to their responsibilities. All teachers should have their teaching evaluated on a regular basis by peers and students. Professors who are strong in teaching but weak in publications should have their teaching schedule reflect this, and conversely for strong researchers who are weak teachers. All professors should also be encouraged to participate in paid summer institutes on a regular basis to keep abreast of developments in their field.

The renewable contract idea would at the very least have a chilling effect on professors’ speech and research. All forms of subtle pressure could be used by the administration and faculty to remove someone with whom they are uncomfortable or for financial reasons. In addition, a flood of costly litigation would likely result from non-renewed professors. Finally, and perhaps most importantly, there is the possibility of conflict of interest given that all faculty would be equally nontenured. When a colleague came up for renewal there may be a tendency to be lenient since this would increase the chances of one’s own renewal in the future. In the tenure system which exists today at most schools, tenured faculty do not have reasons to be lax on junior faculty, in fact, quite the contrary may often occur.⁹

A related argument contends that professors should not be singled out for the special protection that tenure provides, but employee rights for all should be expanded. On this view, all employees should have expanded rights in the workplace including the right to due process if disciplinary action or discharge is recommended. This means the employer must specify a just cause for terminating or penalizing an employee, base promotions and raises on public and fairly applied standards, and uphold employee

rights. These rights involve, in addition to the right to due process, the right to “blow the whistle” or go public with immoral or illegal company activities, the right to privacy, and the right to strike.¹⁰ It may well be true that all employee rights should be extended, yet this point ignores the special status of the teaching profession. The academic profession is, in a sense, a foundational profession in that all other professions depend on it for their training and education. It is foundational in the sense that it helps to inculcate through the process of socialization the basic or foundational values of democracy. As such, it seems clear that the excellences of the teaching profession in terms of teacher skills, liberties and moral integrity would permeate the breadth of society. Consequently, a lack of independence on the part of teachers would contaminate with dogmatism and stagnation the entire gamut of educational and professional training and cultural life.

As suggested above teachers play a pivotal role in the preservation of liberal democracy a role which, say, plumbers and bus drivers do not. Furthermore, though the right to “blow the whistle” is an important right that should be protected, it is not clear that a private corporation should tolerate free speech to the degree of allowing an employee to publicly insult, ridicule and denigrate his own employer and his products or services and advocate those of a competitor. The general consideration that suggests itself here is whether the behavior of the employee is consistent with the assigned function of the employee. That is, it seems one cannot have the most extensive set of rights in the workplace, since this may conflict with efficiency or adequate job performance.¹¹

However, in academia there is no conflict between freedom and efficiency since freedom is precisely one of the goals and defining characteristics of the professor. It is this type of wide-ranging freedom and independence that tenure guarantees and that the academic profession needs if it is to be capable of criticizing the status quo. In most cases, the function of the non-academic individual is more narrowly defined as performing a certain task within a corporate structure, whereas the academic’s role is not fully defined within the narrow confines of his or her institutional affiliation but involves the role of critic in the larger context of the society itself. Just as judges must be independent of political pressures in order to decide cases fairly, so professors must be independent of political, economic and administrative control. It is this role which gives

academics special status that merits special protection which tenure, properly applied, provides. Again, this is not to suggest that non-academic employees should not have greater rights in the workplace, for they should. The point has been to define their different roles and functions from which flow differential rights and duties.

The problem of junior or non-tenured faculty must be addressed if tenure is not to be used as a reward for timid conformists. To deal with this problem, some have suggested that junior faculty not be terminated for exercising their right to express new and perhaps unpopular ideas. The institutionalizing of due process for these professors would protect their freedom, if they are competent, of course.¹² This does not mean that junior faculty should have tenure from the start, but it does mean that they cannot be terminated for reasons tenure is meant to guard against. Since a probationary period seems to be necessary to evaluate the competence of new employees, junior faculty cannot have the same protection as senior faculty since the idea of tenure is to protect those who can best perform the function of a teacher, education and criticism; to give it to others would be detrimental to the advancement of these basic purposes.¹³

The argument presented here has been in terms of the social and institutional structures necessary to maximize freedom and knowledge. In order for elections to be rational and government to be accountable, democracy requires free speech and a properly socialized new generation that is rational and critical. Free speech and knowledge are maximized if those most knowledgeable have the freedom of free inquiry without fear of reprisal. Teachers and professors are in the vanguard of scientific, cultural and political progress through their own field-related research, teaching (socializing students to think critically and rationally), and general role as social critics. This vocation can be fulfilled only if professors can question every aspect of the status quo, whether it concerns the university, the profession, the community or the political system as a whole. Tenure, properly understood, protects teachers in their performance of these functions and thus preserves an open and free society.

Notes

1. Mill, J.S., *On Liberty*, Bobbs-Merrill Co., 1956, pp. 20-5.

2. Cf., Dewey, John, *Democracy and Education*, New York: Macmillan Co., 1963; Lovejoy, Arthur, "Academic Freedom," *Encyclopedia of the Social Sciences*, V.1, New York Macmillan Co., 1937, pp.384-387; Strike, Kenneth, *Liberty and Learning*, Oxford: Martin Robertson, 2002, pp. 54-8, 75-8.
3. Mill, op. cit., pp. 30-34.
4. AAUP: Policy, documents and Reports, 1977, p.2; Passmore, John, "Academic Ethics" *Journal of Applied Philosophy*, V.1, N.1, 1984.
5. Sartorius, Rolf, "Tenure and Academic Freedom," in Pincoffs, Edmund, ed., *The Concept of Academic Freedom*, Austin: University of Texas Press, 1992, pp. 141-155; Jaggar, Alison, "Tenure, Academic Freedom and Professional Competence," *The Philosophical Forum*, V.X, N.3-4, 1978-9, pp.360-363.
6. Hare, R.M. "Tenure" unpublished manuscript, p.1; Robinson, George; Moulton, Janice, *Ethical Problems in Higher Education*, Englewood Cliffs: Prentice Hall, pp.45-7.
7. Sartorius, Rolf, op. cit., pp.150-5.
8. Cahn, Steven, *Saints and Scamps: Ethics in Academia*, Totowa, NJ,: Rowman & Littlefield, 1996, pp.76-9.
9. Sartorius, Rolf, op. cit., p.155, Atherton, Margaret, Morgenbesser, Sidney, and Schwartz, Robert, "On Tenure," *The Philosophical Forum* V. X. N. 2-4, 1978-9, pp.349-50.
10. Ladenson, Robert, "Is Academic Freedom Necessary?" *Law and Philosophy*, 5, 1986, pp.69-75; cf., Werhane, Patricia, *Persons, Rights and Corporations*, Englewood Cliffs, NJ: Prentice-Hall, 1985, pp. 110-22.
11. Ways, Max, "The Myth of the Oppressive Corporation" in Donaldson, Thomas, Werhane, Patricia, eds., *Ethical Issues in Business*, Englewood Cliffs, NJ: Prentice-Hall, 2005, pp. 312-4.
12. Atherton, Margaret, et al., op. cit., p.344.
13. Schneewind, J.B., "On 'On Tenure'" *The Philosophical Forum*, V.X, N.2-4, 1999, pp. 355-6; see "The Part-time Problem: Four Voices" by Elizabeth Flynn, John Flynn, Nancy Grimm, and Ted Lockhart, *Academe*, Jan-Feb. 1986, pp.12-8 and "The Status of Part-time Faculty," *Academe*, 67, N.1, Feb.-Mar. 1981, pp. 29-39, for a discussion of why tenure should be available to part-time instructors. For an analysis of the state of American education today, see *College: The Undergraduate Experience*, Report of the Carnegie Foundation for the Advancement of Teaching, by Ernest L. Boyer, New York: Harper & Row, 1987; *Nation at Risk*, Report of U. S.

JOSEPH GRCIC

Dept. of Education, April 1983; Hacker, Andrew, "The Decline of Higher Learning," *The New York Review of Books*, Feb. 13, 2006, pp 35-42.