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ESSAY

IN PRAISE OF TENURE: A CAUTIONARY ESSAY

MERTON C. BERNSTEIN

Democracy needs free speech just the way the brain needs fresh blood. Without unrestrained speech, society would become brain dead.

Our society depends upon the media to probe, report, and criticize. Government needs constant observation. So do private institutions. Revelations like the abuse of government-paid transportation can unseat a President's Chief of Staff. News reports of unconscionable salaries, perks and self-dealing can unseat the head of the United Way.

But not all speakers are free. Indeed, financial circumstances probably inhibit the great majority to some degree because few are invulnerable to the possibility of reprisal for outspokenness. The suspicion lurks that television, radio and print media hesitate to offend significant groups lest advertisers withdraw their patronage. What hidden toll does truth pay to cigarette, liquor and local department store advertising?

Our society endows only two small classes of people with life tenure—federal court judges and college and university faculty.¹ The extraordinary privilege of assured employment and a reasonably comfortable retirement can be justified only by major contributions in return, especially as the privilege is subject to abuse. Stories of irritable and acerbic federal judges are a staple of lawyers' lunches. Stories of preoccupied professors are a staple of student brown bag confabs.

We tolerate life-time judgeships that confer so much individual advantage despite obvious potentialities for abuse because society needs judges who are free to decide in accordance with proof and legal principle irrespective of the power of a litigant, the legislature, or government executives. We enshrine tenure as an essential element of the college and university so as to have talented critics who are insulated against reprisal for what they investigate, what they say in class, and what they write.

Our society often looks to fiction writers to raise troublesome questions

1. Arguably, the protections afforded by federal and state civil service law give comparable protection to government employees. While they afford substantial protection, free expression is *not* their primary focus or tradition.

about ourselves and society (Austen, Dickens, Dos Passos, Sinclair Lewis, Steinbeck, and Twain come quickly to mind). They poke their fun, occasionally jab fingers into portly midsections, even an occasional eye. But we also depend—probably more than we commonly realize—upon academic critics to assemble evidence, to review it critically, and to challenge the conventional wisdom. Academic inquiry need not satisfy conventional “bottom line” criteria. Indeed, repeated failure is the hallmark of much scientific probing. In literature and the arts, the concept of the bottom line does not fit.

I offer as one item of evidence in support of tenure an instance of financial retaliation against a group of distinguished business school academics.

The story starts in the mail room in 1965. I opened a letter from the associate dean of a business school, a person with whom I had no connection known to me. Oddly enough, a check fell out of the envelope. It was for \$500. (In today’s dollars that might be about \$2,000.) Having no reason to expect such a check, I assumed it came to me by mistake and I smiled ruefully as I contemplated the need to return it. Then I read the letter. It informed me that my book, *The Future of Private Pensions*, had won the Elizur Wright award, named after the first commissioner of insurance, and bestowed for the best book on insurance in the year of publication. The American Risk and Assurance Association, composed of academics teaching in the field of insurance, had made the selection. I did not have to return the check. What a boon!

Some time later, however, I learned that the sponsor of the prize, one of the nation’s leading insurance companies, berated the association, and quite specifically the chair of the prize committee, for the award. When the association declined to withdraw the award as the insurer urged, the company withdrew its financial support for the prize.

The chair of the awards committee told me the story with considerable pride. It pleased him greatly that he and his associates did not knuckle under to one of the most powerful and influential members of the business community.

No one said that tenure enabled the prize committee and its parent organization to make the award (which anyone could anticipate would cause a stir)² and then stick by it. But tenure combined with the

2. The insurance industry resented the book, although the text urged a larger role for private pension plans provided that the weaknesses I depicted were overcome. Indeed, one bank vice-president who headed a giant pension operation thought it necessary to assure me (prior to our presentations at https://openscholarship.wustl.edu/law_lawreview/vol71/iss4/10

well-established tradition of academic freedom and the criteria and procedures established by the American Association of University Professors (AAUP) form the context of American higher education. Faculty know that tenure insulates them from reprisal and those who protest know that they can kick dirt on the umpire's shoes but cannot expect the call to be changed.

Some argue that academic freedom would suffice without tenure. The simple answer is that, if the rules of academic freedom existed alone, those who claim its protection would have the full burden of proving violations. With tenure added, adverse actions against faculty must be justified. Quite apart from burdens of proof, the tradition of faculty intellectual independence has been bolstered by tenure and the protective procedures that accompany it.³

Happily, academic freedom needs to be invoked only infrequently. Those protected by tenure freely assume that their inquiries and writing and other speech will be amply protected no matter what private or governmental interest may be inconvenienced or annoyed.

So, those who hold tenure are privileged beyond most in society. And for a good reason. Their freedom to inquire and report exists, not for *their* convenience, but because that freedom can benefit society by enabling challenge to accepted views in science, all academic disciplines and, indeed, all societal arrangements. Whatever passes for knowledge must be open to question; whatever areas remain unknown must be open to exploration. Both government and private enterprise frequently show their intolerance of whistle blowers who allege improper and unsafe conduct. It often falls to the media and colleges and universities to address such issues without the fear of reprisal that inevitably hinders free inquiry. And academics do not face the media's short time frame. The lone academic or small groups may pursue elusive goals for years, for decades, even a lifetime.⁴

Of course, such freedom obligates the tenured professor to exercise that freedom, sometimes addressed to what may seem like arcane debates on

a meeting sponsored by the American Enterprise Institute) that my breakfast had not been poisoned.

3. Committees of the AAUP investigate several complaints of violations of academic freedom and tenure and proceed with only a handful. Most institutions seek to avoid the imposition of AAUP sanctions. The rarity of such cases makes it reasonable to conclude that AAUP standards, procedures and possibility of its sanctions have secured the protection of academic freedom, as reinforced by tenure, in most institutions of higher education in the United States.

4. Nobel prizes, largely awarded to academics, usually honor a lifetime corpus of work.

narrow subjects, with judgment and care. The process for gaining tenure requires the candidate to demonstrate knowledge, skill and judgment, not necessarily according to generally accepted standards. After it is conferred, robust—and sometimes peevish—academic debate encourages care in writing, teaching, and formulating principles.

While some attack the academy for narrowness and a tendency to impose new orthodoxies, my own limited experience leads me to conclude that faculties—especially law faculties—have a hearty respect for the right to advocate widely varying views. This may come from our frequent need to take account of constitutional rights in a wide variety of settings. That breeds respect for not only the strictures but the spirit of the First Amendment's protection for speech and press (now media).

One of my most prized colleagues usually disagrees with me both on questions that come before the faculty and larger issues in society. He does not hesitate to expatiate at considerable length even though his views do not often prevail (no one's do). But his challenges perform a very useful function. They force the proponents of proposals to justify them, not to the like-minded, but to an energetic, articulate critic. For his part, he need not hesitate to irk his colleagues nor to take our (valuable) time. Oh, we often begrudge the time but no one would think of challenging the process or his right to use it just as he does (although occasionally a colleague may verge on mock apoplexy during his disquisitions).

I see great dedication by academics to basic constitutional principles and especially the Bill of Rights. Of course, I am (mostly) an optimist—who else would run for public office?⁵ And if a university faculty curbs speech in the name of respecting diversity, tenured judges are there to blow the whistle.

Those of us protected by tenure enjoy a rare prize. But the protection is incidental to our obligation to use tenure for our academic discipline, for our students, and for society.

5. Those contributing to *A Tribute to Professor Merton C. Bernstein* clearly agree with this characterization. In the course of this *Tribute*, Professor Bernstein has been described as an optimist on at least ten occasions. [Footnote by the Editors.]