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THE ASSAULT ON FACULTY INDEPENDENCE

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Editor's Note: The following is the first of a series on tenure in the academy. In this newsletter, the author defends the current tenure system. In the next issue, Richard Chait will present his ideas on changes which might be made in the system. Both are papers presented at the 25th Annual Conference of the National Center. Views expressed are those of the authors.

In 1915, a committee of distinguished academics issued a Manifesto for academic freedom and tenure. It rested the claim to tenure not only on the need to protect the freedom to teach, to disseminate and discuss the fruits of academic research, and the need to assure sufficient security to attract people of academic gift and independent mind, but also on the need to define the status of the faculty. "A university," the report opined, "is a great and indispensable organ of the higher life of a civilized community, in the work of which the trustees hold an essential and highly honorable place, but in which the faculties hold an *independent* place, with quite equal responsibilities -- and in relation to purely scientific and educational questions, the primary responsibility."[1]

The claim was not kindly received. Regental and administrative authority pointed to the fundamental principle of subordination, embedded in the employment relationship, measured against which the profession's claim was presumptuous. "No way has yet been found," the Association of American Colleges rejoined in 1917, "to play the 'cello or the harp and at the same time to direct the orchestra."[2] It went on: "Official relationships form the circle within which individual initiative must find room for play, and sufficient academic freedom would seem to be granted when there is no interference *within the circle first prescribed* of research, thought and utterance."[3] It left no doubt where the power so to prescribe lay.

In 1915, the Board of Regents of the University of Utah defended its summary dismissal of two faculty members, for their criticism of the University administration, thusly:

> Dr. Knowlton [one of those dismissed]...has seen fit to speak very disrespectfully, if not insultingly, of the Chairman of the Board of Regents. From his standpoint, this doubtless means that he has exercised his inalienable rights of free thought, free speech and free action. But the President and the Board also have an equal right to free thought, free speech and free action, with the result that the President and Board do not agree with Dr. Knowlton's sentiments; he may hereafter find an institution and State where similar sentiments against the presiding officer of the governing board may be approved. If so, that is where he belongs.[4]

So, too, did the *New York Times* editorialize in wake of the dismissal of Scott Nearing by the Wharton School in 1914 to assert the prerogatives of trustees: Let the upholders of "academic freedom,"

> establish a university of their own. Let them provide the funds, erect the buildings, lay out the

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> campus, and then make a requisition on the padded cells of Bedlam for their teaching staff. Nobody would interfere with the full freedom of the professors, they could teach Socialism and shiftlessness until Doomsday without restraint. For one thing, that would give crank professors a congenial occupation and free universities established for other purposes from pressure to give employment to the teachers of raw and false doctrines.[5]

J. Levering Jones, a trustee of the University of Pennsylvania, defended the University even more bluntly: "No one has the right to question us."[6]

Suffice it to say, the dispute about academic freedom and tenure was seen by the academic profession, correctly, as a confrontation over the status of the faculty within the institution. In the ensuing debate, the very terms of mastery and service used to justify regental control took on a pejorative meaning at the hands of Progressive reformers: the professor was not to be made a "hireling,"[7] a "servant,"[8] a "mere employee,"[9] a "hired-man,"[10] a "placeholder"[11] (John Dewey's phrase), or a "subservient coward."[12]

By 1940, the academic profession and the Association of American Colleges had come to agreement that acceded (though not entirely) to the profession's view. The resulting joint AAUP-AAC 1940 *Statement of Principles on Academic Freedom and Tenure* was at pains to define the faculty member as an "officer" of the employing institution, and for obvious reasons. In private employment at the time, most jobs were held "at will." In private employment at the time, the common law implied an obligation of respectful subservience to higher authority. But the 1940 *Statement* not only recognized the need for tenure, it grounded that need as an essential buttress for a freedom to dissent from authority, even to criticize one's employer. Resonating against both the employment law and practice of the time, the 1940 *Statement* was, and is, a remarkable achievement in the annals of freedom.

In recent months, however, a massive assault on tenure has been mounted in the opinion pages of the popular[13] and trade press[14] -- a veritable mugging. Some of these have been cast as calls for reasoned reappraisal. We have been summoned by C. Peter Magrath to an "open debate," and by Richard Chait to "civilized discourse and incisive analysis." But, on closer inspection, little of what they offer is open-minded or analytically incisive, let alone civilized. Instead we have been presented with a series of tendentious propositions packaged with all the slickness of a political campaign.

This is a harsh accusation. I intend to prove it. Having done that, I will offer a suggestion at the close about what the current assault on tenure is all about.

To the first task at hand, analysis best proceeds from the half dozen or so rhetorical techniques the adversaries of tenure deploy: (1) The Big Lie; (2) The Red Herring; (3) The Invidious Comparison; (4) The Band Wagon; (5) The Glittering Generality; (6) The Trojan Horse; and, (7) The Half Truth. Let us take them in turn.

The Big Lie

Magrath has opined: "We must acknowledge that academic freedom and tenure, in fact, have been uncoupled." The assertion rests upon the fact that all persons enjoy the speech protections of the United States Constitution, whether an untenured instructor or the holder of an endowed chair, as indeed they do -- if they are employed in a public institution. Necessarily, then, Magrath conflates academic freedom and constitutional free speech. The two are not coextensive, as has been pointed out repeatedly before.[15] The proposition is wrong. Why, then, the willful repetition of it?

Interestingly, Magrath (and Chait) advert to an essay, a kind of "thought experiment" by Peter Byrne of the Georgetown Law School, to show how academic freedom can be protected without tenure. If academic freedom equals constitutional free speech, and if constitutional free speech adequately protects us all, why do we need to consider any such alternative?

I will turn to Byrne's essay later. Suffice it to say at this point the proposition that existing law (or some other alternative) can protect free speech in a tenureless academy assumes that it is desirable to separate out a special claim of wrongfully *motivated* discharge from claims merely of *wrongful* discharge. The former would be subject to adjudication; the latter would not. In this way, abridgments of academic freedom would be deterred even as administrations would remain otherwise free to dismiss. Consequently, the proponents of the proposition have to explain why a discharge that is wrongful not because it sanctions disciplinary speech, but because it is erroneous, arbitrary, or vindictive should *not* be heard. But neither Magrath nor Chait undertake that explanation.

Even in its own terms, the proposed distinction fails to recognize that, "The motive for a dismissal, and the reason officially given for it, are frequently two very different things."[16] This from Arthur Lovejoy's response to a similar proposal made in 1916. (Or, as Edward Kirkland put it two decades later, "Departure from consecrated conformity is a common prelude to the discovery that an intellectual non-conformant is in fact non-cooperative in other matters as well.")[17] The tenureless approach trusts the adjudicative body to sort it all out -- later on. But the prospect of that occurring, perhaps long after a discharge, is scarcely equivalent to a hearing on the *bona fides* of the discharge before it takes place. And lacking *that* protection, we can justifiably be skeptical that faculty would not tend to steer clear of any zone of speech or activity that would enmesh them in that very process. As Lovejoy noted, the attempt to protect only disciplinary discourse is "to give up all practical possibility of maintaining academic freedom."[18]

The intimate connection between tenure and academic freedom has been challenged not only by Magrath's repetition of a false proposition of law but, on other grounds, by Richard Chait. He claims that about half of all faculty members do not have tenure, which he takes in turn to call "into question the unbreakable bond between academic freedom and tenure." The proposition rests upon a non-sequitur of undergraduate dimension, as I will next explain; but the conclusion offered of it, that there is no bond whatsoever between academic freedom and tenure, is risible.

The Red Herring

The use and the potential misuse of adjunct and full-time but non-tenure eligible positions is a real issue, not the least of which concerns the lack of the kind of intensive evaluation that is a key feature of the award of tenure and which is wanting in the indefinite renewal of these positions. A real issue; but, a side issue, for it says nothing about the bond between academic freedom and tenure. The economist, Fritz Machlup, wrote that "if tenure is to serve freedom, it is...essential to make [tenure rules] cover as large a portion of the faculty as is possible *without jeopardizing other equally important objectives*.[19] Institutions require a period of probation. Some short term, visiting and other kinds of special appointments may be justified by programmatic need or for institutional flexibility. It may well be that institutions have gone much too far in the use of contingent academic staff. But it simply does not follow that because too many non-tenure track appointments have been made, then tenure no longer serves the ends conceived for it.

Machlup argued that a body of tenured faculty is essential if they are to speak freely to the administration and to rise to the defense of colleagues (or students or others) threatened by an arbitrary or dictatorial action. The question posed by Machlup is how many is "enough." In his opinion, as many as the system can accommodate consistent with other desirable institutional ends. Does the fact that not everyone is or can be tenured mean that no one should be? By this manner of reasoning, the 1915 *Declaration* should have been dead on arrival: How could any professor claim the need for tenure when, at the time, no professor had it? I am reminded of then Professor Frankfurter's argument for Oregon's ten hour day law before a Supreme Court still in the thrall of *Lochner*. "Ten hours! Ten! Why not four?" sneered Justice McReynolds. "Your Honor," Frankfurter replied, "if your physician should find that you're eating too much meat, it isn't necessary for him to urge you to become a vegetarian." Upon which from the bench, Justice Holmes said, "Good for you!"[20]

The Invidious Comparison

Magrath also points to the fact that "people outside the academy, people whose jobs are in jeopardy, resent faculty members whose jobs carry special protection" as an argument against tenure. Most jobs in the private sector in 1915 were held at-will. Most jobs in the private sector in 1940 were held at-will. Most jobs in the private sector today are held at-will. This says nothing at all to what system is sensible for college and university faculty.

Let me point out that under the at-will rule an employee in the private sector can be discharged summarily for any reason or no reason, even a morally repugnant reason, so long as no law is infringed. In recent years, the judiciary has found nothing amiss in the discharge of an employee for having been a victim of rape,[21] for having consulted a lawyer about his workplace problems,[22] for wearing long hair,[23] for socializing with a former co-worker,[24] for having been thought (erroneously) to be dating a co-worker,[25] for refusing (as a newspaper editor) to wear an anti-union button,[26] for being a person who is "sympathetic to African-Americans,"[27] and, of course, for speaking disrespectfully of the enterprise's management in a private conversation[28] -- precisely the conduct that resulted in professor Knowlton's discharge in 1915. Must we now yield our claim to independence from authority because "people outside the academy" have

less? But if the comparison is invidious on this account, would it not be equally invidious on the account of tenure?

Interestingly, one argument for tenure adverts to the political difficulty trustees and presidents have in defending the free speech rights of embattled faculty, over whom they had the power of summary dismissal, in the face of substantial hostility from outside the academy. It is much easier to say that a hearing must first be afforded because of tenure than to defend the speaker's right to utter the particularly offending words. If we are now called by chief executives to abandon tenure because of public displeasure in the abstract, how secure can we be that these same chief executives will display courage under hostile fire when directed at a visible target? The preemptive capitulation urged upon us here cannot be encouraging. Magrath assures us that the courts will save the speaker -- later on. But if tenure insures against the risk of administrative cowardice, Magrath's proposition invites it.

The Band Wagon

"According to Richard Chait...about 20 percent of all independent four-year colleges *no longer* offer their faculty lifetime contracts."[29] According to Cathy Trower, thirteen of 280 institutions replying to an AAHE survey "reported replacing [their] tenure systems."[30] That is, about 5 percent. A comparison conducted by Jonathan Knight of the Annual Reports of the Economic Status of the Profession surveying over 2,200 institutions, including about 690 baccalaureate colleges (public and private), concluded that of 89 colleges participating in 1995-96 and reporting no faculty with tenure -- a figure roughly congruent with the AAHE's survey that about 15 percent of their sample did not provide for tenure -- 39 had participated a decade earlier of these 32 then reported that no faculty had tenure.[31] I.e. as many as 7 of these schools had abandoned tenure.

In other words, about 13 percent to 15 percent of baccalaureate institutions reporting in two surveys have never offered tenure -- in both cases, most of these being Bible Colleges, schools of art and design, and very small church related colleges. And, over the past decade, tenure has been abandoned by as few as 1 percent or as many as 5 percent of this universe of institutions, depending on sample size. Scarcely the bandwagon Chait claims, even without considering the fact that some institutions have adopted tenure systems in this period.

The Glittering Generality

Of the 1940 *Statement*, Chait says, "[O]ne size no longer fits all." Institutions need "more alternatives to better serve individual faculty members and thereby strengthen departments and institutions."

> In a profession that prizes autonomy, we should not bar professors and universities from creating new, yet mutually beneficial, terms of employment that match individual interests and campus needs. In other words, let Bennington be Bennington.

All this sounds terrific. Who can be against any of it? But what does it mean?

Legally, the choices an institution has as to security of employment are four: (1) at-will employment, in which the employee may be discharged at any moment for no reason; (2) employment for a fixed duration, though terminable for cause during its term; (3) permanent employment which continues indefinitely but is subject to termination upon express or implied conditions; and, (4) lifetime employment, which is a guarantee of a job irrespective of any future condition, *i.e.* a sinecure.

Though academic tenure is often spoken of as a "lifetime" job, it actually falls into the third category: After completion of a probationary period, a faculty member cannot be dismissed except for adequate cause or other valid condition such as financial exigency or the *bona fide* abolition of a department of instruction. That is the "one size that fits all." How does it not? Where is the lack of fit with the ends it is designed to serve? Chait never tells us. He cites only to the growth in the number of institutions of higher education since 1940 and concludes that we need "more alternatives." He is totally agnostic about what the terms of those alternatives might be, for if they are agreed to they could not be other than of "mutual benefit."

If so, why consider at-will and term employment? Why not voluntary servitude? If "new, yet mutually beneficial, terms of employment that match individual interests and campus needs" are called for, why would we not want at least to consider that as contributing to an enlarged menu of choice? Here, for example, is an employment contract used in South Carolina about the time the academic profession was coming to demand tenure:

> I agree at all times to be subject to the orders and commands of said ----- or his agents, [and] perform all work required of me[.] ----- or his agents shall have the right to use such force as he or his agents may deem necessary to compel me to remain on his farm and to perform good and satisfactory services. He shall have the right to lock me up for safekeeping, work me under the rules and regulations of his farm, and if I should leave his farm or run away he shall have the right of offer...a reward...for my capture and return...."[32]

Chait cannot scoff at this alternative because his very agnosticism on the content of the terms agreed to, so long as they are "mutually beneficial," is empty of any ethical content. This contractual option is not available, however, not because it may not be "mutually beneficial" -- in fact the laborers employed under these terms pronounced themselves "satisfied and contented" with them[33] -- but because we have decided it is inimical to the kind of society we wish to inhabit. The analogous question is not what agreements may be "mutually beneficial," but what system of employment best conduces toward the kind of institution of higher learning we wish to inhabit.

A Trojan Horse

Chait does come up with one concrete proposal. He has suggested that institutions should offer to buy out the claim to tenure in return for a higher salary or some other benefit. As he explains,

> If significant numbers of colleagues followed suit, the public might finally understand the value that the profession truly attaches to academic freedom as a fundamental principle, rather than as a convenient rationale for near-absolute employment security.

The "truly" gives pause. The Minneapolis College of Art and Design recently offered its faculty a substantial salary increase -- they had had none in two years -- in return for a contract terminable without cause, not in lieu of tenure, for they had none, but in lieu of their existing short term appointments. Not surprisingly, virtually all of them accepted. The administration then dismissed five senior faculty under that provision.[34] It had, of course, "purchased" the right to do just that; but we can legitimately be skeptical about the voluntariness of the sale.

The proposal errs far more fundamentally, however, in its very conception of tenure. Tenure is not a piece of property, a gift or special benefit disposable by the beneficiary acting in his or her economic self-interest. Regrettably, the United States Supreme Court has come close to that conception, identifying tenure as a species of constitutional "property" in order to require a hearing for its deprivation.[35] But the academic profession never made that claim. The brief *amicus curiea* of the AAUP before the Court, drafted by Professor William Van Alstyne, argued for the "broad recognition that the academic freedom and constitutional rights of nontenured and probationary faculty members do require *some* procedural safeguards in *every* case."[36] The Court rejected the profession's argument in a result that Van Alstyne later criticized for the very reason that it carried a notion "of personal entitlement and sinecurism that no constitutional court...should desire to encourage."[37] Not to put too fine a point on it, the profession was right and the Court was wrong. Tenure is not a piece of property. It is a means of assuring freedom in an institution of higher learning.

Perhaps an analogy of special relevance to this audience might be helpful. Prior to the Norris-LaGuardia Act, some American employers required prospective employees to sign a short form agreeing not to join a union as a condition of employment. It was known as the Yellow Dog contract, for in labor parlance it was said that only a yellow dog would sign it. But in neo-classical economic terms, these employers had to pay a price in order to "buy" that concession from their employees.[38] Why should employers not offer such a choice? Look at it in just the terms Chait has put his proposal: "If significant numbers of employees followed suit, the public might finally understand the value that employees truly attach to the freedom of association as a fundamental principle...."

The short of it is that we do not permit employers to purchase their employees' freedom of association. That freedom is not a gift or benefit subject to sale. Its exercise, even if rarely resorted to by the majority, goes to the potential of maintaining some degree of liberty in the workplace. So, too, of tenure. Fritz Machlup explained that some, perhaps many faculty would be pleased to "sell" their tenure for higher salaries. They rarely speak or act in a manner displeasing to higher authority and they do not expect to. They may even resent the disruption stirred up by the outspoken. Thus it is not surprising that Chait has discovered that contentment reigns among the faculties of institutions without tenure and that those who have sold their tenure, a self-selected lot if ever there were,

are pleased to have done so. But it is important to the outspoken, and to us all, that the indifferent might have the capacity to become outspoken or to rise to an issue if and when the need arises.

The Half Truth

Both Chait and Magrath point to a recent paper by Peter Byrne of the Georgetown Law School as evidencing how academic freedom might be assured without tenure. Chait outlines Byrne's essay in detail:

> The key elements include a peer-dominated review panel; a requirement that the faculty member make a *prima facie* case that a violation has occurred, whereupon the burden of proof shifts to the institution; an oral hearing held prior to the panel's decision; and the possibility of arbitration of still-disputed claims by an external tribunal of trusted academics.

These are indeed "the key elements," save one that Chait neglects to mention: the need to maintain independence of judgment by the members of the adjudicative body that hears complaints of violation of academic freedom and of the peer review panel that passes on the non-renewal of a now untenurable professoriate. Of the former, Byrne opines:

> The effects of tenure on academic freedom are pervasive. A simple example is the status of any professors who serve on the appeals panel discussed above. In our hypothetical tenureless college, these professors would themselves not be tenured. Their continued employment would rest to some extent on some of the very institutional decision makers whose actions they are reviewing. They simply cannot enjoy the independence of decision making that tenured professors would be able to enjoy. This might make them unwilling to question the memory or veracity of an official in one case, or to stake out a broad reading of faculty prerogatives in another. Thus might academic freedom shrink over time both in practice and in theory. At a minimum, professors serving on such a committee must explicitly be protected against retaliation by the institution; perhaps longerterm contracts or even tenure would be desirable, to give them adequate independence.[39]

And the same is suggested on those passing upon non-renewal. Indeed, their position is "more tenuous than the members of the appeal panel" because they would be in the same department as the supervisor recommending the non-retention; consequently they too might need "some extraordinary job guaranty."[40]

So it seems that tenure has something to do with academic freedom after all. But once that is understood, the next question presents itself: Why should only the members of these committees be protected in the exercise of an independent judgment?

Summary and Comment

I have not unpacked it all. I hope I have unpacked enough to dispel any notion that the critics have given us "open-mindedness" or "incisive analysis." As for "civilized discourse," more than a decade ago Richard Chait and his co-author, setting out to "slay the dragon of tenure," bemoaned "the fate that befell Bloomfield College."[41] As I wrote at the time,

> The "fate that befell Bloomfield College" was a president who invoked finances to abolish tenure and fire [dissident] senior faculty when, as the courts conscientiously held, the finances justified no such action. Yet, despite the judicial determination of the lack of *bona fides* in the president's action, it seems to be the president, not the faculty, who receives the authors' commiseration.[42]

Now, more than a decade later, Chait intones, "[L]et Bennington be Bennington." This of an institution that, lacking tenure, dismissed 26 faculty members, the majority of long service, in a thinly veiled purge that brooked no dissent, and it did so in a "petty...vindictive and inhumane" manner.[43] (The characterization is by one of the nation's eminent economists and former University administrator of long service.) Again, it is the president and not the victims who receives Chait's support. In neither instance could the condonation of such squalid institutional behavior be considered "civilized."

What, then, is the assault on tenure all about? As Magrath and Chait have pointed out, it is in part a dispute over institutional flexibility and individual faculty accountability; but only in part and, perhaps, not even for the most part because under *these* heads Chait has observed that, "Tenure may not, in fact, be a substantial obstacle." These questions can be resolved with the full participation of faculty governing bodies and in a manner that is fully respectful of tenure as, I think, we are doing at the University of Illinois.

Consequently, these concerns alone cannot explain the critics' extraordinary rhetorical excess. Something else is at work which Magrath captures, if unintentionally:

> [T]he real reason that we hear so much passion about the importance of tenure from those who have it is not concern about freedom of expression. It is the understandable fear and insecurity that many tenured faculty members feel about their status and economic security.

What Mr. Magrath fails to appreciate is what the regents and presidents did appreciate in 1915, that tenure *is* a question of the status of the faculty in the university. Peter Byrne has put the point elegantly:

> The debate about tenure is a debate about power. ... Opponents of tenure want administrators to have more power to deploy faculty as academic assets, in response to market and regulatory signals, to obtain greater benefits for students and society at lower cost. Defenders of tenure believe that faculty who have proven their professional competence should enjoy a measure of independence and dissent from the projects of administrators and regents, and from the preferences of students or of the public. This view depends on an understanding of the nature of scholarship and teaching, that it thrives in a context of free and mature academic judgment, rather than in response to signals or commands.
>
> ...In short, the case for tenure rests on the belief that the permanent faculty is the heart of any educational institution.[44]

When President Holt discharged Professor Rice at Rollins College in 1933, he dismissed the idea of a hearing thusly: "When you want to fire a cook, you don't go out and get a committee of the neighbors to tell you what to do, do you?" And when President John Slorp of the Minneapolis College of Art and Design unilaterally restructured the college's programs in 1991, he stated to the local press, "[T]hose decisions were not going to be made in some sort of soup of homespun democracy." One cannot read all the blarney about "redefining scholarship" and "new career paths"[45] without the nagging suspicion that someone will do that redefining and set the hapless professor on that path. What saves the professor from that fate, from being *une administree*, is her tenure. Genuine negotiations can only be pursued between equal bargaining partners; and tenure makes the dialogue a little more equal.

The rhetoric is so hot because the stakes are so high. And, as I have tried to evidence however so briefly, none of this is new. In, "Let Bennington be Bennington" we hear the unmistakable echo of, "No one has the right to question us." We have returned to the fundamental issue posed in 1915 and in virtually the same terms: Whether our faculties will continue to hold a place of independence in our colleges and universities.

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