A Faustian Bargain for Academic Freedom

By ROGER BOWEN

The historic institution of tenure is rapidly becoming history. The American Association of University Professors, for which I served as general secretary, has for almost a century advocated for tenure as the chief guarantor of a faculty member's academic freedom. But today tenure and academic freedom are viewed less and less as crucially intertwined.

Academic freedom has widely been embraced as the central value of the academy because it is correctly regarded as a necessary condition for developing new knowledge. Tenure, on the other hand, has been gradually eroded, for largely economic reasons. Tenure is, in fact, expensive, while academic freedom is not. Awarding tenure can be a multimillion-dollar commitment for a college, with no guarantee of a financial return, while endorsing academic freedom costs no money at all.

I have enjoyed earning tenure at three institutions. At the first one, I regarded tenure as my guarantee of job security. In the second and third instances, I viewed it as an appropriate reward for an academic who happened to be holding administrative positions. Not once did I think at the time of winning tenure, "Ah, now my academic freedom is ensured!"

Only on the third occasion did I fully appreciate tenure's promise of guaranteeing academic freedom — not because my own was being threatened, but rather because the academic freedom of the faculty I served as president was being attacked. That I was in a situation where academic freedom was threatened even once is unusual. The AAUP annually receives about 1,000 claims that the academic freedom of a faculty member has been abridged, but that number is modest, given that a half-million or so professors teach nationwide. While it may be assumed that many professors who believe their academic freedom is under assault do not report the problem, it may also be assumed that, generally, most colleges embrace the principle of academic freedom as essential to their educational missions.

The 1940 "Statement of Principles on Academic Freedom and Tenure," jointly written by the AAUP and the American Association of Colleges and Universities, and today endorsed by more than 200 learned societies, states that academic freedom and tenure are inseparable, and that tenure guarantees teachers the freedom to teach, conduct and report on research, and be active as citizens without fear or favor. A key sentence reads: "Freedom [of teaching and research and extramural activities] and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society." Tenure, in other words, is the best way to achieve the academy's most important value — academic freedom — and to give faculty members economic security. Tenure, in brief, is a means, not an end.
Since 1940, and most particularly over the past 15 years or so, tenured positions have been on the decline, as more colleges have relied on less expensive part-time and non-tenure-track faculty members — even as those same institutions professed fidelity to the principles of academic freedom. The reason for the change is simple, and brutal: To enhance their own economic security as institutions, colleges have enhanced the economic insecurity of professors by hiring more and more contingent faculty members — that is, cheap, part-time laborers who enjoy few prerogatives of the profession while suffering low pay, few (if any) benefits, and flimsy contractual rights. Today two of every three new faculty members hired across the nation are not on the tenure track, up from about 50 percent in the early 1990s. The trend is clear.

Yet according to the AAUP's data, the number of faculty members who have alleged the violation of their academic freedom over the past 20 years has not risen. In fact, as a percentage of all faculty members employed, academic-freedom violations have probably decreased over the past two decades. Despite the changing economic conditions of academe — changing for the worse for most faculty members, and in often problematic ways for many institutions — higher education's allegiance to academic freedom seems nonetheless strong. As common law and as an essential condition of teaching and learning, academic freedom is usually honored even as the institution of tenure is gradually diminished.

That does not mean that threats to academic freedom coming from outside the academy have disappeared. Supreme Court cases like Rumsfeld v. FAIR (2006) — about the right of law schools to decline to play host to military recruiters because the military's "don't ask, don't tell" policy violates the universities' nondiscrimination policies — not only have overlooked the relevance of academic freedom, but also have certainly not treated it as a settled constitutional issue. Such rulings have very likely emboldened the federal government to impose on higher education noxious regulations that squarely assault academic freedom and institutional autonomy. For example, the Department of Homeland Security has denied colleges the freedom to hire certain foreign scholars, and the newly reauthorized Higher Education Act requires international-studies programs to "reflect diverse perspectives."

Court rulings and government regulations change over time, and not always for the better. Academic freedom is, at best, a "general norm of academic practice," writes William W. Van Alstyne, a law professor at the College of William and Mary — "soft law," whose protection is not "reasonably secure."

One reason recent federal government actions have not been reliably supportive is that, outside academe, academic freedom is viewed more as an idea or aspiration than as a certain right. Indeed, were academic freedom to describe an undisputed condition of faculty work or a legal guarantee, I doubt that the professoriate's need for the AAUP, or for the inclusion of this crucial principle in the contracts bargained by faculty unions, would be as compelling as it is today.

Just as government can threaten academic freedom, so too can a public that does not understand the centrality of academic freedom to higher education — and that holds values that disregard the 1967 Supreme Court ruling in Keyishian v. Board of Regents, which asserted that "academic freedom is a special concern of the First Amendment."

For example, the Freedom Forum's First Amendment Center, at Vanderbilt University, reports that annual surveys of American attitudes reveal an incurious public, wed more to religious certainties than to critical thinking.
The 2007 survey discovered, for instance, that 65 percent of Americans believed that the founders intended America to be a Christian nation, and that 55 percent believed the Constitution actually established a Christian nation. Only 56 percent believed that the freedom to worship extends to all religious groups, and 74 percent would have prevented public-school students from wearing T-shirts with slogans that might offend others.

Right after September 11, 2001, an ABC-\textit{Washington Post} poll found that 66 percent of Americans would willingly surrender civil liberties to combat terrorism; a year later nearly half of all Americans in another survey said "the First Amendment goes too far in the rights it guarantees." It is no stretch to assert that few members of the public know that academic freedom is a "special concern" of the First Amendment.

Closer to home, a public-opinion survey conducted by AAUP and sponsored by the Spencer Foundation found two years ago that 76 percent of Americans who self-identified as "conservative" believed that professors who were Communists or supported Islamic militants should not be tenured, and in fact should be fired. The same survey showed that 85 percent of Republicans (compared with 25 percent of Democrats) believed that ideological or political-party restrictions should be imposed on faculty members; and that 68 percent of the public believed liberal faculty members dominated our colleges.

The survey concluded that the opponents of academic freedom tend to be the elderly, those with low levels of educational attainment, conservatives, and Republicans. Is it any wonder, then, that in a recently completed study, Neil Gross, an associate professor of sociology at the University of British Columbia, and Solon Simmons, an assistant professor of conflict analysis and sociology at George Mason University, found that one-third of social-science faculty members in the United States believed that their academic freedom was threatened? Gross reminds us that only 20 percent of faculty members felt that way in 1955, during the height of McCarthyism.

The real threat to academic freedom today, then, generally comes from outside academe, not from within it. How can we secure academic freedom when its guarantor — tenure — is on the wane, and the public is indifferent or even hostile to it?

Several years ago, at a Unesco conference in Berlin, I debated a former British-university vice chancellor — what we in America would call a university president — on the topic of academic freedom. He lauded the decision of British faculty unions to trade away tenure for a parliamentary guarantee — in a law passed in 1988 — of academic freedom.

The outcome, he said, was that British faculty members had been divided into two categories: a minority with virtual tenure, and a majority who can be dismissed on grounds of "redundancy" because their short-term contracts are always contingent on enrollment. But, he insisted, the trade-off in giving up tenure for the state's guarantee of academic freedom was a fair one and, moreover, the academic freedom of all faculty members, including the most vulnerable, now had a basis in law. He mistakenly referred to the trade as the de facto "American model" and urged the rectors of universities in Serbia, Croatia, the Czech Republic, Bulgaria, and other former Soviet colonies who were in the audience to adopt the scheme.

I countered the vice chancellor with more passion than savvy by arguing that even if a class system within the professoriate was a fair description of the "American model," it was nonetheless destructive of academic freedom. I conceded that two-thirds of all faculty appointments in the United States went to non-tenure-track teachers, and that the economic security demanded by the authors of the AAUP's 1940 statement had become pure chimera — to wit, tenure lines were disappearing at an alarming rate. But I added that worthy
organizations like the AAUP were fighting, sometimes successfully, to defend academic freedom. And I assured him that academic freedom had gained some First Amendment protection.

In the fullness of time, however, I have thought more about the seemingly Faustian bargain cut by the British government and the faculty members. I recalled that immediately after World War II, several New Deal lawyers drafted the basic law of the land for a defeated Japan that included in that nation's bill of rights a clause guaranteeing academic freedom. It turns out that what happened in Britain under Margaret Thatcher had, in one respect, a 40-year-old precedent set by the United States.

I do not believe in cure-alls or magic bullets. Apart from the question of feasibility, even if the U.S. Constitution could be amended to include a right of academic freedom, lawsuits and constitutional challenges over alleged violations of academic freedom would continue. But the educational effort that would go into mounting a campaign for a genuine "academic bill of rights," which guaranteed academic freedom, would, if nothing else, educate the public about why that aspiration is crucially important to sustaining democracy.

Constitutions, of course, are not easily amended; equally obvious, just causes for constitutional amendments can fail — consider the Equal Rights Amendment. Educating the public about higher education is always difficult, if only because many people have not been exposed to higher education and tend to be opposed to what they see as the special privileges enjoyed by members of a certain profession. Add to such depressing observations the public antipathy toward the values of the professoriate, as the poll numbers I shared earlier indicate, and the notion of a constitutional amendment at the federal level seems highly unlikely, if not downright silly.

But wouldn't such an amendment have a chance of being passed at the state-constitution level? Instinct tells me that mobilizing faculty members, legislators, and friends of higher education on a state-by-state basis could result in establishing academic freedom as a basic right at the state level.

Yet I recognize that even with a basic constitutional right to academic freedom, the growing reliance on non-tenure-track faculty members, and the prevalence of external intrusions, will no doubt continue to threaten academe's core values. Indeed, as conditions stand, I have given up hope that the trend to replace full-time, tenure-track positions with non-tenure-track, part-time ones can be arrested, let alone reversed. Tenure, it seems to me, is bound to be eventually scuttled.

Yet asserting a possibility is not the same as passively accepting its inevitability. The 1940 statement began by saying that its purpose was "to promote public understanding and support of academic freedom and tenure." Almost 70 years later, it is evident that this purpose has not been fulfilled. Decoupling academic freedom from tenure just may be, as my British colleague asserted, the best way to protect academic freedom.

Elevating that ideal and aspiration into a legal right, possibly into an enumerated constitutional right in certain states, with a force equal to the First Amendment, may be a Faustian bargain, but also, alas, it may be the very best deal that America's faculty members can cut. Tenure, after all, has always been a means to an end — securing academic freedom. Perhaps the time has come to rethink the best way to preserve academe's highest value.

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