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## Academic Freedom and Judicial Independence

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## Is Academic Freedom in Peril? A View from the Trenches

Sara R. Benson\*

In the midst of trying times in academics, especially in the field of law, when application numbers are low<sup>1</sup> and costs are high, the need to protect academic freedom is pressing. For instance, if a scholar argues that the Environmental Protection Agency is shirking its duties in permitting fracking practices to continue, powerful, wealthy donors to institutions may be less than thrilled. It is the protection granted by job tenure that provides academics with the courage and the will to speak the truth in the face of threats to cut funding or donations to the institution. However, when that protection is set aside, academics will be forced to take more notice of the words they speak, write, or publish, and the truth will suffer.<sup>2</sup>

The silencing of professors is already occurring in the legal academy. Recently, the untenured law faculty members at Seton Hall University were notified that, in an effort to cut costs, their contracts “may not be renewed for the 2014-2015 academic year.”<sup>3</sup> It is uncommon for untenured faculty members to receive such curt notices in their appointment letters and, such a notice, “encroaches on an important principle of academic freedom, namely that a tenure decision should be based on the merit of the case, not the budget of the department.”<sup>4</sup> Or, I would add, the wrath incurred by the professor or her department from the public due to her unpopular research conclusions.<sup>5</sup> And, on August 9, 2013, the American Bar Association’s Council of the Section of Legal Education and Admissions to the Bar recommended that the requirement for law school positions to include

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<sup>1</sup> See Debra Cassens Weiss, *Law School Applications Drop Nearly 18 Percent, Benefiting Students Seeking Financial Aid*, A.B.A. J. (Aug. 20, 2013, 8:05 AM), [http://www.abajournal.com/news/article/law\\_school\\_applications\\_drop\\_nearly\\_18\\_percent\\_benefiting\\_students\\_seeking\\_](http://www.abajournal.com/news/article/law_school_applications_drop_nearly_18_percent_benefiting_students_seeking_).

<sup>2</sup> Richard J. Peltz, *Penumbra Academic Freedom: Interpreting the Tenure Contract in a Time of Constitutional Impotence*, 37 J.C. & U.L. 159, 161, 174-75 (2010) (noting that academic freedom protects the right to speak freely).

<sup>3</sup> Victor Fleischer, *The Unseen Costs of Cutting Law School Faculty*, DEALBOOK N.Y. TIMES (July 9, 2013, 3:46 PM), [http://dealbook.nytimes.com/2013/07/09/the-unseen-costs-of-cutting-law-school-faculty/?\\_r=0](http://dealbook.nytimes.com/2013/07/09/the-unseen-costs-of-cutting-law-school-faculty/?_r=0).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* (noting that “the university’s ideals of academic freedom reassured me that no dean would fire me because of my views.”).

tenure be removed for law school faculty. These recommendations are not yet final, but this could be a massive blow to academic freedom; and likely, it is happening in the name of the budgetary crisis.<sup>6</sup>

Especially for legal writing professors, a field once called the “pink ghetto” due to the greater number of female professors, lower pay, and less job protection afforded to it,<sup>7</sup> this proposal is a step backwards. Indeed, professors like me are still fighting to obtain clinical tenure status to protect our right to speak freely.<sup>8</sup> Besides legal writing, my research interests include Sexual Orientation and the Law (normally a controversial field) as well as Domestic Violence, and Gender and the Law issues (which can also lead to heated debates). Indeed, I received an angry letter last year from an alumnus after I spoke about same-sex marriage and the Obama administration in the University of Illinois’s alumni magazine, and I was informed by the alumni organization that they also received complaints over the phone about the views expressed in the article. Thus, I sincerely hope the proposal by the ABA to remove tenure protection remains just that—a proposal.

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<sup>6</sup> Karen Sloan, *Law Schools Gain Greater Autonomy*, NAT’L L.J. (Aug. 19, 2013), [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202615847956&Law\\_Schools\\_Gain\\_Greater\\_Autonomy](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202615847956&Law_Schools_Gain_Greater_Autonomy).

<sup>7</sup> Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562, 562-63 (2000).

<sup>8</sup> Christine Des Garennes, *UI Report Looks at Nontenure-Track Faculty*, NEWS-GAZETTE (Feb. 18, 2014).