Review of Michael Bérubé and Jennifer Ruth's

IT'S NOT FREE SPEECH: RACE, DEMOCRACY AND THE FUTURE OF ACADEMIC FREEDOM

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Starting with its provocative opening sentence, Michael Bérubé and Jennifer Ruth's new book, *It's Not Free Speech: Race, Democracy, and the Future of Academic Freedom*,[1] makes clear that this volume will be no ordinary recitation of the history or current state of academic freedom. That first sentence asks a simple but loaded question: "Does academic freedom extend to white supremacist professors?"[2]

The authors' answer to this question is clear: Bérubé and Ruth express a strong belief that academic freedom needs to be rethought so as not to protect professors who espouse perspectives that the authors would characterize as racist and lacking any sort of sound evidentiary basis. The authors take great pains to distinguish academic freedom protections from the constitutional protections of free speech, arguing that judgments about the appropriate exercise of academic freedom should be put squarely in the hands of faculty members, not administrators. Writing in the context of the Black Lives Matter movement and the wave of protests that followed the killing of George Floyd and other Black Americans, Bérubé and Ruth argue that broad free speech principles have too often been used to shield white supremacist professors from consequences for hateful, damaging statements that fail to meet rigorous professional norms. The authors rely on a mixture of history, law, experience, and shared governance principles to reinforce their arguments. If nothing else, their analysis certainly sets the stage for lively discussions and debates regarding the appropriate role, limits, and arbiters of academic freedom.

The book begins by naming names. The authors are direct in labeling instances of what they characterize as white supremacist speech. They argue that academic freedom in such instances has been "weaponized in ways that undermine

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1 Michael Bérubé and Jennifer Ruth, *It's Not Free Speech: Race, Democracy and the Future of Academic Freedom* (2022). Bérubé is the Edwin Erle Sparks Professor of Literature at Pennsylvania State University. Jennifer Ruth is a professor of film at Portland State University.

2 *Id.* at 1.

democracy."[3] As colleges and universities become more diverse, their premise is that some faculty members (especially if they have tenure or other forms of status and job security) can hide behind the broad contours of free speech as understood under the Constitution to flout professional standards—while causing real harm to students from historically underrepresented backgrounds. In making this argument, Bérubé and Ruth explicitly understand and justify academic freedom and the educational mission in terms of serving the common good—namely, to support a diverse democracy that is truly inclusive and welcoming to individuals of all backgrounds.

While this understanding might seem unremarkable on its face, it is worth noting at the outset that much of the public discourse about the purpose of higher education today focuses on the notion of higher education as a private benefit (i.e., as a way to prepare individuals for good-paying jobs in the workforce), rather than as a public good. Many of the current attacks on higher education from outside the academy are based on a perception that colleges and universities focus too much on abstract theory, and thus are not adequately equipping students with the skill sets they need for the "real world" of work. Moreover, many politicians and pundits today assert that a major problem with higher education is its overwhelmingly liberal bent. This particular volume seems focused on a higher education audience, rather than on these skeptics outside of higher education, and thus the book is not likely to win many converts to its proposals from the latter group.

The first chapter provides examples of provocative speech that need to be understood within a larger context. In this age of social media—when a single posting can be spread within a matter of moments to a national and even international audience—the nuances of context are often lost. The authors refer to this effect as "a kind of decontextualization apparatus,"[4] and it is a phenomenon well known to leaders in higher education who are quickly inundated with angry messages when controversial statements "go viral." The authors criticize administrators for overreacting to some faculty utterances that were not intentionally hurtful, while at the same time imploring faculty members to use prudent judgment with their own language. Their proposed approach to such situations is to provide for greater faculty involvement in the review of such matters—an idea that forms the crux of their position.

In the second chapter, Bérubé and Ruth focus on "extramural speech"—that is, faculty speech that occurs outside the classroom. They provide historical perspective by pointing out how scholarly norms and public notions of what is acceptable can change relatively quickly over time. The key question for institutions, according to Bérubé and Ruth, "is whether a professor is unfit" for duty,[5] which is by necessity a case-by-case determination.[6] In analyzing this question and the degree to which faculty members' extramural speech is protected, they spend a lot of time dissecting relevant policy statements from the American Association of University Professors—the organization that was founded in 1915 in large part to protect the

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3 *Id.* at 7.

4 *Id.* at 43.

5 *Id.* at 72.

6 *Id.* at 94.

academic freedom of individual faculty members. Bérubé and Ruth argue for an expansive view of academic freedom that clearly encompasses extramural speech, as it can be difficult to draw clear boundaries between when expression occurs "in" and "outside" of the academy. Thus, they assert that "the experience of freedom is indivisible, and extramural speech must be protected as a prophylactic protection for freedom of research and teaching."[7] As they do throughout the book, in this section the authors rightfully point out that contingent faculty face special risks when their expression is challenged, while noting the reality that such faculty make up an increasing portion of the professoriate.[8]

Next, the authors explore the question of what constitutes a firing offense, enumerating examples of controversial speech and how they were handled (or mishandled, as the case may be) by various institutions. To their credit, Bérubé and Ruth are clear and direct about their opinions, as reflected in this passage: "White supremacist scholarship is bad scholarship; it serves morally and politically repugnant ends; and though we can't wish its legacy away, we can and should say that it has long outlived its expiration date."[9] It is hard to dispute this kind of assertion on its face, especially at this moment of national racial reckoning. The harder question, however, is how to define and draw the lines with sufficient clarity and certainty to respect and protect differing, and sometimes controversial, points of view. At the end of their third chapter, the authors themselves go so far as to declare that "[w]hite supremacism is baked into the foundations of some academic fields in this country, and it remains a powerful obstacle to any attempt at honest and free intellectual exchange, let alone any attempt to forge a more perfect union."[10] If that is the case, it would seem potentially problematic to assume that professors in such disciplines will necessarily be well positioned to draw these lines in the ways the authors believe should be done.

The fourth chapter tackles a subject that has become a pejorative catchphrase for many politicians and commentators in our highly polarized political and social climate, as it discusses the origins and history of critical race theory (CRT). While this phrase has been thrown around a lot in the public sphere recently, its actual meaning and academic underpinnings are much less well understood. Once again, the authors do not pull their punches in arguing that "[t]he backlash against CRT is being used as a strategy to mobilize efforts to suppress knowledge of America's history of racism."[11] While Bérubé and Ruth are unabashed in their concerns about the Trump era and what they see as the significant harm it caused to progress in race relations, they are critical of individuals on both ends of the political spectrum for not taking meaningful steps to address the impact of racism. Indeed, they castigate traditional liberals for clinging to a naïve faith in the power of the traditional, laissez-faire marketplace of ideas concept that has widely been understood to be a key to long-term progress in civil society under the First Amendment. In their words, "[b]y abandoning the liberal fantasy that all differences are surmountable given enough

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7 *Id.* at 89.

8 *Id.* at 89.

9 *Id.* at 125.

10 *Id.* at 126.

11 *Id.* at 146.

speech and counter-speech, we can more honestly defend academic freedom rather than succumbing to the temptation to subordinate it to free speech."[12]

Out of this critique arises the authors' position that academic freedom, if properly understood in a truly democratic and inclusive way, includes a level of responsibility and accountability that will better protect against discrimination in the academy than the kind of speech free-for-all embraced by many free expression purists. Bérubé and Ruth then turn to discuss the limits of academic freedom, arguing forcefully that academic freedom should not be understood as constituting "an indiscriminate endorsement of the value of *all* ideas (including epithets)."[13] They are clearly disillusioned with "the liberal faith that the best antidote to hate speech is more speech,"[14] citing the fact that this traditional First Amendment view has in fact given white supremacists a continuing platform to espouse hatred and bigotry. Once again, the authors place their faith in faculty members to render judgments that strike the correct balance with regard to which ideas should (and should not) be protected under a properly understood definition of academic freedom in the twenty-first century. In their words, "[f]aculty must make judgment calls on the university's behalf that take into consideration the historical and political circumstances in which their universities find themselves."[15]

So how would this actually work in practice? In their final chapter, Bérubé and Ruth double down on their proposal that higher education institutions should rely on newly formed faculty committees, rather than administrators, to make these judgments. These committees would be responsible for developing clearer guidelines than currently exist to identify the contours and limits of faculty expression under academic freedom. While these lines might be difficult to draw, the authors argue that difficult cases are already being investigated by diversity, equity, and inclusion offices and human relations personnel, with assistance from higher education lawyers—most of whom, the authors argue, have little or no experience in the classroom and thus do not fully understand or appreciate appropriate standards of pedagogy. They assert that faculty members are more likely than administrators in such circumstances to stand up to outside pressures, given that administrators will be concerned with threats of bad publicity and potential litigation resulting from controversial faculty speech.

Part of the value of this approach, in the authors' view, is that it restores a sense of shared governance in dealing with what are admittedly thorny and often high-profile challenges at institutions of higher education. They are certainly right in pointing out that shared governance faces significant headwinds in an era of relentless legal and political challenges—and in which controversies over faculty expression can explode quickly with the powder keg of social media always present. They are also on firm and well-trodden ground in sounding the alarm about the power imbalances that put contingent faculty in especially precarious positions when their expression is challenged.

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12 *Id.* at 163.

13 *Id.* at 178 n.3.

14 *Id.* at 202.

15 *Id.* at 211.

Less compelling for many readers, however, may be the authors' relatively dim view of the professionalism, integrity, and resolve of administrators who currently play roles in such situations. In many instances, such administrators are trained to bring an analytical lens to investigations of any claims of wrongdoing—which may be coupled with considerable experience in evaluating facts and evidence. On the other hand, faculty members who are experts in specific academic disciplines may not necessarily have expertise in the pedagogy of other disciplines. There are many unresolved questions here about how such faculty committees would be selected and trained. Groupthink and peer pressure can creep into committees of all kinds—even those constituted of highly educated professionals. From a shared governance perspective, therefore, the traditional pitting of faculty against administrators may be less helpful than an honest reckoning with the respective roles each can play in working together to address these difficult questions if and when they arise.

It might be easy to dismiss a book like this as yet another salvo in the ongoing culture wars, but it does raise important questions for institutions of higher education to ponder. The belief that fighting hateful and harmful speech with more speech will inevitably lead to more welcoming and inclusive institutions is hard to reconcile with the increasing level of viciousness, polarization, and tribalism we are witnessing both in and outside of higher education. Furthermore, the costs and burdens of free speech that are imposed disproportionately on faculty, staff, and students from historically marginalized backgrounds are real and increasingly well documented.

Indeed, the authors raise a profound question about the role of higher education in supporting inclusive democracy by positing that "[a]cademic freedom committees would … understand that academic freedom's justification is to serve the common good, which is not one and the same as the abstract pursuit of an ever-contested truth."[16] The authors' insistence on academic freedom standards that are grounded in facts, evidence, and research reminds us of the value and importance of our educational mission to a healthy democracy at a time when misinformation and disinformation run rampant.

In the face of democratic backsliding across the world, Bérubé and Ruth tell a cautionary tale in asserting that the stakes in this debate are higher than we might have realized only a few years ago. As they warn in their conclusion, "the struggle for academic freedom is the struggle for democracy; but that struggle must be predicated on the belief that academic freedom is a matter of democratic competence, not a license to say and believe anything and everything imaginable."[17] All of us in higher education could benefit from thoughtful reflection and introspection on this admonition. Have we put too much faith in abstract, near-absolutist principles of free expression and in a search for truth when the entire concept of truth is itself under relentless siege in the public square? Have we paid too high a price for the protection of hateful and bigoted expression that has hindered full participation in higher education? Does such expression really add value in higher education at all? These are questions well worth debating, using all the tools of critical thinking that we seek to develop in our students.

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16 *Id.* at 240.

17 *Id.* at 251.