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## Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others

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# Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others\*

James J. Fishman\*\*

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\* 444 PARL. DEB., H.C. (5th ser.) 206-207 (1947). This has been paraphrased from a speech from Sir Winston Churchill which reads in full, "[n]o one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time. . ." *Id.*

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*"The exact meaning and intent of this so-called tenure policy eludes us. Its vaporous objectives, purposes, and procedures are lost in a fog of nebulous verbiage."*<sup>1</sup>

## I. INTRODUCTION

Academic tenure is under attack in many universities and by critics of higher education. There are attempts to reduce its privileges, to utilize long-term contracts in its stead, to engage in post-tenure review so as to discharge underperforming faculty, and to expedite the procedural process to make it easier to terminate tenured academics.<sup>2</sup> Throughout higher education

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1. *Worzella v. Bd. of Regents*, 93 N.W.2d 411, 412 (S.D. 1958).

2. See Fred L. Morrison, *Tenure Wars: An Account of the Controversy at Minnesota*, 47 J. LEGAL EDUC. 369 (1997); *Northwestern Professor Sues, Seeking Pay in Tenure Dispute*, N.Y. TIMES, Nov. 24, 1997, at A21; Patrick Healy, *A Take-No-Prisoners Approach to Changing Public Higher Education in Massachusetts*, CHRON. HIGHER EDUC., Dec. 5, 1997, at A41 (discussing how the chairman of the state Board of Education seeks to end the scam of tenure). The president of the American Association of University Professors claimed that he was denounced wherever he went, stating "It's 360-degree bashing. . . . All around us, people are throwing things. I've been a teacher for 33 years, and I can tell you it's never been this bad." William H. Honan, *The Ivory Tower Under Siege*, N.Y. TIMES, Jan. 4, 1998, § 4A, at 33. "Shiftless, lazy good-for-nothings? Richly paid leftist professors securely ensconced in their irrelevant ivory towers." David Horowitz, *The Loafing Class*, (Feb. 9, 1998) <<http://www.salon.com>>. There is even a board game, "Survival of the Witless," which satirizes the tenure process. Denise K. Magner, *Play Your Cards Right and You, Too, Can Earn Tenure*, CHRON. HIGHER EDUC., Sept. 11, 1998, at A16. Tenure according to the rules of the game is "the key to fame, wealth, happiness and most importantly, to never having to put in a single day's work again." *Id.* Players draw cards to determine the gender, class, sexual orientation and whether they are either "hopelessly white" or "desperately minority." *Id.*

Though criticism has reached a crescendo, it has been harsh in the past. One recalls Edward Gibbon's vicious description of the faculty at Oxford in the eighteenth century:

Instead of animating the under-graduates by the example of diligence, they enjoyed in tranquil indolence the benefactions of the founder, and their slumbers were seldom disturbed by the labor of writing, of reading, or thinking. Their discourse in the common room, to which I was sometimes admitted, stagnated in the narrow circle of college business and Tory politics; their deep and dull computations left them no right to censure the warmer intemperance of youth; and their constitutional toasts were not expressive of the most sincere loyalty to the house of Hanover.

THE AUTOBIOGRAPHY OF EDWARD GIBBON 226 (John Murray ed., 1897).

there has been a movement away from tenured faculty slots through the use of non-tenure track positions.<sup>3</sup>

In one view, tenure seems a preposterous and outmoded idea. Individuals are judged by their fellow employees after a few probationary years, and if favorably reviewed and the judgment is affirmed by the employer—the usual case—the individual receives lifetime employment. Universities seem unable to remove faculty members despite their incompetence or neglect of duties.<sup>4</sup> From another perspective, tenure is a flexible concept, and does not constitute a barrier to removal of faculty members who are professionally deficient. Rather, tenure enables academic institutions to achieve their educational goals.

This article attempts to defend academic tenure and offer some recommendations to make it more effective. There is nothing unique in this effort. What might be new to the discussion is the belief that the catalyst to making tenure more flexible and effective lies not with the professorate relinquishing some of its rights, but with university administrators creating an environment of expectations and incentives for tenured

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3. Many universities use armies of adjuncts who may teach at several institutions. No matter what the quality of instruction they provide, adjunct faculty do not have the same investment in or commitment to the university at which they serve. Nor do they have the benefits or privileges. Adjuncts do not set curricula, help or assist students in a substantial way, or participate in university or departmental governance. Tenure may well be withering of its own accord. See Brent Staples, *The End of Tenure?*, N.Y. TIMES, June 29, 1997, § IV, at 14. Data from the U.S. Department of Education and the American Association of University Professors indicates that only about 25% of America's 1.2 million college teachers are tenured. Of those who do not have tenure only 40% are eligible to apply for it, down from 60% a few years ago. See *id.* The most recent data collected in January of 2000 from the National Center for Education Statistics indicates that in 1997, 67.4% of faculty members worked full-time, 32.6% part-time. See Courtney Leatherman, *Colleges Continue to Hire More Part-Time Faculty Members, Government Study Finds*, CHRON. HIGHER EDUC., Jan. 19, 2000, at 2. At two year institutions only 35.4% worked full-time. See *id.* Overall part-timers now make up an estimated 42% of college instructors nationwide, compared to 22% in 1970. See Robin Wilson, *Contracts Replace the Tenure Track for a Growing Number of Professors*, CHRON. HIGHER EDUC., June 12, 1998, at A12. This trend is considered likely to continue. See Courtney Leatherman, *Growth in Positions Off the Tenure Track Is a Trend That's Here to Stay, Study Finds*, CHRON. HIGHER EDUC., April 9, 1999, at A14.

4. See generally ARVAL A. MORRIS, *DISMISSAL OF TENURED HIGHER EDUCATION FACULTY: LEGAL IMPLICATIONS OF THE ELIMINATION OF MANDATORY RETIREMENT* (1992) (offering an excellent summary of the caselaw dealing with dismissal of tenured faculty and procedures to be used in such situations).

faculty, developing the fortitude and procedures to make tenure work as it should, and encouraging faculty to exercise the responsibilities that accompany their status.

William W. Van Alstyne, a former president of the American Association of University Professors and a faculty member at Duke Law School, has defined our subject as: "Tenure, accurately and unequivocally defined, lays no claim whatever to a guarantee of lifetime employment. Rather, tenure provides only that no person continuously retained as a full-time faculty member beyond a specified lengthy period of probationary service may thereafter be dismissed without adequate cause."<sup>5</sup>

Basically, tenure protects the faculty member in three direct ways: 1) it safeguards academic freedom, a subject which will be discussed below; 2) it ensures fair procedures when one is threatened with dismissal; and 3) building upon the second, it provides security of employment. Thus, tenure essentially requires fairness before one is dismissed from a position, thereby giving expectation of continued employment.<sup>6</sup>

This rather benign definition is not how it is perceived by many. It is sometimes difficult to find anyone to say something nice about tenure. In the felicitous words of Ralph Brown and Jordan Kurland, ". . . academic tenure is *always* under attack [emphasis in original]. Usually we hear only grumbling and rumbling, as of distant artillery. But occasionally there is a prolonged fire-fight."<sup>7</sup> The author once walked into a meeting of a university-wide committee as an administrator was com-

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5. See *Tenure: A Summary, Explanation, and "Defense,"* 57 AAUP Bull. 328 (1971).

6. The 1940 Statement of Principles on Academic Freedom and Academic Tenure of the American Association of University Professors, drafted by faculty and college presidents and endorsed by the Association of American Colleges, representing universities and 156 professional organizations as of 1995, states that:

Tenure is a means to certain ends, specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure are indispensable to the success of an institution in fulfilling its obligations to students and to society.

American Association of University Professors, *1940 Statement of Principles on Academic Freedom and Tenure*, reprinted in AAUP POLICY DOCUMENTS AND REPORTS 3, 3 (1995) [hereinafter *1940 Statement*].

7. Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 325, 327 (1990).

plaining: "Why, the professors are worse than civil servants, at least they [civil servants] work from nine to five." The administrator's attitude is common though the analogy to the civil service is misplaced, for the primary rationale for civil service status is economic security while that of tenure is the protection of academic freedom. The most analogous group in society to tenured professors are federal judges, who receive life-time appointments to assure their independence, so they will reach decisions on the basis of legal principle irrespective of the power of the litigants or the pressures of other branches of government. Tenure insulates faculty members from retribution for what they investigate, what they say and teach in class, and what they write.<sup>8</sup> It also protects, to some degree, their extramural utterances.<sup>9</sup>

#### A. *A (Very) Brief Overview of the History of Tenure in the United States*

The concept of tenure dates to the twelfth century and was widely recognized throughout Europe.<sup>10</sup> In fact, the medieval period may have been tenure's golden age, for scholars were exempted from service in the army as well as from payment of taxes.<sup>11</sup> In America in the eighteenth century, the relationship

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8. See Merton C. Bernstein, *In Praise of Tenure: A Cautionary Essay*, 71 WASH. U.L.Q. 1017, 1019 (1993).

9. See American Association of University Professors, *Committee A Statement on Extramural Utterances*, reprinted in AAUP POLICY DOCUMENTS AND REPORTS 32 (1995).

10. See WALTER METZGER, *Academic Tenure in America: A Historical Essay*, in FACULTY TENURE: A REPORT AND RECOMMENDATIONS BY THE COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION 93, 94 (1973) [hereinafter METZGER, *Academic Tenure in America*].

11. The rights, privileges and immunities of medieval scholars were products of the social needs of their time. See PEARL KIBRE, *SCHOLARLY PRIVILEGES IN THE MIDDLE AGES: THE RIGHTS, PRIVILEGES, IMMUNITIES OF SCHOLARS AND UNIVERSITIES AT BOLOGNA, PADUA, PARIS & OXFORD* 325 (1962). They were supplemented by Roman civil and canon law and by the 12th century *authentica habita* or *privilegium scholasticum*. See *id.* The privileges or *privilegium*, in the sense of compensation or favor, were given to those whose activities were regarded as both necessary and beneficial to the public welfare under the *authentica habita*. See *id.* Privileges exempted scholars from payment of all local taxes, and from all civic duties and responsibilities, as well as from military service, and the performance of guard duties, except under unusual circumstances. See *id.* They gave scholars guarantee of imperial or royal protection on the way to, from, and at the place of the schools. They also gave scholars freedom from the application of the law of

between professor and the university was contractual in nature, but with the emergence of endowed chairs, the incumbents of such positions were granted life-time or indefinite appointments. In the nineteenth century, by and large, appointments were of indefinite nature and dismissals would be for adequate cause. There was a presumption that faculty would be reappointed, and they usually were, but this presumption was not legally binding. Nor was there a consensus as to what was adequate cause. In a legal sense in most jurisdictions, all appointments were temporary and instantly extinguishable, and many boards of trustees so proceeded.<sup>12</sup>

During the latter part of the nineteenth century, universities reflected a growing division of labor as the professorate reorganized into departments reflecting the national specialist organizations, such as the American Historical Association, that were being formed at this time. This had several consequences. One was that faculty had a more narrow professional identity. Second, they became research scholars who could best be evaluated by their peers, rather than by the university administration or outsiders such as lay trustees.<sup>13</sup> Faculty members thus gained a bifurcated identity. They belonged to a professional group across disciplines, the faculty, and were professors within a discipline, economics, law or medicine, or

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reprisals, the right to be tried in ecclesiastical courts, and by judges of their own choosing, and the right to summon their adversaries before those judges at the place of the schools where they themselves could not be summoned to appear outside the city walls. *See id.* They also exempted scholars from the jurisdiction of the local civil courts and magistrates. *See id.*

The scope further expanded to granting exemptions for freedom from tolls and taxes, the right to adequate housing and fair rents, the right to be compensated for theft or destruction of property, the right to be protected from disturbing noises or disturbing odors, particularly in Oxford, the right to be protected against uncleared streets, unfair practices in the sale of foodstuffs and other commodities, and against the use of fraudulent weights and measures. *See id.* Scholars at the University of Paris could not be excommunicated by local clergy except under the express will of the Pope. *See id.* at 326.

12. *See* METZGER, *Academic Tenure in America*, *supra* note 10, at 118, 122, 132-35 (1973).

13. *See* Thomas L. Haskell, *Justifying the Rights of Academic Freedom in the Era of "Power/Knowledge,"* in *THE FUTURE OF ACADEMIC FREEDOM* 43, 45-46 (Louis Menand ed., 1996).

ganized by department or school.<sup>14</sup> Concurrently, the American university was undergoing curricular and structural reform. The problem of bureaucratic disconnectedness was solved by bureaucratic responses, one of which resulted in faculty-administrative consultation.<sup>15</sup> It was but a short step to suggest that faculty be involved in a judicial proceeding to determine whether a peer should be dismissed.

The catalyst for tenure as we know it in the United States was the firing in 1900 of a young economist at Leland Stanford Jr. University, E.A. Ross. A precursor to many others in the dismal science, Ross was an activist and interested in public policy. At a time when most economists were Republicans, Ross endorsed the idea of free silver and supported William Jennings Bryan for the presidency. Stanford University had been founded and funded by Leland Stanford, president of the Union Pacific Railroad. Upon Stanford's death, his widow, Jane Lothrop Stanford, who gave new meaning to the phrase "battle axe," became the sole trustee of the university.<sup>16</sup> Offended by

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14. See Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom In America*, 66 TEX. L. REV. 1265, 1267 (1988) [hereinafter Metzger, *Two Definitions of Academic Freedom*].

15. See METZGER, *Academic Tenure in America*, *supra* note 10, at 143. From an economic perspective, as the "frontier of knowledge" advances, three problems in the market for professors are created which universities must solve. These problems are "specialization, obsolescence, and asymmetric information." Aloysius Siow, *Tenure and Other Unusual Personnel Practices in Academia*, 14 J.L. ECON. & ORG. 152, 152 (1998). Professors must specialize to keep up with a discipline. See *id.* "At the departmental level, as specialization increases, more and more professors are needed to cover a discipline." *Id.* at 153. "Increasing specialization exacerbates the informational asymmetries," making it more difficult for the university to make personnel decisions. *Id.* Faculty will have more knowledge about their colleagues' abilities and the field than the university administrator. See *id.* Tenure encourages individual professors to specialize, and enables peer review to overcome the university's informational deficiency in making sound hiring and promotion decisions. See *id.* at 156, 160. Peer review then becomes the university's monitoring mechanism of its employees. See *id.* at 160. Thus, faculty-administrative consultation serves as an efficient organizational advantage for university administrations of research institutions. See *id.* at 153, 154.

16. By the terms of the founding grant of Stanford University, the former Governor of California and United States Senator Leland Stanford and his wife were to exercise complete control over the university; in the event of the death of either, the survivor would assume absolute power. Consequently, when Senator Stanford died in 1893, just two years after founding the university, this 'unusual oligarchy' as Richard Hofstadter and Walter P. Metzger have aptly phrased it, was converted into a 'still more unusual



Ross's politics and activism, she ordered the university's president, David Starr Jordan, to fire him.<sup>17</sup> Instead, Jordan granted Ross a sabbatical, and thereafter transferred him to the sociology department with the title of professor of sociology. Mrs. Stanford then promulgated a ban on all political activity, but Ross ignored it.<sup>18</sup> She ordered Ross fired. Other members of the Stanford faculty also were terminated on Mrs. Stanford's order. Ross, however, was an able self-publicist, and the terma-gant of Stanford an easy foil with which to publicize the cause of academic freedom. At the annual convention of the American Economic Association in December of 1900 the Association conducted an inquiry into the Ross case, using procedures that were later adopted by Committee A of the American Association of University Professors. There were other dismissals after Ross, the most notable one involved a professor at Wesleyan in Middletown, Connecticut. He was dismissed for a speech that he made in another city in which he urged a less rigid observance of the Sabbath.<sup>19</sup>

In 1913 a group of Johns Hopkins professors issued a call to colleagues from other leading universities to join them in the formation of a national association of professors. The purpose of the association was to protect their institutional interests, specifically by the formulation of general principles respecting tenure and legitimate grounds for dismissal of faculty. The association was also to establish a representative judicial commit-

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matriarchate' in which Mrs. Stanford alone exercised complete control over the university.

James C. Mohr, *Academic Turmoil and Public Opinion: The Ross Case at Stanford*, 39 PAC. HIS. REV. 39, 41 (1970) (quoting RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 437 (1955)). It was not until 1903 that Mrs. Stanford relinquished absolute power to a board of trustees. See *id.* at 41 n.8.

17. See Haskell, *supra* note 13, at 49; METZGER, *Academic Tenure in America*, *supra* note 10, at 137-42; and Mohr, *supra* note 16, at 44.

18. Ross was no hero. The reason for his ouster was that he publicly condemned the use of "coolie" immigration and issued a plea for Anglo-Saxon racial purity. See Haskell, *supra* note 13, at 49-50. Mr. Stanford's fortune was based on oriental labor which built the Union Pacific Railway. See *id.* Mrs. Stanford felt that her husband had been criticized. See *id.*

19. See METZGER, *Academic Tenure in America*, *supra* note 10, at 146. During World War I, some professors who opposed the war on pacifist or socialist grounds were fired. See Jon Wiener, *Tenure Trouble*, 45 DISSENT, Winter 1998, at 60. One was singer Pete Seeger's father who was terminated from Berkeley. See *id.*

tee to investigate and report on cases in which freedom is alleged to have been interfered with by the administrative authorities of any majority.<sup>20</sup> Thus, the faculty was to judge administrative conduct. The organization, the American Association of University Professors (hereinafter AAUP), was consciously modeled on the American Bar Association and the American Medical Association as a link between professionalism and academic freedom.<sup>21</sup> In 1915, the AAUP published a General Report on Academic Freedom and Tenure which delineated firm procedures involving dismissal. It outlined the right of the faculty, as a body, to judge the fitness of a current member when brought into dispute, and to have a fair trial apart from the administration. It was inappropriate "that the power of determining when departures from the requirements of the scientific spirit and method have occurred should be vested in bodies not composed of members of the academic profession."<sup>22</sup> The demand for professional autonomy and collegial self-governance are at the heart of academic freedom.<sup>23</sup> *The 1940 Statement of Principles*, adopted by so many professional organizations and universities, first introduced the concept of tenure as economic security.

The *1915 Declaration of Principles* viewed the expressive freedom of academics as a corollary to the need for universities to increase the sum of human knowledge, to provide general instruction to students and to furnish experts for public service.<sup>24</sup> Central to the *Declaration of Principles* was the idea of institutional neutrality and trustee restraint.<sup>25</sup> The *1915 Declaration*

20. See METZGER, *Academic Tenure in America*, *supra* note 10, at 135.

21. See Haskell, *supra* note 13, at 53.

22. METZGER, *Academic Tenure in America*, *supra* note 10, at 149 (citing "General Report of the Committee on Academic Freedom and Academic Tenure," presented at the annual meeting of the association, December 31, 1915, *AAUP Bulletin*, 1915, 38-39).

23. See Haskell, *supra* note 13, at 54.

24. See *General Report of the Committee on Academic Freedom and Academic Tenure*, 1 AAUP BULL. 17 (1915), reprinted in 53 LAW & CONTEMP. PROBS. 393, 397 app. (1990) [hereinafter *1915 Declaration*].

25. See Walter P. Metzger, *Freedom and Tenure in the Academy: The Fiftieth Anniversary of the 1940 Statement of Principles*, 53 LAW & CONTEMP. PROBS. 3, 15 (Summer 1990) [hereinafter Metzger, *Freedom and Tenure in the Academy*]. The beneficiaries of the 1915 declaration were faculty, not students. One should not forget that this faculty autonomy was subsequently utilized to preserve a predominantly male WASP professorate. Not until 1967 did the AAUP issue a Joint State-

identified three elements of academic freedom: freedom of inquiry and research; freedom of teaching within the university; and freedom of extramural utterance and action.<sup>26</sup> The third aspect of academic freedom was placed in the *Declaration* because the AAUP had discovered that professors were more likely to be punished for extramural utterances made in public, outside of the university, than for anything said in the classroom or done in the laboratory.<sup>27</sup> The *Declaration* concluded with a number of practical proposals for accomplishing its goals. The *1915 Statement* was a call for action by the AAUP. In 1925 a *Conference Statement* was signed by the Association of American Colleges but was a retreat, at least linguistically, from the florid language of the previous decade.<sup>28</sup> The *1925 Statement* gave tenure rights to persons on permanent or long-term appointments.<sup>29</sup>

The *1940 Statement*, jointly negotiated by the Association of American Colleges and the AAUP, offered a new set of principles that have received widespread endorsement in higher education.<sup>30</sup> It embodied two new rationales. One was security of employment, which was tied to years of service.<sup>31</sup> The second was that all dismissals, except for cases of financial exigency, had to be for cause and reviewed through a trial-type procedure.<sup>32</sup> The procedural aspect was firmed up in a *1958 Statement on Procedural Standards in Faculty Dismissal Proceedings*.<sup>33</sup>

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ment on the Rights and Freedoms of Students. In 1976 a brief formal statement on discrimination was adopted, though similar positions had been taken at earlier annual meetings of the Association. See American Association of University Professors, *On Discrimination*, reprinted in AAUP POLICY DOCUMENTS AND REPORTS 147 (1995).

26. See *1915 Declaration*, *supra* note 24, at 393.

27. See Metzger, *Freedom and Tenure in the Academy*, *supra* note 25, at 15.

28. See METZGER, *Academic Tenure in America*, *supra* note 10, at 151-52.

29. See *id.*

30. See *id.* at 152.

31. See *id.* at 153.

32. See *id.*

33. See American Association of University Professors, *Statement on Procedural Standards in Faculty Dismissal Proceedings*, reprinted in POLICY DOCUMENTS AND REPORTS 11 (1995) [hereinafter *Faculty Dismissal Proceedings*]. See also AALS Committee on Academic Freedom and Tenure, *Model Code of Procedure for Academic Freedom and Tenure Cases*, 21 J. LEGAL EDUC. 222 (1967).

The *1940 Statement* and its progeny are basically normative expressions. In many institutions they represent private constitutional or contractual arrangements between the institution and its faculty. For example, the Pace University Faculty Handbook specifies, "As a matter of principle, the University supports the AAUP Statement on Academic Freedom and Tenure. Academic tenure is a guarantee of academic freedom and becomes an integral part of the contract between the individual member of the faculty and Pace University."<sup>34</sup> Thus, the *1940 Statement* is essentially a consensual, ethical relationship between employer and employee. In the private university, tenure is fundamentally a social compact. One should remember that the constitutional aspects of tenure, ratified by the Supreme Court in a number of cases,<sup>35</sup> protect the *institution*, rather than the individual from external intrusion.<sup>36</sup>

At public institutions, the rights of the faculty member are coextensive with those of public employees and bound by constitutional precedent.<sup>37</sup> At private institutions, tenure and academic freedom are a subject of contract, an agreement between the faculty and institution, that the latter will grant certain rights and be bound by the *1940 Statement*.<sup>38</sup> Tenure is more than a grant to faculty of freedom and rights. In turn, the faculty member has responsibilities. The only sanction against a private university, unless tenure is violated for constitution-

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34. PACE UNIVERSITY FACULTY HANDBOOK § II.8 (1991).

35. See *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Keyishian v. Bd. Regents*, 385 U.S. 589 (1967); *Sweezy v. New Hampshire*, 354 U.S. 236 (1957).

36. There is a need to distinguish "professional academic freedom," in the words of the leading historian of the subject, Walter P. Metzger, which relates to freedom of research and teaching, from "constitutional academic freedom" through which the courts have protected universities by insulating scholarship and liberal education from extramural political interference. Constitutional academic freedom protects the university from outside interference, rather than the individual faculty member. See J. Peter Byrne, *Academic Freedom: A Special Concern of the First Amendment*, 99 YALE L.J. 251, 289 (1989); Brown & Kurland, *supra* note 7, at 335; Metzger, *Two Definitions of Academic Freedom*, *supra* note 14, at 1265.

37. See MORRIS, *supra* note 4, at 27-30.

38. At public institutions tenure disputes are a matter of state administrative law, whereas at the private institution they are a matter of contract law. There are differences in the standard of proof, and more importantly, in remedies. In the private university context, courts are loath to award specific performance for wrongful dismissal of a personal services contract. In contrast, in public institutions where tenure is a matter of statute, reinstatement is ordered. See MORRIS, *supra* note 4, at 27-30.

ally impermissible reasons, is censure by the AAUP, and possibly an action for breach of contract by the professor, though contracts formally tendered by a university are for but one year.

### B. *Criticisms of Tenure*

The attacks on academic tenure fall into several categories, including the financial cost and resulting inflexibility to the institution, the creation of inappropriate incentives for faculty, and the problems that result from lifetime employment. Admittedly, some of the criticisms are deserved. Almost all institutions in higher education are financially hard-pressed. The easiest way to save money in a highly labor-intensive industry like higher education is to reduce the size of the teaching staff, particularly the more highly paid under-performers. This is an option practically unavailable to universities with tenured faculty, except under specific conditions of financial exigency<sup>39</sup> or in the relatively rare situation, for cause. The expense of the tenure system diminishes an institution's opportunity to recruit and retain a younger and more diverse faculty.<sup>40</sup> Tenure has been painted as a very one-sided contract binding the university, but not really obligating faculty members to do more than teach their classes. But this is an accusation that misunderstands the nature of faculty responsibilities and relationship to the institution.<sup>41</sup> Critics charge that academic tenure impairs the obligee's powers to adjust their programs to meet changes in demand beyond the drastic measures of dismissals for financial exigency.<sup>42</sup> Related to this complaint is the allegation that tenure imperils retrenchment at a time of financial decline.<sup>43</sup>

Tenure, some critics allege, weakens incentives for excellence, tolerates sloth, and has outlived its original purposes.<sup>44</sup> Though the keystone of tenure is academic freedom, many

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39. See AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, ON INSTITUTIONAL PROBLEMS RESULTING FROM FINANCIAL EXIGENCY: SOME OPERATING GUIDELINES, reprinted in AAUP POLICY DOCUMENTS AND REPORTS 193 (1995).

40. See COMMISSION ON ACADEMIC TENURE, FACULTY TENURE 14 (1973) [hereinafter FACULTY TENURE].

41. See *id.*

42. HOWARD R. BOWEN & JACK H. SCHUSTER, AMERICAN PROFESSORS: A NATIONAL RESOURCE IMPERILED 235 (1986).

43. See *id.*

44. See FACULTY TENURE, *supra* note 40.

professors do not write, so tenure, it is alleged, is no longer essential to its original goals. Some criticize the centrality of academic freedom to academic tenure, for academic freedom applies to all teachers even if they lack tenure.<sup>45</sup> Tenure, it is said, harbors the lazy, the incompetent and worse. It also undermines the importance of classroom effectiveness. During the probationary period, scholarship is emphasized, because it is easier to measure than good teaching, and thereafter tenured faculty prefer to focus upon research to which the professional reward system is geared.<sup>46</sup>

Surveys present a different view about the relationship between teaching and scholarship than the critics assume. Contrary to common assumptions, there are significant differences among faculty productivity rates across different kinds of institutions and throughout one's career. Several studies have indicated that there seems to be no apparent reduction in productivity rates after tenure, nor can either rank or career age predict the percentage of time given to teaching or research.<sup>47</sup> The granting of tenure does not alone influence productivity.<sup>48</sup> Two studies have concluded that as faculty age, their scholarly productivity declines, but interest in teaching increases.<sup>49</sup> Without question, individuals who lack self-disci-

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45. See *id.* at 15.

46. See *id.*

47. See James L. Bess, *Contract Systems, Bureaucracies and Faculty Motivation: The Probable Effects of a No-Tenure Policy*, 69 J. HIGHER EDUC. 3, 15 (1998); ROBERT T. BLACKBURN & JANET H. LAWRENCE, *FACULTY AT WORK: MOTIVATION, EXPECTATION, SATISFACTION* 204 (1995); Robert T. Blackburn & Janet H. Lawrence, *Aging and the Quality of Faculty Performance*, 23 REV. EDUC. RESEARCH 265, 268 (1986) [hereinafter Blackburn & Lawrence, *Aging*]. It is extremely difficult to draw generalizations about faculty career development because of the heterogeneity of disciplines, the differing types of colleges and universities (most studies are of research institutions), the dearth of longitudinal studies, and the noncomparability of smaller investigations. See Robert T. Blackburn, *Faculty Development: Theory and Practice*, in *FACULTY VITALITY & INSTITUTIONAL PRODUCTIVITY* 55, 61 (Shirley M. Clark & Darrell R. Lewis eds., 1985).

48. See Bess, *supra* note 47, at 15; Blackburn & Lawrence, *Aging, supra* note 47, at 276.

49. See Blackburn & Lawrence, *Aging, supra* note 47, at 273. According to a survey published in 1996 by the Carnegie Foundation for the Advancement of Teaching, the American professorate places greater emphasis in teaching over research than any other country. See *id.* See also Sharon G. Levin & Paula E. Stephan, *Research Productivity Over the Life Cycle: Evidence for Academic Scientists*, 81 AMER. ECON. REV. 114 (1991).

pline and motivation will not thrive in a system where most deadlines are self-imposed. As with every vocation, it is very difficult to excel in any field of academic pursuit. However, tenure allows professionals within the field of higher education to take advantage of their autonomy, and to slacken off during their careers.

A more valid critique is that tenure does not create toleration or openness toward innovation or alternative approaches. Tenure has sometimes stifled originality by perpetuating the existing academic order.<sup>50</sup> In most law schools, there is a canonical approach as to whom should be eligible for the charmed circle. Regrettably, in much of legal education, the academic tenure system has excluded innovative approaches to learning, such as clinical education and legal writing.

What particularly upsets some critics about tenure, and may have been at the bottom of the high ranking official's gibe, is the freedom that tenure affords to those who have it.<sup>51</sup> Tenured law school faculty often devote substantial time to outside activities, ranging from the quest for social justice to the practice of law. In a society where many workers have little security, and most jobs reflect the routinization and structure of so much of modern life, tenure's license, combined with its security, is bound to bring resentment. To be sure, many faculty cannot handle such freedom and do little. To be successful, an academic must be more structured and disciplined than those in most other areas of employment.

### C. *Termination of Tenured Faculty*

Perhaps the harshest criticism of tenure is that it erects an impenetrable barrier to removing the teacher who cannot teach, the scholar who cannot publish, or the miserable departmental

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50. See HENRY ROSOVSKY, *THE UNIVERSITY: AN OWNER'S MANUAL* 207 (1990) [hereinafter ROSOVSKY]. Rosovsky quotes a memorandum from fellow Harvard faculty member John Kenneth Galbraith, "Faculty control of appointments *can* sometimes be a means to self-perpetuating quality. It can more especially be a means to self-perpetuating mediocrity. And in a world of change, it can be a powerful tendency to academic obsolescence." *Id.*

51. See Christopher Shea, *No Tenure, No Peace*, 10 LINGUA FRANCA No. 8, Nov. 2000, available at [http://www.linguafranca.com/print/0011/field\\_notenure.html](http://www.linguafranca.com/print/0011/field_notenure.html). Untenured professors are far from free because they have to establish their scholarship and their teaching.

or university citizen.<sup>52</sup> Tenure affords, for all practical purposes, life-time employment in an age when job insecurity is the norm, even in sectors which formerly provided tenure-like status. It *has* been nearly impossible to fire tenured faculty. Of roughly 300,000 tenured professors in the United States, there are approximately fifty formal dismissals for cause annually,<sup>53</sup> and an unknown number are informally settled. In over 300 years Harvard University has never stripped a professor of tenure. Even though one murdered a colleague, he went to the gallows with his tenure intact.<sup>54</sup>

There is an understandable frustration at the inability to remove the miscreants, sloths, and other wrongdoers with what should be greater ease. It is alleged that the difficulty of discharging those with tenure encourages incompetence. Clearly, this is not unique to higher education. The civil service at all levels, union employees and others, have similar due process rights. In the business world, mediocre chief executives often continue in office until the mandatory retirement age despite the harm to the corporation or the shareholders.<sup>55</sup> One of the difficulties in higher education is that the procedures of removal are so arduous and embarrassing, that few administrators are

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52. See Brian G. Brooks, *Adequate Cause for Dismissal: The Missing Element in Academic Freedom*, 22 J. C. & U. L. 331, 332 (1995). In the words of Robert MacIver, tenure protects not only "the thinker, the intellectual pioneer, the social critic but also the inert, the barely competent, the perfunctory reciter of ancient lessons, and the one-time scholar who now devotes his best energies to more lucrative pursuits." ROBERT MACIVER, *ACADEMIC FREEDOM IN OUR TIME* 240 (1955).

53. See Neil W. Hamilton, *Peer Review: The Linchpin of Academic Freedom & Tenure*, *Academe* 15, 18, May-June 1997 [hereinafter *Peer Review*]; see also MORRIS, *supra* note 4, at 80.

54. See SAMUEL ELIOT MORRISON, *THREE CENTURIES OF HARVARD* 282-86 (Harvard University Press, 1936). The perpetrator was Professor John W. Webster, who taught chemistry and mineralogy at Harvard College and the Medical School for 25 years. See *id.* at 283. The victim was Dr. George Parkman, also on the faculty of Harvard Medical School, who had lent money to Webster and unsuccessfully attempted to collect his debt. See *id.* Dr. Parkman was killed for his efforts in 1849. See *id.* at 282. Webster was hanged in 1850. See *id.* According to E.J. Kahn, Jr.'s history of the University, "The minutes of the appropriate Medical School faculty meeting simply stated that Dr. Webster was no longer around, that his professional associates 'regretfully took note of action by the civil authorities,' and that they had voted to fill the vacancy that existed 'in Dr. Webster's absence.'" E. J. KAHN, JR., *HARVARD: THROUGH CHANGE AND THROUGH STORM* 70 (1968).

55. See John J. Keller, *Outside In, How AT&T's Directors Decided It Was Time for Change at the Top*, *WALL ST. J.*, Oct. 20, 1997 at A1.



willing to take their time and that of the faculty, to prosecute the cases.<sup>56</sup> The criticism of extensive due process procedures is misguided.

Because of the concerns of academic freedom,<sup>57</sup> the long probationary period before tenure is granted, and the fact that discharge for cause is for all practical purposes the end of an academic career anywhere, termination of tenured faculty *should* be difficult. The decision to terminate should be initially reached by a judgment of one's peers, through a fair process punctiliously followed. The difficulties lie not only with the detailed requirements of the AAUP and other professional bodies,<sup>58</sup> but because the matter will almost certainly be appealed to the courts, further extending the cost and time in reaching the final decision.<sup>59</sup>

The long term employment security provided by tenure has been exacerbated by the uncapping of the retirement age in the 1986 amendments<sup>60</sup> to the Age Discrimination in Employment Act of 1967 [hereinafter ADEA]<sup>61</sup> which ended mandatory retirement of faculty after December 31, 1993. Mandatory retirement assured that some positions would open as older professors were forced to make way for the younger generation, who reflected the diversity of the modern university, possessed new intellectual ideas, and were more likely to be productive scholars. Mandatory retirement also provided an escape from underperforming faculty whose lack of accomplishment did not warrant the effort to dismiss for cause.

The impact of mandatory retirement is uncertain, as many universities have implemented early retirement programs and most faculty do retire by age seventy.<sup>62</sup> Early retirement incentives can be effective, but because they are voluntary, they may

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56. See BOWEN & SCHUSTER, *supra* note 42, at 243.

57. See *infra* pp. 517-521.

58. See *Faculty Dismissal Proceedings*, *supra* note 33, at 12.

59. See Ann H. Franke, *Why Battles Over Tenure Shouldn't End Up in the Courtroom*, CHRON. HIGHER EDUC., Aug. 11, 2000, at B6.

60. Pub. L. No. 99-592, § 2(c)(1), 100 Stat. 3342 (1986) (codified at 29 U.S.C. § 631(a)(1997)).

61. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1997)).

62. See Denise K. Magner, *An Aging Faculty Poses a Challenge for Colleges*, CHRON. HIGHER EDUC., Aug. 8, 1997, at A10.

not influence those very professors most in need of pasture. There is, for example, the response of the professor who was targeted by Stanford's early retirement plan, "Why should I retire on half pay, when I'm retired now on full pay?"<sup>63</sup> There have been other suggestions, including upon the granting of tenure, the faculty member would sign a long term contract, up to thirty-five years or more, or perhaps to age sixty five. At the end of the term, tenure would expire and further employment would be based upon term contracts.<sup>64</sup> The end of mandatory retirement is a more manageable problem for higher education than the difficulty of rescinding tenure after it has been granted.

Despite the validity of many of these complaints, the tenure system should be maintained. The positive attributes far outweigh its negative factors, and any alteration of the tenure system would drastically change the relationship between faculty and administrators and their governing boards, and more importantly, between faculty and the student body.

## II. ARGUMENTS IN FAVOR OF TENURE

### A. *Tenure as a Guarantor of Academic Freedom*

The primary argument in favor of the system of academic tenure is that it is a guarantor of academic freedom. "Academic freedom" is a non-legal concept, referring to the liberties claimed by professors through professional channels against administrative or political interference with research, teaching, and governance. Academic freedom allows the professorate to

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63. Rosovsky, *supra* note 50, at 216 n.2.

64. See Oscar M. Ruebhausen, *The Age Discrimination in Employment Act Amendments of 1986: Implications for Tenure and Retirement*, 14 J. C. & U. L. 561, 569-73 (1988). An excellent argument has been made in *Note: Questioning Age-Old Wisdom: The Legality of Mandatory Retirement of Tenured Faculty Under the ADEA*, 105 HARV. L. REV. 889, 894-901 (1992), that the ADEA, 29 U.S.C. § 631(c)(1)(1997), should not apply to tenured faculty under the statute's "high policymaker" exemption. The article cites *NLRB v. Yeshiva University*, 444 U.S. 672, 679 (1980), for the proposition that faculty members were managerial personnel and not employees within the National Labor Relations Act. *Note: Questioning Age-Old Wisdom: The Legality of Mandatory Retirement of Tenured Faculty Under the ADEA*, 105 HARV. L. REV. 889, 895. Some litigation-seeking educational institution should make that argument. The case also would demonstrate how difficult it is to challenge the tenure system.

seek and discover, to teach and publish, without outside interference.<sup>65</sup> Historically speaking, academic freedom's heart and soul lie not in free speech, but in professional autonomy and collegial self-governance. It defends the community of disciplines that make up the modern university.<sup>66</sup> Academic freedom's linkage to tenure is that the requirement of a due process hearing before termination for cause, protects the fundamental values of the university: disinterested inquiry, reasoned and critical discourse, and the ethos of liberal education.<sup>67</sup> Tenure permits the faculty member to express unpopular academic views and advance non-academic causes, to act upon knowledge and ideas that one perceives using professional judgment without fear of retribution from a latter day Mrs. Stanford, or of donors, corporations, legislators or colleagues.<sup>68</sup>

Fundamentally, academic freedom reflects the demands of scholarly disciplines to pursue disinterested scholarship and teaching, and to have their work and teaching evaluated according to the discipline's standards of competence. These standards are determined through peer review, rather than through the political, economic, or ideological filters of boards of trustees, legislators or the community.<sup>69</sup> The job security that tenure offers is conducive to such research and teaching, free from the fear of penalty.<sup>70</sup> The centrality of academic freedom within

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65. See BOWEN & SCHUSTER, *supra* note 42, at 233; see generally MATTHEW W. FINKIN, *THE CASE FOR TENURE* (Matthew W. Finkin, ed., 1996).

66. See Haskell, *supra* note 13, at 54.

67. Cf. Byrne, *supra* note 36, at 388.

68. Cf. ROSOVSKY, *supra* note 50, at 180. Even today unpopular speech brings calls for resignation and dismissal. See, e.g., Sam Howe Verhovek, *Texas Law Professor Prompts A Furor Over Race Comments*, N.Y. TIMES, Sept. 16, 1997, at A28. In the 1980s Edward Schuh, a professor in the School of Agriculture at the University of Minnesota and later Dean of the Hubert Humphrey Institute of Public Affairs, came out against farm subsidy payments at 90% of parity. See Wiener, *supra* note 19, at 61. Farm price supports in farming states are as sacred as the words of Kim Il Sung in North Korea. See *id.* This created great controversy and the governor of Minnesota went to the university president and demanded Schuh be fired. See *id.* The president said he couldn't because Schuh had tenure. See *id.* See also Alison Schneider, *A California State Professor is Attacked for His Defense of a Holocaust Denier*, CHRON. HIGHER EDUC., June 23, 2000, at A19.

69. Cf. *Academic Freedom: A Special Concern*, *supra* note 36, at 262, 278-79. Academic freedom is curtailed at many religiously affiliated colleges, requiring adherence to the college's faith.

70. The conventional justification for academic freedom is that it is instrumental in the discovery of truth. A system of independent academic institutions

the university is elegantly described by Louis Menand of the City University of New York:

Academic freedom is not simply a kind of bonus enjoyed by workers within the system, a philosophical luxury universities could function just as effectively, and much more efficiently without. It is the key legitimating concept of the entire enterprise. Virtually every practice of allowing departments to hire and fire their own members to the practice of not allowing the football coach to influence the quarterback's grade in math class—derives from it.<sup>71</sup>

Tenure protects not only the individual faculty member, but the integrity of the university. The nuances of academic freedom are a more complex subject than this essay suggests.<sup>72</sup> However, one should point out two things: academic freedom is not the equivalent of liberty or license within the classroom or in research, and it includes only the rights unique or necessary to the functions of higher education.<sup>73</sup> Thus, members of a profession or discipline must adhere to the norms of that specialty broadly defined. Administrators may exercise more extensive control over curricular judgments than most would imagine, so long as they do not attempt to punish a faculty member for his or her political viewpoint.<sup>74</sup>

We tend to believe that assaults on academic freedom are a thing of the past, particularly of the McCarthy era, when, as the writer Harold Brodkey wrote, the nation "walked on tip toe."<sup>75</sup>

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organized by discipline allows scholars who are independent to collectively reach the truth. Ronald Dworkin, *We Need a New Definition of Academic Freedom*, in *THE FUTURE OF ACADEMIC FREEDOM* 181, 187 (Louis Menand, ed. 1996).

71. Louis Menand, *The Limits of Academic Freedom*, in *THE FUTURE OF ACADEMIC FREEDOM* 3, 4 (Louis Menand, ed. 1996).

72. See generally WALTER P. METZGER, *ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY* (1995); Byrne, *supra* note 36; Dworkin, *supra* note 70; Julius G. Getman & Jacqueline W. Mintz, *Forward: Academic Freedom in a Changing World*, 66 TEX. L. REV. 1247 (1988).

73. See Byrne, *supra* note 36, at 264.

74. See *Hetrick v. Martin*, 480 F.2d 705, 709 (6th Cir. 1973) (holding that a school could fail to renew non-tenured faculty because of displeasure with pedagogical attitude and teaching methods); *Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1973) (holding that a university teacher has no first amendment right to disregard curriculum content); Byrne, *supra* note 36, at 301-02 (noting that administrators may exercise extensive control over curricular judgments so long as they do not penalize a professor solely for his political viewpoint).

75. *The Last Word on Winchell*, THE NEW YORKER, Jan. 30, 1995 at 71, 77-78, quoted in Irving Louis Horowitz, *Culture, Politics and McCarthyism: A Retrospec-*

Professor Neil W. Hamilton has demonstrated that external threats to academic freedom are episodic, usually concurrent with external crises in society.<sup>76</sup> Today, the primary threat to academic freedom comes from within, from fellow faculty members and students. The simplistic phrase usually used to describe this development is "political correctness," though the problem is somewhat more complicated. Incidents have occurred widely and have affected faculty and students. As the jazz critic and journalist Nat Hentoff has written, "... censorship of opposing views is one of the strongest drives in human nature. Throughout history one group or another has been labeled too dangerous to be heard."<sup>77</sup> Most people do not like a diversity of viewpoints. They want to ensure their own view is the dominant one. When it comes to intellectual freedom one should fear majoritarian rule. Academic freedom protects the individual from the views of the mass.

An additional internal threat to academic freedom has been a paradigmatic shift leading to significant intellectual and methodological transformations in the ways in which scholars think about knowledge, language, truth and politics—changes that have altered assumptions and approaches to teaching, writing, and education itself.<sup>78</sup> The first example usually offered is the Kosovo of academe, any meeting of the Modern Language Association. One sees this shift in legal education too.<sup>79</sup> At one time everyone stood pretty much on the same methodological ground. That is no longer so, as new approaches toward

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*tive from the Trenches*, 22 WM. MITCHELL L. REV. 357, 358 (1996); cf. ELLEN W. SCHRECKER, *NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES* (1986).

76. See generally NEIL W. HAMILTON, *ZEALOTRY & ACADEMIC FREEDOM: A LEGAL & HISTORICAL PERSPECTIVE* (1995).

77. NAT HENTOFF, *FREE SPEECH FOR ME - BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER* 5, 7 (1992) *quoted in* Neil W. Hamilton, *Foreword: Symposium on Zealotry and Academic Freedom*, 22 WM. MITCHELL L. REV. 333 (1996).

78. See Linda Ray Pratt, *Foreword*, *THE FUTURE OF ACADEMIC FREEDOM*, at viii.

79. Twenty years ago when the author entered legal education, the then dean of the law school advised him: "Write three law review articles on traditional subjects, and then you can do what you want." He meant two things. The first was that the independence that academic freedom affords only kicks in after one has received tenure. The second was that there was a standard methodological approach within legal education to a law review article, i.e., there was but one way to write them if one wanted more than a six year career.

the meaning of reality, truth, and methods of research have emerged: the law and economics movement, critical legal theory, critical race theory, feminist theory, communitarianism, and so on. In evaluating approaches to teaching, faculty and others are debating whether courses should be analytical, skills-oriented, clinical, simulated, or remedial. One could say today, that not only are people standing on different methodological grounds, that academics are attempting to dig tunnels under one another. Only academic freedom permits these issues to be debated and worked out in terms of effectiveness, success, and general acceptance. Only providing security of employment can protect a full and free discussion. This development of different *weltanschauung* to teaching and research, means that academic freedom and tenure may be the only means through which disputatious and difficult people can continue to coexist and espouse unpopular causes or new approaches.<sup>80</sup>

Perhaps because of the nature of work that academics do, and the security tenure provides, higher education tends to have more than its share of nonconformists and abrasive personalities. The boxer Mike Tyson would fit in well on many faculties.<sup>81</sup> For whatever reason, and such theories are best left to the realm of psychology, one's academic colleagues can be difficult, and the opportunity to get rid of some of them is irresistible. Thus, tenure is needed as much for protection from within as without.

### B. *Tenure as a Social Contract*

Election to tenure represents virtual lifetime membership in a community. As a member of an academic commonwealth, one is bound with fellow citizens whom the faculty member admires, loathes, or fears, but who are linked within a joint enterprise. Academic tenure encourages commitment, discipline, collegiality and compassion to the institution, and despite what was implied above, to one's colleagues as well. Tenure contributes to institutional stability by creating a permanent group of academic citizens without the distraction of ongoing reviews

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80. Cf. Rosovsky, *supra* note 50, at 180.

81. Most law school deans would affirm that some faculty member, weekly, wants to chew his ear.

which might be destructive to collegiality and commitment.<sup>82</sup> The tenured faculty has been described as a club of eminently un-clubbable people in the English sense. As with the outside polity, there are rights and obligations of citizenship. Tenure has been characterized as a social contract,<sup>83</sup> and it is through that compact that the faculty develops internal norms of behavior and expectations. The institutional allegiance creates a relationship that extends far beyond the normal employer-employee connection. In *NLRB v. Yeshiva*,<sup>84</sup> the United States Supreme Court recognized the special nature of the employment relationship and the faculty's role in university governance. Faculty are managers because of their absolute authority in academic matters.<sup>85</sup> The absence of tenure would ultimately diminish faculty powers of governance, and lead to a more traditional employer-employee relationship.<sup>86</sup>

To be effective, a university must be a community to which people belong and about which they care.<sup>87</sup> Academic disputes are notorious, but sometimes forgotten are the collegiality and

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82. See ROSOVSKY, *supra* note 50, at 182; MORRIS, *supra* note 4, at 86.

83. See ROSOVSKY, *supra* note 50, at 183.

84. 444 U.S. 672 (1980).

85. See *id.* at 686.

The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.

*Id.* Cf. *New York University*, 332 N.L.R.B. No. 111 (Oct. 31, 2000) (deciding that a university's teaching assistants, graduate assistants, and research assistants are employees within the meaning of National Labor Relations Act, 29 U.S.C.A. § 151 (1998)); *Boston Medical Center Corp.*, 330 N.L.R.B. No. 30 (1999) (holding that residents and fellows employed by Boston Medical College while students are also employees under National Labor Relations Act, 29 U.S.C.A. § 151 (1998)).

86. See MORRISON, *supra* note 2, at 383 (discussing how a threat to tenure at the University of Minnesota led to a revitalization of attempts to unionize the faculty). See also Courtney Leatherman, *Union Movement at Private Colleges Awakens After a 20-Year Slumber*, CHRON. HIGHER EDUC., Jan. 21, 2000, at A16.

87. See BOWEN & SCHUSTER, *supra* note 42, at 236-37.

compassion that do exist among members of the university community. Virtually everyone affiliated with the legal profession has heard, at some time, of Samuel Williston, the great contracts scholar and author of *Williston on Contracts*. What is not so well known is that Williston suffered from depression and endured numerous breakdowns. He was institutionalized for approximately four years during the course of his teaching career. In his autobiography, one of the first to speak forthrightly of this illness, he poignantly describes the support of his Harvard Law School colleagues, and his surprise at how they refused his resignation and welcomed his return after long absences.<sup>88</sup> No doubt, other law school communities have shown similar compassion to colleagues when sickness or tragedy have struck. Absent tenure, the bonds of community might be more slack.

### C. *Tenure and Economic Efficiency*

Most economists who have studied the tenure system have found it an economically efficient institution.<sup>89</sup> Colleges and universities historically have not had the financial resources to pay faculty at rates competitive with private industry or the marketplace. In real terms, professorial and public service salaries have risen little in the post-war period, while the incomes of professionals and business people have shown large gains.<sup>90</sup> One way to overcome the economic inequalities is through non-salaried benefits such as tenure.<sup>91</sup> Elimination of tenure would seriously reduce the attractiveness of higher education as a career. It may lower the caliber of people drawn to it, actually

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88. See SAMUEL WILLISTON, *LIFE & LAW* 142-66 (1941); see also Allen D. Boyer, *Samuel Williston's Struggle with Depression*, 42 BUFF. L. REV. 1 (1994).

89. See H. Lorne Carmichael, *Incentives in Academics: Why Is There Tenure?*, 96 J. POL. ECON. 453 (1988); Fritz Machlup, *In Defense of Tenure*, AAUP Bull. 112 (Summer 1964); Michael S. McPherson & Gordon C. Winston, *The Economics of Academic Tenure: A Relational Perspective*, J. ECON. BEHAV. & ORG. 163 (1983); Siow, *supra* note 15. But see Robert W. McGee & Walter E. Block, *Academic Tenure: An Economic Critique*, 14 HARV. J.L. & PUB. POL'Y 545 (1991).

90. See ROSOVSKY, *supra* note 50, at 220.

91. See BOWEN & SCHUSTER, *supra* note 42, at 237. This argument seems to fail when applied to the humanities where there is an inadequate nonacademic marketplace to compete for the supply of candidates. The result of the two-decade oversupply of Ph.D's in the humanities is to drive down wages even more through the widespread use of non-tenure track part-time workers.



increase the cost of attracting talent,<sup>92</sup> or lead to the strident unionism that has so changed the nature of public primary and secondary education.<sup>93</sup>

Particularly in areas where there are active labor markets, both within and outside the discipline of education, institutions would either have to pay salaries comparable to the industry or hire lower quality people. Absent tenure, it would be difficult to get the most gifted younger candidates to interrupt their careers in law, medicine or elsewhere at severe financial disadvantage. In a most interesting study of the economics of tenure, Michael MacPherson and Gordon Winston suggest that an extended probationary period, followed by a lifetime guarantee of a properly defined job, is a well adapted response to the unique features of academic work. Those features include the difficulty of monitoring faculty work performance, the highly specialized nature of academic work and the long, expensive training such work requires.<sup>94</sup>

The tenure decision should be a source of internal discipline, for the consequences of making a mistake will be with the department or school for years.<sup>95</sup> After the initial tenure decision, following the long six year probationary period, there is no need for detailed subsequent reviews. These reviews are inherently subjective, institutionally destabilizing, costly, time-consuming and difficult to administer because of the highly specialized and diverse intellectual tasks faculty perform.<sup>96</sup>

#### D. *The Importance of Job Security to Scholarly Research*

The job security tenure provides is what really gets in the craw of many critics. Without it, however, much experiment, scholarship and intellectual risk would not be undertaken. Job security not only allows the faculty member to pursue the controversial, but also to investigate matters that present a high probability of failure, including those particular to the sciences,

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92. See *id.* at 239-40.

93. See *Boston Medical Center Corp.*, 330 N.L.R.B. No. 30 (1999); *New York University*, 332 N.L.R.B. No. 111 (Oct. 31, 2000); Courtney Leatherman, *As Teaching Assistants Push to Unionize, Debate Grows Over What They Would Gain*, CHRON. HIGHER EDUC., Oct. 3, 1997 at A12.

94. See MacPherson & Winston, *supra* note 89, at 182-83.

95. See ROSOVSKY, *supra* note 50, at 181.

96. See *id.* at 182.

where failure can occur after years and even decades of research. Tenure allows someone to take that risk and fail without negative employment consequences. As with the federal judiciary, job security permits the exercise of independent judgment without fear of repercussions. One cannot forget that this security comes after a long six year probationary period. While it is true that this may be too short for some late bloomers, if the pre-tenure review process works as it should, the never-bloomers will be weeded out.<sup>97</sup>

#### E. *Tenure as a Benefit to Society*

Undoubtedly tenure is of benefit to the individual faculty member. It is also of advantage to the university. Ultimately, the most important test of tenure is whether it is a benefit to society. This advantage, the crucial one, rests in the intellectual products of academic freedom.<sup>98</sup>

One of the most important roles of the university is the encouragement of research and scholarship that would not otherwise take place in business or industry.<sup>99</sup> This includes the production of scientific and technical discoveries that cannot be appropriated and knowledge that would not be of advantage or of interest to the private sector. This includes much of the research unique to the humanities, pure mathematics, public policy, and even, alas, law.<sup>100</sup> Tenure creates an atmosphere that promotes the advancement of knowledge into areas where there are minimal revenue possibilities, and with little encourage-

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97. The up-or-out approach of the tenure system is not unique. Until recently law firms were organized on that principle, see Ronald J. Gilson & Robert H. Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 STAN. L. REV. 567, 571-81 (1988), as are some minor league sports teams that release competent players who will not be promoted to the major leagues. See Siow, *supra* note 15, at 157. The film BULL DURHAM (1988) deals with this situation.

98. See Machlup, *supra* note 89, at 119. The 1940 Statement of Principles also recognized that tenure's primary purpose was to benefit society: institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition. See 1940 Statement, *supra* note 6.

99. See Carmichael, *supra* note 89, at 455.

100. See *id.* See also Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U.L. REV. 615, 648 (1996); Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313 (1989).

ment internally from universities or externally from the marketplace.<sup>101</sup>

Of major importance, the tenure system encourages the scholar and teacher's search for truth. It enables the scientist, without fear of consequences, to come forward with information that a drug promoted by a company that heavily sponsors research at her university, is unsafe or ineffective.<sup>102</sup> It permits the teacher or scholar to be uninhibited in criticizing accepted theories, widely held beliefs, or existing social, political and economic institutions. It encourages individuals to embark, or continue upon, new lines of reasoning, which may eventually lead to new insights, understanding or knowledge regarding nature or society.<sup>103</sup> Tenure and academic freedom allow faculty members to revise and experiment in their teaching methodologies, to better train their students for important roles in society.<sup>104</sup> Academic tenure protects the decentralized community of checkers, who determine what, for the present, is to be considered knowledge, what is error, and what is mere belief. Whether knowledge is proven by the scientific method, or as in the humanities and social sciences, to be reviewed by those deemed competent in a discipline, the disinterested judgment provided by academic freedom is one of the major benefits to society of the tenure system.<sup>105</sup> The primary benefit to all of us

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101. One never knows when a discovery or insight will prove valuable. The absence of market incentives allows research that can stand on hold until knowledge, science or society can put it to use. The university serves as such a reservoir of knowledge. Even advances that can be put to practical use in a few years may not be recognized immediately. It took Myron Scholes and Robert Merton, 1997 Nobel Prize winners in economics, who (along with Fisher Black) discovered the formula for pricing options and derivative instruments, three years to get their work published. Peter Passell, 2 *Get Nobel for a Formula at the Heart of Options Trading*, N.Y. TIMES, Oct. 15, 1997, at D2.

102. See Philip J. Hiltz, *Company Tried to Block Report That Its H.I.V. Vaccine Failed*, N.Y. TIMES, Nov. 1, 2000, at A26. (California company sued university and researchers to block publication of scientific papers and seeks damages of \$7 million).

103. See Machlup, *supra* note 89, at 120, 123-24.

104. See MORRIS, *supra* note 4, at 8.

105. See Hamilton, *supra* note 53, at 15-16; see also Byrne, *supra* note 36, at 269-88.

is that the academic tenure system creates a means whereby society may have the benefit of honest judgments.<sup>106</sup>

### III. MAKING TENURE MORE EFFECTIVE

#### A. *The Pre-Tenure Process*

To say that tenure is a net benefit to society does not mean one should break into cheers. After all, one could reach the same conclusion about the Immigration and Naturalization Service, Internal Revenue Service or the State Department of Motor Vehicles. If tenure is to survive, it must become more flexible than it has been in the past.

The prescriptions for making the tenure system more effective are so obvious and commonsensical that one hesitates to express them. At the onset, the pre-tenure procedures and expectations must be understood by the candidate, faculty, department chair and dean. The process must be applied in similar fashion to each individual. Consistency in process is paramount. This does not mean that the substantive standards must remain the same. There are decisions which hold that the standards applied to tenure candidates can change between the time the person entered upon the tenure trail, to the decision point, but the procedures must remain consistent for each candidate.<sup>107</sup> As a university improves its reputation, tenure standards tighten. Economics also play a part. It is ironic that tenure is most difficult to attain at the most elite universities, which are generally the most affluent, and easiest to obtain at

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106. See CLARK BYSE & LOUIS JOUGHLIN, *TENURE IN AMERICAN HIGHER EDUCATION* 4 (1959).

107. See *Wells v. Doland*, 711 F.2d 670, 675 (5th Cir. 1983) (holding that a university could deny tenure to an assistant professor because of a desire to upgrade the department with a new requirement of doctorate); *Hooker v. Tufts University*, 581 F. Supp. 104, 114-16 (D. Mass. 1983) (holding that a change in the policy waiving scholarship requirements in considering tenure for athletic coaches, which thereby held candidates to criteria in Faculty Handbook, did not implicate sex discrimination); *Lewandoski v. Vt. State Colleges*, 457 A.2d 1384, 1388-90 (Vt. 1983) (holding that a substantial tightening of criteria for tenure, making substitutes for Ph.D. degree the exception rather than the rule, within the discretion of president in interpretation of tenure criteria was not arbitrary or abuse of discretion); *Clark v. Whiting*, 607 F.2d 634, 640-45 (4th Cir. 1979) (holding that the failure of a school to apply the same standards in evaluating qualifications as were used "in the past" in passing on promotions of faculty members, was not a constitutional violation of due process and equal protection).

the less research-oriented institutions and community colleges.<sup>108</sup>

The tenure decision should be divided into procedural and substantive components. Peer review, the substantive prong, is the primary duty of the faculty. One should not underestimate the importance of student input. It is the formal responsibility of the administration to ensure consistent and fair procedures in the consideration of candidates. They will bear the costs of litigation when the process is flawed. It is, however, the moral responsibility of the tenured faculty to ensure such procedures. University counsel should meet with department chairs annually to ensure that the process is consistent, clear, and fair. If candidates have weaknesses, they should be counseled with candor and notified before they come up for tenure consideration. There should be a lawyerly approach, including keeping detailed written records of such communication.<sup>109</sup> The essence of the tenure decision is peer review, but the university should occasionally insert itself at the substantive level. This observer concludes that faculty are often reluctant to vote "no," and department chairs support the faculty decision even when they know better. In the end, the administration is guardian of the gate. They must make hard decisions in good faith, which may go against majority rule, or return a recommendation to the appropriate committees demanding a further burden of proof be met.<sup>110</sup>

The administrative focus should be less on quality of teaching or effectiveness in the classroom, of which student input and peer reviews will create an adequate record, and more on whether the individual adequately exceeds the standard. Is this person likely to contribute and to grow? That should be the bottom line. This administrative review should not be utilized frequently, rather it is like the emergency cord on a subway car or train, to be exercised with great care and discretion.

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108. Thus, in the School of Arts and Sciences at Harvard, only 60% of tenure track faculty will receive tenure. See ROSOVSKY, *supra* note 50, at 190. In law schools, perhaps because of the ease of moving to more lucrative private practice, tenure track success is greater and the time period for review usually shorter. In secondary education, tenure, a subject of union contract, comes after a few years.

109. See Franke, *supra* note 59.

110. See generally Sara Rimer, *Tenure Denial to a Woman Puts Harvard in an Uproar*, N.Y. TIMES, May 19, 1997, at A12.

The proper approach toward the tenure decision should be when in doubt, don't. If one looks at such decisions as a two or three million dollar commitment over thirty to fifty years, one's level of scrutiny and concern increases. The probationary period is not a marathon, where a finisher, or in this context, one who completes the requirements, throws himself across the finish line with an expectation of reward. Rather, it should be like a satellite tournament, offering the best estimate of one's future professional growth and development.

### *B. After the Unfavorable Decision*

We live in a litigious society, and unfavorable tenure decisions are more likely than not to wind up in court. The hook by which one may obtain a serious consideration of a claim of improper treatment, is to allege some impermissible form of discrimination. In the law school context, litigation is probably therapeutic for the disappointed candidate. After all, if a disappointed law faculty member does not sue, who would? A lawsuit also saves face until one moves on with his or her life. If the process of tenure consideration is consistent and fair, the university should defend its decision to the end. These litigations are expensive. They go on for years. Publicity can be terrible. Human Rights Commissions appropriately are responsive to allegations of discrimination. Yet, if the university is in the right, it should not settle.

### *C. Dealing with Deadwood*

One of the most unfortunate images of the academic profession is the ad hominem "deadwood," defined in the dictionary as anything useless and burdensome.<sup>111</sup> If that definition of deadwood is correct in the higher education context, such a faculty member could, and should, be terminated for cause. Speaking more precisely, "deadwood" refers to an underperforming faculty member who has not attained the promise demonstrated when considered for tenure.

Clearly, an unproductive faculty member is a cost to students, the university, and society. Yet, it is very difficult to ascertain how great of a problem this really is. Though we live in

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111. RANDOM HOUSE UNABRIDGED DICTIONARY 512 (2d ed. 1993).

a quantitative age, there is no deadwood index. Where is US News when you need them? "The Top Twenty Deadwood Faculties." The author has found two non-scientific estimates. Henry Rosovsky, in his delightful book, *The University: An Owner's Manual*, states that the label "deadwood" would apply to under two percent of a major university's faculty.<sup>112</sup> Ralph Brown and Jordan Kurland proffer a "guess" of five percent at colleges and universities that make less demanding requirements for tenure.<sup>113</sup> They also ask about the deadwood index for comparable sectors of the workforce. Is there de facto tenure, and is the deterrent to society, from the existence of unpruned deadwood, more or less severe than the harm caused by the indolent of academia?<sup>114</sup> This observer wonders whether there may even be university administrative personnel who might be saddled with the deadwood epithet. The higher up one goes on the administrative ladder, the less one sees the kind of rigorous review and turn-over that critics of tenure would wish for underperforming faculty.

A wounding and common criticism of tenure is that it fosters mediocrity which leads to deadwood. This argument really divides into two prongs. One is that the petrified forest will grow as tenured mediocrities perpetuate bad teaching and little scholarship. The second prong is that the system of academic tenure turns previously energetic, gifted and promising faculty into deadwood, because they lose interest in the hard, frustrating, and often tedious and time-consuming work that teaching and scholarship entail.<sup>115</sup> The first argument goes to the practice of selection, and the care and rigor in which the tenure deci-

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112. See Rosovsky, *supra* note 50, at 210-11.

113. Brown & Kurland, *supra* note 7, at 332.

114. See *id.* One might argue that unpruned deadwood frequently exists in the higher levels of business. Unless the corporation is in severe financial exigency or has a particularly independent board of directors, most managements that muddle along and whose corporations underperform for years will not be replaced. A recent example is that of Robert Allen of AT&T whose nine year reign led to billions of dollars in losses in a misguided computer investment, a split of the company into three, stripping the corporation of some of its greatest assets and management talent, and being bypassed by the telecommunications revolution. See John J. Keller, *Outside In, How AT&T's Directors Decided It Was Time for Change at the Top*, WALL ST. J., Oct. 20, 1997, at A1.

115. This argument is offered and answered in Machlup, *supra* note 89, at 116-17.

sion is made. It is rare, though it does happen, that faculty will bloom after the probationary period. It is better to lose the occasional late bloomer than take a chance and be burdened with a never-bloomer. There really are not that many surprises. The fault of average candidates continuing their mediocrity lies with those responsible for the tenuring process.

The second prong of the criticism is harder to answer. Undeniably, some faculty fool you after the fact.<sup>116</sup> They turn lazy and satisfied. They never reach their potential and disappoint their colleagues, and undoubtedly themselves. Here the tenure system fails. Would another system energize these people? The insecurity engendered by non-tenure systems probably would vitalize some, but others burn out, have personal crises or change their goals. These have little to do with the tenure system, but one must admit the enervation of energy and potential is a consequence of it. It seems the appropriate response to the second criticism is to create an atmosphere of post-tenure aspirations and expectations.

Assuming that to some extent the academic tenure system is a dead weight, a burden on the university and society, the question arises whether the cost of a more efficient, productive system is worth what would be lost. If the tenure system offers a higher form of social and economic organization, imposes less stress on the individual, and produces a net gain to society through the advancement of knowledge, should it be emended because of its inefficiencies?<sup>117</sup> In fact, recent studies of down-

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116. In discussing this subject with a colleague who recently retired from a major "Wall Street" law firm, he pointed out that the most frustrating aspect of electing a person to partnership was that their personalities seemed to change. The author suggested that it was less a personality change than the emergence of their real persona. Any probationary employee in any field who demonstrates a difficult personality should be denied partnership or tenure or whatever on grounds of stupidity. To get along while untenured, one should go along.

117. In recent years there has been a transformation in the ambiance and economic structure of many law firms from a system where partnership was a lifetime commitment on both sides to a mere business where non-productive partners are expelled from the firm. Perhaps the author knows few of the affluent winners under this system, but he has never met an attorney who believes that this approach is a professional advance or improvement in the nature of work. The compensation approach of some law firms, "you eat what you kill," i.e., remuneration is directly related to the business and profits one generates, offers a poor analogy to education. In the absence of pressing financial exigency or the transformation of a profession into a business, there are other sectors with quasi-tenure systems.



sizing corporations have shown that they suffered loss of morale, ongoing insecurity, lack of loyalty, and lack of trust by the workforce, long after the cuts had ended.<sup>118</sup> Insecurity does not increase productivity, and in a labor intensive environment, where relationships among faculty and with students are critical, it would not.

Deadwood creates an economic and image cost on higher education.<sup>119</sup> The best way to avoid the deadwood problem is to have a fair but rigorous pre-tenure scrutiny. Many law schools engage in a substantial amount of hand-wringing over faculty perceived to be underperforming, albeit rarely to their face. One alternative to the deadwood problem is to ignore the offenders, or in the business analogy, write the disappointment off and move on.<sup>120</sup> Another is to introduce a system of personnel management that will keep expectations high and develop a reward system.

#### D. *Post-Tenure Review*

One of the more consistent refrains from the administrative side of the debate has been for "post-tenure review," a phrase that has the ambiguity and generality of such flexible legal con-

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118. See Rosabeth Moss Kanter, *Manager's Journal: Show Humanity When You Show Employees the Door*, WALL ST. J., July 21, 1997, at A22 (describing how inside downsized companies cynicism and mistrust remain); see also Adam Bryant, *Market Place: What Price Efficiency? Focus on Costs May Have Blurred Delta's Vision*, N.Y. TIMES, July 25, 1997, at D1.

119. The economic costs of nonproductive senior faculty are uncertain, but may be less than one intuit. Michael R. Ransom has asserted that "nation-wide data from large research-oriented universities show a negative relationship between seniority and salary of professors. . ." Michael R. Ranson, *Seniority and Monopsony in the Academic Labor Market*, 83 AM. ECON. REV. 221, 232 (1993).

120. Another law school with which the author is familiar gentrified over the past fifteen years from a basically bar-review, trade-focused, evening-oriented law school to one now considered a leading regional institution. Many faculty from the old regime basically taught as an adjunct to their law practices. Given the new mission of the school, these faculty members were not an asset. What did the school do? It ignored them. The school did what businesses do when a product or strategy fails. It wrote them off. Though there were not the tax benefits of write-offs one receives in a for-profit business, the approach was similar. These individuals taught their courses, but for all practical purposes were treated as well-paid adjuncts. They had no influence, and received none of the non-salary prerequisites. They had become nonpersons as the school moved on and looked to cementing a new reputation.

cepts as “good faith,”<sup>121</sup> “fiduciary obligation,”<sup>122</sup> or “reasonable expectations.”<sup>123</sup> Post-tenure review is a system of periodic evaluation that goes beyond traditional forms of monitoring utilized in most colleges and universities. It may include annual reports for purposes of determining salary and promotion, formalized reviews for awarding grants and sabbaticals and review of teaching or service.<sup>124</sup> Those who are critical of tenure often use the term in the sense of another chance to get rid of underperforming faculty.<sup>125</sup> The studies never seem to focus upon the impact of such reviews on the morale of the particular department or school, or whether intra-departmental or school politics create a tension that filters down to the student body.<sup>126</sup>

There are other reasons to doubt the efficacy of the “capital punishment” approach. Assume a tenured faculty of fifty, and a

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121. Because the doctrine of good faith must be applied to the entire range of contracts, definitions of good faith tend to be either too abstract or applicable only to specific contexts. *See, e.g.,* Best v. U.S. Nat'l. Bank, 739 P.2d 554, 557 (Or. 1987); RESTATEMENT (SECOND) OF CONTRACTS § 205 (2000); Robert Summers, “Good Faith” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 199-207 (1968); Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 390-94 (1980).

122. *See* DEBORAH A. DEMOTT, FIDUCIARY OBLIGATION, AGENCY & PARTNERSHIP: DUTIES IN ONGOING BUSINESS RELATIONSHIPS 2 (1991). “Fiduciary obligation is also notably elusive as a concept; the particular duties it imposes vary in different contexts, as does the justification for imposing the obligation itself.” *Id.*

123. The scope of reasonable expectations, for example, within the context of close corporations is explained in a leading treatise: “The breadth of the reasonable-expectations standard is that, within the close corporation, participation in management - and certainly the receipt of a salary are the rewards shareholders customarily seek when investing in a close corporation.” JAMES D. COX, THOMAS LEE HAZEN & F. HODGE O'NEAL, CORPORATIONS § 14.12 at 385 (1997). *See also* Meiselman v. Meiselman, 307 S.E.2d 551, 563 (N.C. 1983); Robert Hillman, *The Dissatisfied Participant in the Solvent Business Venture, A Consideration of the Relative Permanence of Partnerships and Close Corporations*, 67 MINN. L. REV. 1, 77-81 (1983) (arguing that expectations should be a part of an understanding, explicit or implicit, between the participants in the corporation).

124. *See* AAUP, Post-Tenure Review: An AAUP Response, *Academe Today*; Document Archive, June 15, 1998, available at <http://aaup.org/postten.htm> [hereinafter *Post-Tenure Review*].

125. In fairness, these plans are usually portrayed as the faculty development. *See* Brown & Kurland, *supra* note 7, at 342.

126. Many in legal education are familiar with the guerilla warfare at Harvard Law School. Though ideology was a major part of the Harvard conflict, unless handled carefully, post-tenure review can create more problems than it solves. *See e.g.* ELEANOR KERLOW, POISONED IVY: HOW EGOS, IDEOLOGY, AND POWER POLITICS ALMOST RUINED HARVARD LAW SCHOOL (1994).

renewal review every six years with the decision for the seventh. This evaluation could not be done by administrators without gutting the idea of peer review. The amount of faculty time needed to fairly and adequately review their tenured colleagues would be enormous. That time could better be used in furtherance of teaching, scholarship, or service to the community. Would faculty willingly spend the additional time to review their tenured colleagues and friends? Would this be an efficient use of resources? Would it cause more tumult and stress than benefits gained? Would there be success in removing tenured faculty, and if so, at what litigious cost and disruption to the school?<sup>127</sup>

A few institutions have implemented systematic post-tenure review. In 1983 the University of Colorado instituted such a system, and a study of its effect was undertaken and published in 1989 and supported the conclusion, "that the benefits to be gained from such review are modest or speculative while the costs, principally consumption of time are substantial and demonstrable."<sup>128</sup> Harold Shapiro, currently president of Princeton University, while endorsing periodic evaluation of tenured faculty as simply good personnel policy, has suggested that:

We should disconnect such ongoing periodic evaluations from the question of tenure itself. Any attempt to link the issue of tenure and periodic evaluation of tenured faculty, no matter how well-meaning, is, in my judgment, unlikely to strengthen our institutions. . . . To the extent that the present tenure system serves society well, it does so independent of periodic evaluation. To the extent that the present system does not serve society well, a system of periodic post-tenure evaluation linked to tenure itself will not rectify the situation.<sup>129</sup>

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127. See Robert B. Conrad & Louis A. Trosch, *Renewable Tenure*, 27 J. LEGAL EDUC. 551 (1998). "The long-term effect of replacing tenure with renewable tenure or other employment control structures could be disastrous not only to academic freedom but to the overall good of higher education." *Id.* at 571.

128. *Report of Committee A*, 76 *Academe* 32, 38 (Sept.-Oct. 1990), cited in Brown & Kurland, *supra* note 7, at 342 n.105. For a review of more recent efforts see Ira P. Robbins, *Exploring the Concept of Post-Tenure Review in Law Schools*, 9 *STAN. L. & POL'Y REV.* 387 (1998).

129. Quoted in Brown & Kurland, *supra* note 7, at 343.

The concept of post-tenure review is enormously broad, and to some degree exists everywhere. Basically, as Dr. Shapiro notes, it is good personnel policy.<sup>130</sup> Even at a public university where salaries are open to public scrutiny and proceed in lock-step, a department chair or dean makes decisions on courses taught, time of scheduling, research assistance, sabbaticals, travel allotments and other discretionary items. Decisions on these matters can be a form of post-tenure review.

In June 1998, recognizing that many institutions have adopted post-tenure reviews and some state legislatures have made such reviews mandatory in public institutions, the AAUP endorsed a statement: "Post-tenure Review: An AAUP Response" which created guidelines for a review process, but stopped far short of its use as a method to revalidate or revoke tenured status.<sup>131</sup> The AAUP statement states that post-tenure review should not be aimed at accountability but at faculty development.<sup>132</sup> It must be developed and carried out by the faculty, should not be used to shift the burden of proof from an institution's burden of proof to show cause for dismissal, and the review must be conducted according to standards that protect academic freedom.<sup>133</sup>

It is often said that law school deans are to faculty as hydrants are to dogs. When it comes to concepts such as post-tenure review, a dean should be more than a four letter word. The dean, as well as department chairs, mediate between administration and faculty and are of two worlds. They, rather than faculty, can serve as the most useful evaluators of tenured faculty. At some schools faculty submit a memorandum toward the end of the academic year of their activities in the course of the year and thereafter meet with the dean. The dean should award salary increments after an evaluation. This process should be formalized, and the dean or department chair should speak forthrightly to the faculty member about weaknesses, ei-

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130. For a suggestion of periodic evaluation of tenured faculty by peers that review ongoing productivity to provide feedback rather than discipline, see Michael I. Swygert & Nathaniel Gozansky, *The Desirability of Post-Tenure, Performance Reviews of Law Professors*, 15 STETSON L. REV. 355 (1986).

131. See Courtney Leatherman, *AAUP Offers Guidance on Post-Tenure Reviews*, CHRON. HIGHER EDUC., June 26, 1998, at A13.

132. See *Post-Tenure Review*, *supra* note 124.

133. *Id.*

ther in the classroom or in the lack of scholarship. There should be goals established, and they should be reviewed in the subsequent year. A record should be kept of such aspirations and whether they are achieved. Salary increments and other emoluments and privileges should reflect attainment of one's goals.

Most people wish to do well. This informal, though regularized, approach will be the most efficient in terms of human resources, and will provide a meaningful reward system. Except for the dean or department chair, it will be less threatening and stressful than other approaches.<sup>134</sup> A full scale post-tenure review should be undertaken when evidence exists to warrant it. For example, a professor's review for salary purposes may indicate his or her performance is inadequate.<sup>135</sup>

#### E. *Long-Term Employment Contracts*

Most frequently offered as an alternative to traditional tenure, are long-term or rolling contracts, sometimes referred to as "term tenure." The faculty member is initially appointed for one to three years, with terms of reappointment eventually extended to seven or, as at Hampshire College in Massachusetts, ten years.<sup>136</sup> Each contract renewal is contingent on the faculty member's performance in the preceding period. Long-term contracts are in effect at some community colleges and a few four year institutions, often of the granola-crunching or experimental variety. The proffered advantages of long-term renewable appointments are that the potential of non-reappointment provides an incentive to good performance, and will eliminate deadwood. They permit institutional flexibility in planning, budgeting and program development, and enable the college to terminate those who do not respond to current needs, and reappoint those that do.<sup>137</sup> For trustees, and some administrators, long-term contracts, as well as the kind of post-tenure review which leads to dismissal,<sup>138</sup> offer a superficial attractiveness.

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134. At some cost of stress to the Dean or department chair.

135. See Myles Brand, *Why Tenure is Indispensable*, CHRON. HIGHER EDUC., Apr. 2, 1999 at A64.

136. See MacPherson & Winston, *supra* note 89, at 187.

137. See FACULTY TENURE, *supra* note 40, at 11-13.

138. See *id.* at 39-40.

Empirically, data show that term contracts are renewed at an overwhelming rate.<sup>139</sup> Turnover is quite low.<sup>140</sup> Dismissals raise the same issues and ruckus as tenure denials, or post-tenure dismissal for cause.<sup>141</sup> It should not surprise that most contracts are renewed perfunctorily. If the renewal decision was other than nominal, the resources required to adequately monitor faculty performance would be extremely costly to universities committed to it. Without substantial dismissals, the monitoring effort may be wasted. If the institution is competing in the employment market with others that do have a tenure system, it will be difficult to hire the best available candidates at the same wages as places with greater job security.<sup>142</sup>

Routine reappointments make term contracts resemble the institution of tenure. In fact, the term contract approach, in the words of a president of an institution with such a system, is really instant tenure.<sup>143</sup> One of the differences in term appointments from a tenure decision is there is no moment of truth, no time when the faculty must make an up-or-out decision, no time when the monitoring resources of the university must be exercised to make a decision with thirty or more years of consequences. As the opportunity for evaluation will come along again, one can always make the argument of "one more chance." With the tenure decision, there is but one opportunity, and the department must live with the consequences.<sup>144</sup> By forcing the institution at a definite time to determine whether one should remain or go, the tenure system helps institutions avoid continuing on their faculties those who are agreeable, but not out-

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139. See, e.g., Debbie Goldberg, *Career Options*, WASH. POST, July 27, 1997, at R6 (stating that at Hampshire College, which does not have traditional academic tenure, 83% of Hampshire's 90 or so faculty have ten year contracts).

140. See RICHARD P. CHAIT & ANDREW T. FORD, *BEYOND TRADITIONAL TENURE* 42-47 (1982).

141. For examples of controversial contract terminations see Mark Muro, *A Teacher Disillusioned with Utopia; Jeff Wallen Fights Dismissal from Hampshire College*, BOSTON GLOBE, Dec. 20, 1990, at 97 and Courtney Leatherman, *A Campus Without Tenure is Dubbed 'Fire at Will U.'*, CHRON. HIGHER EDUC., Aug. 15, 1997, at A12. See Robin Wilson, *A Trustee's Criticism of Faculty Members Throws Bennington Into a New Period of Turmoil*, CHRON. HIGHER EDUC., March 31, 2000, at A17.

142. See MacPherson & Winston, *supra* note 89, at 180.

143. See CHAIT & FORD, *supra* note 140, at 29.

144. See McPherson & Winston, *supra* note 89, at 180; Machlup, *supra* note 89, at 115; Carmichael, *supra* note 89, at 469 n.7.

standing, and renewing term appointments out of generosity, friendship, or neglect.<sup>145</sup>

A second, even more formidable problem with term contracts, is that those who are judged will soon be judges. In traditional academic tenure decisions why do non-tenured faculty not vote when making the judgment? They know the candidate better than most senior faculty, and are probably more *au courant* with the candidate's scholarship and its quality. The reasons are twofold: the inevitable conflict of interest and the high probability of collusion.<sup>146</sup> These pressures would be even greater under term contracts, as senior faculty with high salaries and uncertain opportunities for lateral movement are faced with the reappointment decision.

It is likely that because of the enormous resources needed to monitor reappointments, the university will become more involved in the review process. This will create a more hierarchical system of control, which differs from the professional self-regulation and peer control that now exists. It will create a more adversarial position among the faculty, the administration and the institution.<sup>147</sup>

Long-term contracts do little to protect academic freedom.<sup>148</sup> Take the example of the law professor at the University of Texas who uttered offensive extramural remarks. There were calls from legislators and the public to fire him. Complaints of harassment were filed. The professor was protected as any public employee would be,<sup>149</sup> but what if he was at a private institution? The pressures of boards of trustees who ultimately approve all appointments, not to speak of budgets, might prevail over the best intentioned efforts of an administration. With a controversial candidate the principle of peer review would inevitably be diminished by outside pressures, and the faculty's role in governance would decline.

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145. See FACULTY TENURE, *supra* note 40, at 16.

146. See McPherson & Winston, *supra* note 89, at 178.

147. See Bess, *supra* note 47, at 12-15.

148. See Brown & Kurland, *supra* note 7, at 342.

149. See *Pickering v. Bd. Educ.*, 391 U.S. 563, 569 (1968); *Hall v. Kutztown Univ.*, No. 96-4516, 1998 WL 10233 (E.D. Pa. Jan. 12, 1998) (holding that the defendant state university's failure to hire plaintiff as tenure track faculty member because of critical comments about multiculturalism made at a faculty meeting was violation of First Amendment).

Long-term contracts' greatest deficiency, and the same criticism might be applied to certain forms of post-tenure review, is the change it would bring to the hiring process, as well as to the nature of faculty work. Term contracts will have a long term impact on faculty morale and the academic community. As with the arrival of locusts, every seven years will bring great anxiety. If all faculty had to deal with reappointment, there would be several consequences, not the least of which would be ongoing anxiety, and the reversal of the old saw that academic politics are of the most vicious sort, because the stakes are so low.<sup>150</sup> The stakes and viciousness could be at a new peak.

It has been argued that a contract system in place of tenure will actually reduce faculty motivation. This is because the rewards of academic life, the intrinsic satisfaction of one's work, communication mechanisms that permit peer generated productivity and quality norms to be continually salient (scholarship and its rewards), multiple career tracks that lead to high status and respect (specialization in one's field), the opportunity on occasion to take risks in new ventures without penalty (a shift in intellectual direction), and an expectation of trust and good will by the university will be placed in the background.<sup>151</sup>

Contract systems must be enforced through bureaucratic mechanisms involving the administration to a greater extent than under tenure systems. This is de-motivating. Administrative power will be greater because non-renewal of short-term contracts is more politically feasible than the cumbersome mechanisms used to remove a tenured faculty member. Limited term appointments place the central focus of faculty life on the rehiring decision rather than traditional norms which require an atmosphere of freedom.<sup>152</sup>

There may be more subtle changes with term tenure and post-tenure review dismissals as well. Particularly in the sciences and some areas of the humanities, the long-term career research project would be less likely to be undertaken if it could not be completed within the period before the next reappoint-

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150. See Robin Wilson, *A New Campus Without Tenure Considers What It's Missing: Professors at Florida Gulf Coast University Complain That a Contract System Offers too Little Security*, CHRON. HIGHER EDUC., May 12, 2000, at A18.

151. See Bess, *supra* note 47, at 3.

152. *Id.* at 6.



ment. An optimal hiring system should offer appointments to individuals of ever increasing quality. One of the most positive aspects of the academic tenure system is that it encourages departments to hire the best and brightest available candidate, making decisions that will benefit the institution over time. If the appointment process and tenure decision are working properly, new hires will involve younger, more highly skilled individuals than existing tenured members. As H. Lorne Carmichael, an economist, has pointed out, without tenure a university would have some problems getting its incumbents to identify the best candidates, because they could not rule out the possibility they will be asked to leave at some time in the future for some other more qualified candidate.<sup>153</sup> To ensure an independent evaluation of the ability of candidates being hired or evaluated, the evaluation must be independent of the evaluator's opportunities for future retention.<sup>154</sup> If there is a danger that senior faculty will be fired, incumbents may try to stock the university with poorer quality faculty to reduce the chances that when they are up for reconsideration they will be the ones terminated.<sup>155</sup>

#### F. *Termination for Cause*

Regrettably, there are situations where tenured faculty should be dismissed for cause. If a rigorous probationary review of tenure track candidates is conducted, and the post-tenure annual reviews suggested herein are adopted, there should be few such instances. If educational institutions have the resolve to remove a faculty member where cause exists, and faculty exercise their responsibilities of peer review, termination will occur and be supported by the courts.<sup>156</sup>

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153. See Carmichael, *supra* note 89, at 463.

154. See *id.*

155. See *id.* at 470.

156. In the last seven years the Universities of Texas, Texas A & M, and Houston have terminated the tenure of eight professors, three for poor performance. See Wiener, *supra* note 19, at 62. More common, unfortunately, is the situation of a University of Wisconsin professor, the director of the Engineering Research Center, who served three months in jail after pleading guilty to federal misdemeanor charges for falsifying grant applications. See Julianne Basinger & Courtney Leatherman, *Stanford's Presidential Search Adds to Competition Among Elite Institutions; Wisconsin Professor Keeps Tenure Despite Jail Term for Lying*, CHRON. HIGHER EDUC., Sept. 24, 1999 at A14. The university agreed to allow the

The complexity of the process is often blamed for the near impossibility of dismissal. The procedures *are* time-consuming, as they should be, given the consequences of the action. The burden of proof is on the institution throughout the proceedings. Though the AALS standards should be tailored to the individual institution, the protection they provide should not be undermined.

One way to shorten the time frame from formal charge to resolution would be to insert a clause in the standard faculty contract as well as when tenure is granted that all disputes that are not resolved at the university level shall be submitted to binding arbitration. The AAUP recognizes this alternative.<sup>157</sup> Courts generally limit their scrutiny to whether proper procedural due process has been followed.<sup>158</sup> The danger of an arbitration hearing is that the arbitrator could reconsider the substantive grounds for dismissal. Despite that possibility, which is probably not that great if the arbitrator is experienced in higher education, the advantages of arbitration to all parties in terms of cost and expedition of hearing outweigh the possibility of overturning peer and administrative review.

A greater problem than administrative hesitancy is the reluctance of faculty to "convict," or find justifiable grounds for termination for cause. Faculty do not easily vote for conviction, perhaps for the fear of "but for the grace of" go I or "that is the administration's problem." The governing body of the institution has the right to review the faculty's decision, and in the appropriate situation to overturn it. In the last analysis, the ability to terminate tenured faculty relies as much on the university's will to bring a case, and its capability of proving it. If the faculty are going to respect, enrich and nourish the university, they absolutely must exercise professionalism and integrity on this account. Faculty who ignore the wayward colleague not only betray the university, its ideals, and the student body, but diminish the professorate. In the current environment of

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professor to keep his tenure if he gave up his directorship. *See id.* The university struck the deal to avoid going through lengthy due process proceedings. *See id.*

157. *See* American Association of University Professors, *Arbitration in Cases of Dismissal*, reprinted in AAUP POLICY DOCUMENTS AND REPORTS 86, 88 (1995).

158. *See* *Chung v. Park*, 514 F.2d 382, 387 (3d Cir. 1975); MORRIS, *supra* note 4, at 23-26; Brooks, *supra* note 52, at 335.

legislative and public hostility to academic tenure, and to institutions of higher learning, the failure of faculty to act responsibly is inexcusable. However, it is unrealistic to expect the faculty to be the primary body to police themselves, particularly with the cost of litigation and the tendencies of human nature. The initiating burden must be upon the university, but the faculty should proceed in partnership when the circumstances so warrant.

There generally have been four situations when tenured faculty have been dismissed for adequate cause. One ground is for financial exigency. The AAUP has developed procedures for this,<sup>159</sup> and there has been litigation on the issue.<sup>160</sup> Three other grounds of cause for termination are incompetence, illegal activity, and sexual harassment. The latter may also, but not always, involve illegal activity. When an activity is illegal or against university regulations, as in the case of sexual harassment, adequate cause is clearer than a dismissal for incompetence.<sup>161</sup> A problem with standards of incompetence is that in

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159. See American Association of University Professors, *Recommended Institutional Regulations on Academic Freedom and Tenure*, reprinted in AAUP POLICY DOCUMENTS AND REPORTS 21, 23-24 (1995); American Association of University Professors, *On Institutional Problems Resulting from Financial Exigency: Some Operating Guidelines*, reprinted in AAUP POLICY DOCUMENTS AND REPORTS 193, 193 (1995).

160. See *Browzin v. Catholic Univ. of Am.*, 527 F.2d 843 (D.C. Cir. 1975); *Krotkoff v. Goucher College*, 585 F.2d 675 (4th Cir. 1978); *Mabey v. Regan*, 537 F.2d 1036 (9th Cir. 1976); *Linn v. Andover Newton Theological School, Inc.*, 874 F.2d 1 (1st Cir. 1989); *Scheuer v. Creighton Univ.*, 260 N.W.2d 595 (Neb. 1977); *Am. Ass'n. of Univ. Professors v. Bloomfield College*, 322 A.2d 846 (N.J. Super. 1974).

161. See Brooks, *supra* note 52, at 347. Adequate cause in the latter context consists of an "unwillingness or inability to contribute to the advancement of truth and knowledge through effective teaching, research, scholarship and contributions to the community." *Id.* "Second, this inability or unwillingness must be exhibited for a period of time indicating that improvement is unlikely, or be so egregious that rehabilitation is improbable or impractical" as evidenced by unsuccessful attempts at counseling and remediation. *Id.* Third, the findings must be made by the accused peers, and fourth, each of the factors should be examined in light of the customs, practices, and understandings of the particular institution and the academic community as a whole. See *id.* See also *Faculty Tenure Tomorrow*, in FACULTY TENURE, *supra* note 40 at 75 ("... 'adequate cause' in faculty dismissal proceedings should be restricted to (a) demonstrated incompetence or dishonesty in teaching or research, (b) substantial and manifest neglect of duty, and (c) personal conduct which substantially impairs the individual's fulfillment of his institutional responsibilities. The burden of proof in establishing cause for dismissal rests upon the institution"). *Id.*

most cases they present a substantial number of subjective elements. The cases that have affirmed dismissal for teaching incompetence are usually of the "smoking gun" variety. The professor did not show up, was tardy, did not give grades, was ill-prepared and disorganized in presentation.<sup>162</sup> There have been a few dismissals for insubordination,<sup>163</sup> though such behavior often seems to be the norm amongst a good number of law school faculty members, and a few because of poor student evaluations, though other factors played a part.<sup>164</sup> When procedures are followed, the courts generally uphold the university's decision.<sup>165</sup> At this stage, negotiated settlements are to be welcomed as would be determination on the university's part to proceed against those who are unworthy of membership amongst the tenured faculty.

#### IV. CONCLUSION

Academic tenure is a partnership between administrators and faculty with responsibilities on both sides. The tenure system is under a period of sustained attack, not only by the Visigoths and know-nothings who do not understand its link to academic freedom or the need for economic security of employment, but also by others who see only its inflexibility, cost, and worst-case scenarios that appear in the press. It is also criticized by those who question its viability in today's educational

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162. See *King v. Univ. of Minnesota*, 587 F. Supp. 902 (D. Minn. 1984), *aff'd*, 774 F.2d 224 (8th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986).

163. See *Stastny v. Bd. Trustees Central Washington*, 647 P.2d 496 (Wash. Ct. App. 1982) (regarding a dismissed professor who failed to return from foreign lecture in time to start the semester when permission to do so had been denied); *Chung v. Park*, 514 F.2d 382 (3d Cir. 1975) (involving poor student and faculty ratings and unwillingness to cooperate).

164. See *Agarwal v. Univ. of Minnesota*, 788 F.2d 504 (8th Cir. 1986); *Java v. Fayetteville State Univ.*, 426 F. Supp. 218 (E.D.N.C. 1976); see also John D. Cope-land & John W. Murray, Jr., *Getting Tossed from the Ivy Tower: The Legal Implications of Evaluating Faculty Performance*, 61 Mo. L. REV. 233 (1996); MORRIS, *supra* note 4, at 62-80.

165. See MORRIS *supra* note 4, at 30. Courts give substantial deference to substantive decisions of academic administrators and governing boards so long as they follow sound procedures. See *id.* This is particularly so when the issue is competence and responsibility in teaching and research. See *id.* Cf. *Berkowitz v. President and Fellows of Harvard College*, 2001 WL 13239 (Mass. Super., Jan. 4, 2001). Plaintiff's allegation of the failure to follow institution's own tenure procedures survives motion to dismiss. See *id.* at 1.

marketplace. There *are* some very real problems with academic tenure, as with any institutional or governance structure. The corrective is not to do away with the tenure system but to reinvigorate it by vitalizing both administrative and faculty responsibility. There is a need for the institution to create incentives to maintain commitment and hard work. The tenure system works well for some faculty. Presumably, when all faculty are hired there are similar expectations for performance. James Bess asks, “. . .what caused performance to deviate from the expectation at the time of employment. Is it because faculty have tenure (lifetime employment)? Or is it because the other system rewards and sanctions are not part of the existing academic structure.”<sup>166</sup>

Every serious study of the tenure principle, including those that were commenced to find alternatives, have concluded there is no better one.<sup>167</sup> Academic tenure remains the worst form of university employment save all of the others. Tenure continues to be the best mechanism for creating an atmosphere conducive to pursuit of disinterested scholarship wherever it will lead. It promotes teaching, intellectual inquiry, and evaluation without the deadening limits of orthodoxy and fear.

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166. Bess, *supra* note 47, at 17. See *One Study Finds Tenure Still has Cachet, but Another Suggests Those Without are No Less Happy*, CHRON. HIGHER EDUC., April 2, 1999, at A16.

167. See BOWEN & SHUSTER, *supra* note 42, at 240, state they were unable to discover alternatives to the present system that they could recommend. They conclude:

Perhaps the strongest argument for the continuation of the tenure system is that it has proven to be a pretty durable institution. It is widely prevalent, it is buttressed by an ancient and honorable tradition, it has proved to be resilient against attack, it has generally been upheld by the courts, it has been embraced within collective bargaining, and it commands the support of most faculty.

*Id.*