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TENURE, THE ABERRANT CONSUMER CONTRACT

JAMES J. WHITE*

This symposium concerns asymmetric contracts, usually contracts where one party has great power and the other has little. The papers deal generally with contracts between consumers who get a “take it or leave it” offer and corporations such as Hertz, Microsoft, Verizon, and General Motors who draft the contracts according to their wishes. In almost all of these asymmetric contracts the stronger (corporations) writes the terms and presents them to the weaker (consumers) for signing without negotiation. Indeed the corporate agent with whom the consumer deals (e.g., the person at the Hertz desk) has no authority to change the contract or to bind its principal to any modification of the contract. The deal is simple: take it or leave it.

My paper explores the tenure contract, which is commonly executed between a strong employer and a weak employee. But here the rule is reversed; the employee, presumptively the weaker party, gets his terms. I address three issues: 1) How did this contract come about? 2) What are the terms of the “tenure” contract? 3) Is it a good thing?

I. WHERE DID TENURE COME FROM?

Tenure or something like it has long been the rule in many European universities. In Germany, the universities have never had governing boards of outsiders of the kind that are the norm in the United States.¹ So, apart from an occasional intrusion by the state, German academics were free to do as they pleased without much oversight or outside intrusion.² In the 18th and 19th centuries, many American academics looked to the German universities as models of academic thought and behavior.³ However, there is

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1. Universities in the Middle Ages were considered autonomous corporations even by popes and emperors. Their members made all internal decisions about personnel and teaching. ROBERT HOFSTADER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 5-7 (1955).

2. *Id.*

3. In the nineteenth century, more than nine thousand American students attended universities in Germany and many German expatriates taught in American universities. German academic influence reinforced American trends in education as American universities became more “secular, specialized,

no direct connection between our tenure and the German system. Indeed in the early days at Harvard and other early schools, young men with no assurance of long-term employment did the bulk of the teaching.⁴

The 18th and 19th centuries also brought periodic eruptions of conflict between American academics and their religious sponsors. Protestant churches established many of the early schools in New England and others had Roman Catholic sponsors. Many of the university teachers were drawn from the clergy.⁵ As lay academics replaced the clergy, there was inevitable conflict between church dogma and new learning. For example, Darwin's version of the growth and development of the species was at war with the Christian belief that all were descendants of Adam and Eve and that the development of man occurred under and was directed by the unseen hand of God.⁶

The direct and most immediate stimulant to the birth and growth of tenure comes not from the old schools in New England, but from fresh faces on the West Coast, the Middle West and the South.⁷ Between 1890

and intellectually ambitious." *Id.* at 367-68. See also Walter P. Metzger, *The German Contribution to the American Theory of Academic Freedom*, in *THE AMERICAN CONCEPT OF ACADEMIC FREEDOM IN FORMATION: A COLLECTION OF ESSAYS AND REPORTS* 214, 215 (Walter P. Metzger ed., 1977).

4. For more than one hundred years, all teaching at Harvard was done by one or more tutors – men in their twenties who stayed for an average length of two and a half years. Not until the 18th century did Harvard start calling teachers “professors” and pay them enough to induce them to stay for longer tenures. HOFSTADER & METZGER, *supra* note 1, at 85. See also Henry Dunster, *Dunster's Memorandum of December, 1653*, in *THE FOUNDING OF HARVARD COLLEGE* app. E, at 448-51 (Samuel E. Morrison ed., 1935).

5. During the eighteenth century and earlier, students were considered highly impressionable and their religious development an important part of their university education, so instructors were required to have certain moral qualities. Most universities practiced “restraint by recruitment”: any incoming president, professor, or tutor was screened to make sure he accepted the requisite theological doctrines. HOFSTADER & METZGER, *supra* note 1, at 155. See also JOSIAH QUINCY, *THE HISTORY OF HARVARD UNIVERSITY* 253-60 (1840).

6. During the eighteenth and nineteenth century, secularization was the most significant trend in universities. Academic freedom of religion was limited to students at first, while instructors were still required to reflect the morality of the trustees that chose them. HOFSTADER & METZGER, *supra* note 1, at 190. By the second half of the eighteenth century, strictly secular science curriculum was becoming more and more of a part of the university system. In the first half of the nineteenth century, however, universities went through “great retrogression” when colleges were founded by or aligned with particular Christian denominations. “Sectarian narrowness” limited the universities’ development and cramped secular education. Not until after the Civil War did universities start liberalizing under public pressure and international influence. *Id.* at 250-74.

7. Four professors, Richard T. Ely at Wisconsin, Edward W. Bemis at Chicago, Edward A. Ross at Stanford, and John S. Bassett at Trinity, ran into trouble at their respective universities for voicing unconventional opinions. Hofstader asserts the differences in their experiences suggests more than income class caused the disputes. “At Wisconsin [where Ely taught], the attack on academic freedom was undertaken by a bungling, small town teacher . . . [a]t Chicago [where Bemis taught], the attack was probably inspired by certain local big businessmen. . . . Both Ross and Bassett were members of institutions that were dependent on a single rich sponsor. Both were sharply attacked for speaking unpopular opinion. Ross was eventually dismissed, the victim of his patron’s intolerance; Bassett was retained, the beneficiary of his patron’s indulgence.” *Id.* at 436.

and 1915, well-established professors were dismissed or subject to attempted dismissals at Stanford, Wisconsin, Chicago, and Duke.⁸ To a considerable degree these dismissals or attempts arose from the displeasure of governing boards (or, in the case of Stanford, the governing person) that were offended by the positions taken by the professors. Professor Ross, at Stanford, advocated restricting the importation of Chinese labor and called for public ownership of utilities.⁹ At Wisconsin, Professor Ely applauded “strikes and boycotts.” While Professor Bemis at Chicago, justified the Pullman strikers’ actions by noting the railroads’ own “open violation of inter-state commerce law.”¹⁰ Professor Bassett, at Duke (then Trinity College), was challenged for his defense of black people in the face of lynchings and other hostile anti-black behavior, when he urged that it was time to integrate “these children of Africa into our American life.”¹¹

Two of the four professors, Ely at Wisconsin and Bassett at Duke, were saved by the help of wise trustees or by the support of strong presidents.¹² Bemis at Chicago went quickly and quietly but Ross at Stanford was another matter. Ross faced the challenge of Mrs. Stanford, the widow of the school’s founder and the sole trustee.¹³ President Jordan was no match for her determined attack.

In the words of Hofstadter, “Edward A. Ross was exactly the man to ignite the situation. Fresh from Ely’s seminar, fired by liberal causes, convinced that the aim of big business was to throttle social criticism, Ross had come to Stanford almost spoiling for a fight.”¹⁴ Ross spoke publicly in defense of the socialist leader, Eugene Debs, and made sure that his views were published in academic journals, as well as in the public press.¹⁵ Ross’ dismissal received treatment not only in the San Francisco papers, but also in the New York press.¹⁶ As a result of his dismissal, seven members of the Stanford faculty resigned.¹⁷

The American Economic Association agreed in 1900 to investigate the Ross case and appointed a committee of inquiry. It appears that the com-

8. *Id.*

9. *Id.* at 438 (“[I]n a university that had been founded by a railroad republican whose ventures had depended on free labor, he advocated municipal ownership of utilities and a ban on Oriental immigration.”).

10. *Id.* at 426-27.

11. *Id.* at 446.

12. *Id.* at 430-31, 436.

13. *Id.* at 438-40.

14. *Id.* at 438.

15. *Id.*

16. *Id.* at 440.

17. *Id.* at 442.

mittee was not particularly successful or competent in digging out the motives or developing the facts behind Ross's dismissal.¹⁸ Nevertheless this committee of inquiry became the framework for the standing committee A of the American Association of University Professors (AAUP).¹⁹ The AAUP was founded in 1915, and that same year issued a "Declaration of Principles on Academic Freedom and Academic Tenure."²⁰ Among the "practical proposals" of the committee were the assertion that "[o]fficial action relating to re-appointment and refusals of reappointment should be taken only with the advice and consent of some board or committee representative of the faculty."²¹ The principles urged institutions to make clear the term of each appointment, and it provided that those who had served more than 10 years be granted tenure.²² The principles also advised institutions to formulate grounds for dismissal and to establish "judicial hearings" before dismissal.²³ The hearing for dismissal to be held before a "committee chosen by the faculty senate or council or by the faculty at large."²⁴

It appears that the formation of the AAUP in 1915 was a direct reaction to the four notorious cases described above between 1890 and 1903 and, to a lesser extent, from several other dismissal cases between 1903 and 1915.²⁵

Before the end of the 20th century, the AAUP had become a full-fledged union on more than 70 campuses where it is the collective bargaining agent for the faculty.²⁶ But in 1915 the organization was little more

18. The committee made two big mistakes: they met as an informal body and their investigation had too narrow a scope, making the public wary of their findings, and they tried to find out what motivated Mrs. Stanford to dismiss Ross, rather than bigger questions like whether one person should have the power to run a university entirely, whether professors should be on year-to-year contracts, etc. *Id.* at 443-44.

19. *Id.* at 442-43.

20. See AM. ASS'N OF UNIV. PROFESSORS, APPENDIX I: 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE 291 (1915) [hereinafter GENERAL DECLARATION], available at <http://www.aaup.org/report/1915-declaration-principles-academic-freedom-and-academic-tenure.pdf>

21. *Id.* at 300.

22. *Id.*

23. *Id.*

24. *Id.* at 301.

25. Metzger puts forward two reasons why this might have happened: (1) the complexity of the cases and the increasing sophistication of university administrators created the idea in the academic community that only a professor's peers could accurately evaluate his performance, and only disinterested outsiders could devise the standards they should use and the procedures to follow, or (2) powerful individuals acted on the spur of the moment, reacting to the unfairness they perceived in the Ross case and other cases, and created a lasting institution anyway. HOFSTADER & METZGER, *supra* note 1, at 443.

26. In the late 1960s local AAUP chapters began to pursue collective bargaining; they included Belleville Area college in Illinois (1967), Saint John's University in New York (1970), and Oakland University in Michigan (1971). See generally ERNST BENJAMIN, FACULTY BARGAINING, in ACADEMIC COLLECTIVE BARGAINING (Ernst Benjamin & Michael Mauer, eds., 2006). In 1973, the AAUP issued

than a self-appointed and highly interested group of individual faculty members. How did the practice of granting tenure spread so far and what hand did the AAUP have in that spread?

Certainly the activist founders of the AAUP devoted their energies to more than just the AAUP. Each member also must have been actively promoting tenure at his home school.²⁷ Certainly the times were right; university administrations may have viewed the grant of tenure as better than the alternative: a socialist union among the faculty of the kind that Eugene Debs might inspire. Even conservative professors who would refuse to become union members would gladly accept a position that could be terminated only for cause.

The spread of tenure may also have been helped by the identity of the University presidents. Unlike the executives of industrial companies and unlike boards of trustees of both industrial and educational institutions, the presidents of universities are commonly drawn from the professoriate. The hierarchy of an industrial company, where those who rise from the factory floor to chief executive officer are the rare exception, is the reverse of an academic institution's hierarchy, where the norm is for a professor to rise to be president. A CEO or owner of an industrial company may regard the rank and file of a company union as his enemy, but the President of a university will regard his rank and file, the professors, at worst as frenemies, and, in good times, as his friends.

The spread of tenure from the schools represented on the AAUP committee that issued the 1915 Principles must also have been helped by the high status of those schools. "If Harvard is doing this, shouldn't we do it too?"²⁸

its "Statement on Collective Bargaining," which recognized formal bargaining as a major additional way of realizing the Association's goals in higher education. AM. ASS'N OF UNIV. PROFESSORS, 1973 STATEMENT ON COLLECTIVE BARGAINING 259 (1973), <http://www.aaup.org/file/statement-on-collective-bargaining.pdf>. The AAUP formed its Collective Bargaining Congress (CBC) in 1976, which serves as an umbrella organization of local AAUP collective bargaining chapters and affiliates. Its purpose is to develop and disseminate information and resources in support of collective bargaining activities of local AAUP chapters, and to engage in other activities in support of higher education collective bargaining. The Congress meets annually in conjunction with the AAUP's annual meeting in June, and holds regional conferences throughout the year. Currently, the CBC comprises more than 70 AAUP chapters and affiliates that serve as the collective bargaining representative on their campuses, including California State University, University of Connecticut, State University of New York, and New England state universities (Maine; Massachusetts; New Hampshire; Vermont; Rhode Island). See *History*, AAUPCBC.ORG, <http://www.aaupcbc.org/about/history> (last visited Nov. 20, 2013).

27. Ten years after the 1940 Statement of Principles, "many" universities and colleges had adopted it or written their own policies very similar to it. Robert P. Ludlum, *Academic Freedom and Tenure: A History*, 10 ANTIOCH REV. 3, 25 (1950).

28. Even before the AAUP published the 1915 Principles, the elite universities mostly did not treat their professors as at-will employees. By 1820 Harvard appointed some professors with "indefinite" terms. By 1910, a survey of 22 major universities showed only faculty members with the rank of

But the most clever and simplest trick of the AAUP is one that might have been practiced by your mother, namely shaming. Shortly after its establishment, the AAUP formed an organization described as “Committee A.”²⁹ Committee A’s responsibility was to investigate complaints from professors who had suffered dismissal or demotion.³⁰ The AAUP publishes the reports of the committee.³¹ These reports cannot undo a dismissal, and they have no legally binding effect on an institution, but they shame the institution.³² No school wishes to be singled out in a public document as having dismissed a professor without proper cause. Such claims, even though issued by an organization that one does not recognize, can also have an impact on that school’s recruiting of new faculty members. It may have a direct impact on the members of the department identified in the report and on the members of the institution’s administrative hierarchy.³³

So it came to pass that most teachers at American colleges and universities went from at-will employment in the 19th century to tenured employment by the middle of the 20th century.³⁴ As we see, the movement was lead not by fire-breathing unionists, like the Reuther brothers, but by genteel and conservative members of the professorate. The movement was helped along by foolish attempts at some schools to fire well-established professors for acts that, by today’s standards, seem more quaint than outra-

instructor were appraised annually, and those with the rank of professor held their positions with “presumptive permanence.” The committee hoped the 1915 Principles would actually raise the standards for faculty by creating a tenure track with a seven year probationary period, rather than the idea of “presumptive permanence” once a professor was hired. By 1932, approximately half of the universities in the United States had adopted formal tenure rules as recommended by the AAUP. RYAN C. AMACHER & ROGER E. MEINERS, *FACULTY TOWERS: TENURE AND THE STRUCTURE OF HIGHER EDUCATION* 4-7 (2004).

29. See Walter P. Metzger, *The First Investigation*, 47 AAUP BULLETIN 206, 206 (1961).

30. *Id.*

31. *Id.*

32. *Id.*

33. If committee A finds a university to have terminated a professor in violation of committee A’s standards, they will send a prepublication copy of the investigating committee’s report to the university administration and give the administration a chance to correct its violation. This is often enough to force compliance. For example, at Greenville College in Illinois, a professor was fired on two grounds: financial difficulty and weakness in academic performance. In an investigation, committee A found no evidence that either ground was justified. After committee A sent Greenville the pre-publication report, the administration “promptly” offered the professor a settlement that he accepted as the resolution of his case. In addition, the college president started proceedings to change the college’s hearing process to effect a dismissal for cause, and said he was “favorably disposed toward adopting the procedures that align closely with those set forth in the 1940 Statement of Principles on Academic Freedom and Tenure.” See David A. Hollinger, *Report of Committee A, 2005-06*, 92 ACADEME, Sep.–Oct. 2006, at 84, 85.

34. Lawrence White, *Academic Tenure: Its Historical and Legal Meanings in the United States and Its Relationship to the Compensation of Medical School Faculty Members*, 44 ST. LOUIS U. L.J. 51 (2000) (citing Walter Metzger, *Academic Tenure in America: A Historical Essay*, in COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, *FACULTY TENURE* 93 (1973)).

geous. Doubtless, this was helped by the predisposition of the colleges' and universities' presidents and by the belief on the part of the administration and trustees of most schools that the grant of tenure would have little cost in a setting where dismissals were uncommon in any case.

II. WHAT DOES "TENURE" MEAN?

Among aspiring professors, "tenure" is greatly prized and worthy of mighty effort. But exactly what rights does it confer? At a minimum, tenure means that a professor cannot be dismissed without proof of just cause in a proceeding with elaborate procedural protections for the professor.³⁵

Tenure is commonly defended as a citadel against attacks on academic freedom.³⁶ Certainly the cases of Ross, Bemis and others in the early days of the twentieth century indicate that protection of academic freedom was the principal motivation of its advocates. But tenure is now understood to reach well beyond issues of academic freedom. It is also the professor's protection against dismissal for inadequate scholarly output, for weak teaching and for other deficiencies in the humdrum daily life of a professor. In this paper, I first try to tease some meaning out of the tenure rules and then I balance tenure's virtues against its vices.

At the University of Michigan, where I teach, a professor is informed of the grant of tenure by a one-page letter informing him only that he has been awarded "tenure." That single word bears the entire weight of defining rights that range from the right to criticize the school, to condemn national political figures, to use profanity in class, or to skip scheduled classes altogether. Also included, is the right to due process if tenure is to be removed, and, by implication, the statement that tenure can be removed upon a showing of proper cause.

Because of the emphasis on procedural requirements in the AAUP rules³⁷ and in section 5.09 of the Board of Regents Bylaws at Michigan,³⁸

35. See GENERAL DECLARATION, *supra* note 20.

36. *Id.* at 300.

37. The procedural recommendations include several steps: preliminary proceedings (a "personal conference" with administrators), communication with the faculty member that begins formal proceedings, a hearing committee review, a hearing, and then consideration by the university's governing body of the hearing's outcome. AM. ASS'N OF UNIV. PROFESSORS, *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments*, 57 AAUP BULLETIN 206, 207 (1971), in AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, POLICY DOCUMENTS AND REPORTS 11-12 (1984 ed.).

38. Section 5.09 provides for a similar procedure guaranteed to all tenured professors: notice for the faculty member, committee investigation, a hearing if the professor requests it, and review by governing bodies. See UNIV. OF MICH. BD. OF REGENTS, BYLAWS OF THE BOARD OF REGENTS § 5.09 (2012) [hereinafter UNIV. OF MICH. BYLAWS], available at <http://www.regents.umich.edu/bylaws/bylaws05a.html#9>.

“tenure” seems to mean only that one has the right to due process. However, that cannot be true. There must be something of substance to be found or not found at the end of all that process; otherwise why the process? Remember that an at-will employee may be fired for (almost) any reason or for none at all.

As demonstrated above, tenure’s seeds are found in cases of infringement on academic freedom—Ross’s freedom to advocate public utilities, Ely and Bemis’s right to defend strikers and Bassett’s defense of black people’s rights. These were not professors who were ill prepared for class, who treated their students disrespectfully or who failed to produce good research, yet the barrier to dismissal protects the marginally competent along with the firebrands. If breaches of academic freedom are the rare exception but ineffective teaching and writing are common, then the tenure contract at best facilitates injuries to our students and, by its protection of ineffective teachers and weak researchers, may foster substantial inefficiencies. Ironically, this procedural keep, built to protect Ross’s rambunctious successors, may have become the home of the indolent.

A. Procedural Protections

A right uniformly bestowed by the grant of tenure is the right to elaborate due process before tenure can be withdrawn. At Michigan, tenure can only be withdrawn on an administration proposal to the Regents of the University for “dismissal, demotion, or terminal appointment” after a hearing under section 5.09 of the Regents’ Bylaws.³⁹ The “5.09 hearing” can be initiated by the provost or by a dean or the executive authority in the professor’s school.⁴⁰

The hearing may take place before the executive committee of the school or other “unit” of the University or before an ad hoc faculty committee in the school or college.⁴¹ Sometimes the case is heard by the Senate Advisory Committee on University Affairs’ Subcommittee on Tenure (SACUA).⁴² SACUA is made up entirely of faculty members.⁴³ In all cases the entire group—judge and jury—is composed of faculty members.⁴⁴ To draw both the judge and the jury from the defendant’s tribe is no small

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. UNIV. OF MICH., RULES OF THE UNIVERSITY SENATE, SENATE ASSEMBLY AND SENATE ADVISORY COMMITTEE ON UNIVERSITY § 1 (Nov. 2011 ed. 1997), available at <http://www.sacua.umich.edu/rules/rules-april1997.pdf>.

44. UNIV. OF MICH. BYLAWS, *supra* note 38, at § 5.09.

thing. The committee members will, of course, see the case through the faculty's eyes; they will be sensitive to intrusion on faculty prerogatives and not necessarily be friendly to the university administration's concern about costs, or to student or alumni interests.

Section 5.09 does not state the standard of proof (more likely than not, clear and convincing) and does not set out such details as who presents his case first. However, the rule does specify many procedural details: (1) the charge must be stated with "reasonable particularity," (2) the professor can bring his own counsel, (3) the professor may call and examine any witnesses that he pleases and may cross-examine the University's witnesses, (4) there must be a transcript and the professor may see all of the documentary evidence, (5) the professor is entitled to a review of the hearing committee's recommendation, and (6) the recommendation goes to the President of the university who is to make a final recommendation to the Regents of the university.⁴⁵ So, at least on paper, the accused tenured faculty member cannot be dismissed or demoted unless the university administration has convinced two committees, composed exclusively of faculty members, and the President and the Board of Regents that the proposed sanction is appropriate and within the university rules.⁴⁶

The AAUP rules state some rights not addressed in section 5.09. The rules require that findings be proven by "clear and convincing" evidence, and they specifically permit expert testimony from "qualified faculty members" if the case charges incompetence.⁴⁷

B. *Substantive Bases for Removing Tenure Status*

The references to substantive bases for dismissing a tenured faculty member in the Michigan handbook and in the AAUP rules are sparse and conclusory. At Michigan, the Faculty Handbook demands "excellent teach-

45. *Id.*

46. After a case is recommended by a dean or the president or the university, if the faculty member requests one, a hearing is conducted either:

(1) before the executive committee of the administrative unit, or (2) before a special ad hoc faculty committee appointed by the executive authority with the approval of the executive committee or the governing faculty of the administrative unit." If that committee recommends adverse action be taken against the professor, the professor can also request "review of the case by the standing subcommittee on tenure appointed by the Senate Advisory Committee on University Affairs.

Id.

47. AM. ASS'N OF UNIV. PROFESSORS, *Recommended Institutional Regulations on Academic Freedom and Tenure*, 99 ACADEME, July-Aug. 2013, at 61, 66, available at <http://www.aaup.org/file/RIR2013.pdf>.

ing” for promotion to a tenured position.⁴⁸ The Handbook contemplates termination for cause if the faculty member fails to “maintain a high standard of teaching.” So it follows that Michigan requires “excellent” performance to receive tenure and in theory, at least a decline of below “high standard of teaching” to be cast out.⁴⁹

AAUP’s 1915 Declaration of Principles on Academic Freedom and Academic Tenure had elaborate proposals about the proper procedural safeguards for the professor up for dismissal, but it did “not think it best . . . to attempt to enumerate legitimate grounds for dismissal, believing it to be preferable that individual institutions should take the initiative at this time.”⁵⁰ By calling for expert professorial testimony in any case involving dismissal for incompetence, the 1940 Statement of Principles of the AAUP⁵¹ acknowledges the possibility of dismissal for “incompetence.” However, it has no suggestion about what might constitute incompetence or how one would determine that a professor was not competent. By inference, the AAUP is suggesting that a tenured person’s performance would have to decline all the way to “incompetence” to justify dismissal.

The AAUP’s 1975 Statement on Teaching Evaluation is devoted at least as fully to the procedural safeguards for the professor being evaluated as it is to the means of evaluation. For example, it warns schools that they must provide “conditions and support necessary to excellent teaching.”⁵² It also warns that these expectations must be “put in writing” and “periodically reviewed.”⁵³ It cautions against the “casual procedures” and “unilateral judgments” that “too often” characterize the work of deans and chairmen.⁵⁴ The subtext of the 1975 statement is that evaluation of teaching is an annoying inconvenience, which, if it must be done, should be done with the greatest concern for the professor, with the lightest possible touch, and, by inference, with not much concern for the student consumers of that teaching.

48. UNIV. OF MICH. OFFICE OF THE PROVOST, FACULTY HANDBOOK § 6.B (July 2013) [hereinafter UNIV. OF MICH. HANDBOOK], available at <http://www.provost.umich.edu/faculty/handbook/index.html>.

49. *Id.* at § 6L.

50. GENERAL DECLARATION, *supra* note 20, at 301

51. AM. ASS’N OF UNIV. PROFESSORS, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, 64 AAUP BULLETIN 108 (1978), in AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, POLICY DOCUMENTS AND REPORTS 3 (1984 ed.).

52. AM. ASS’N OF UNIV. PROFESSORS, *Statement on Teaching Evaluation*, 61 AAUP BULLETIN 200, 200 (1975).

53. *Id.*

54. *Id.*

Even though the AAUP and schools like Michigan decline to identify standards by which one might measure the quality of college teaching, there are studies and, probably, a fairly wide consensus on what is good or at least competent teaching and what is deficient teaching. In their 1999 book, *Faculty Misconduct in Collegiate Teaching*,⁵⁵ Professors Braxton and Bayer report on their survey of nearly 1,000 college teachers. The survey focused mostly on teaching in the first two years of college, but most of the findings would be applicable to higher-level teaching, even including law school.

The survey asked each respondent to express his or her opinion on 120 specific acts, believing that the intensity of one's outrage at bad performance is the best measure of incompetence. Most of the statements described acts that were thought to show deficient teaching, for example, "Class is usually dismissed early" or "The instructor insists that students take one particular perspective on course content."⁵⁶ In addition, the survey included acts that every sensible person would recognize to be out of bounds, like "[w]hile able to conduct class, the instructor frequently attends class while intoxicated."⁵⁷ The respondents marked each behavior as 1 appropriate/encourage, 2 discretionary, 3 inappropriate/handle informally, or 4 very inappropriate/requires intervention.⁵⁸ The authors' hypothesis is that the degree of moral outrage expressed by the responses to each question is a good measure of the behavior's deviation from what is acceptable:

Faculty members differ in their assessments of a breach of various proscribed behaviors. Norms vary in the intensity: violations of some are largely ignored or dismissed as personal eccentricities, whereas violations of others are seen as demanding the most severe sanction available to social agents. . . . Consequently, some norms are inviolable because of the extreme severity of the sanctions believed to fit transgressions of such norms.⁵⁹

The survey disclosed seven "inviolable norms" of teacher behavior. These were behaviors that drew the highest, and so most critical, scores on the 4-point scale: "condescending negativism," "inattentive planning," "moral turpitude," "particularistic grading," "personal disregard," "uncommunicated course details," and "uncooperative cynicism."⁶⁰

55. See JOHN M. BRAXTON & ALAN E. BAYER, *FACULTY MISCONDUCT IN COLLEGIATE TEACHING* (1999).

56. *Id.* at 13-15.

57. *Id.*

58. *Id.*

59. *Id.* at 21.

60. See *id.* at 21-41.

Six behaviors added up to condescending negativism. The most important was “the instructor makes condescending remarks to a student in class.”⁶¹ These behaviors violate the ethics of teaching and constitute, in the authors’ view, an abuse of the “asymmetry of power in the classroom.”⁶² Nearly three quarters of the faculty respondents ranked the making of such remarks as a “4,” calling for formal intervention with the teacher.⁶³

The third of the seven inviolables is “moral turpitude.”⁶⁴ This one is relatively easy. It involves a teacher’s sexual relation with a member of the class or making “suggestive sexual comments” to a student and it also includes arriving to class intoxicated.⁶⁵ I suspect that traditional sex issues have involved a male professor and a female student. And I believe that the increase of female representation on faculties has reduced this problem both because there are fewer male teachers now and because a faculty with a large female contingent is less likely to tolerate such behavior. At least at Michigan, a proven claim by a female student that her professor made a sexual advance will cause a “5.09 hearing” and, if the claim is proven, the resignation or retirement of the offending teacher.⁶⁶

“Personal Disregard” ranges from “offensive body odor” to coming late, leaving early and failure to “review the pertinent material for the day.”⁶⁷ These practices are signs of deeper troubles in the professor’s personality, and these practices are tolerated more often than they should be.⁶⁸ One of my colleagues of more than forty years ago routinely failed to turn in his grades until several months after the examination. In his last years, he would sometimes arrive five to ten minutes late to class because he was outside smoking. Finally, at the end of one semester he told the Dean that

61. The others include the instructor expressing impatience with a slow learner in class, an instructor criticizing the academic performance of one student in front of other students, an advisee treated condescendingly, a faculty member making a negative comment about a colleague in public in front of students, and an instructor failing to describe clearly instructions and requirements for course assignments to students. *Id.* at 23.

62. *Id.* at 22.

63. *Id.*

64. *Id.* at 27.

65. *Id.*

66. UNIV. OF MICH. BYLAWS, *supra* note 38, § 5.09.

67. BRAXTON & BAYER, *supra* note 55, at 34.

68. One example of a professor being terminated for poor teaching is quite extreme. A tenured Calculus professor at Michigan State University had a mental breakdown in front of a class in 2012. Students complained he had been acting eccentrically all semester. His classes were assigned to other professors indefinitely after he screamed and stripped naked in front of a class of 31 students. See Brandon Howell, *Michigan State Professor Apologizes to Students for Ranting, Stripping Naked in Apparent Breakdown*, MLIVE (Oct 8, 2012, 1:35 PM), http://www.mlive.com/lansing-news/index.ssf/2012/10/michigan_state_professor_apolo.html.

he could not grade his exams. The Dean roped in two other members to read his exams; the next semester the offending professor was retired. A cynic might read this to mean that “personal disregard” at the expense of students is indefinitely tolerable, but “personal disregard” that inconveniences other faculty members, is not tolerable.

The foregoing examples, together with others from Braxton and Bayer and other sources, could be shaped to a particular school or college’s needs to specify the substantive bases for dismissal or demotion because of inadequate teaching performance. To my knowledge, neither Michigan nor any other school has written down the kind of behavior in teaching or research that would be a basis for demotion or discharge.⁶⁹ I assume that all schools have some fragmentary, hortatory rule about good teaching, but no school to my knowledge has anything like the detail that could be constructed from Braxton and Bayer’s study.

Stating the acceptable quality and quantity of research is harder than defining acceptable teaching. That is so despite the fact that each faculty, where research is expected of faculty members, purports to measure every tenure candidate’s research attainments and promise, when tenure is granted.⁷⁰ Presumably, one could review a colleague’s research and writing by simply applying the tenure standard lite—requiring only that the tenured member continue to perform at an “acceptable” level that would be somewhat lower in quality and quantity than was initially demanded. Professors who produce nothing after they are granted tenure are easy cases. Every faculty known to me tolerates one or more such persons. As a witty professor once said “He gave a wonderful talk when we were considering him, but he never opened his mouth again.”

III. THE CONTRACT IN PRACTICE

Since all grants of tenure and almost all dismissals of tenured professors are private acts by faculties or administrators, it is impossible to collect a representative sample of either. One can study the public findings the AAUP Committee A issued in the cases where the committee has answered the call of the professor who has been dismissed or demoted. But those cases are the opposite of a random sample. Those cases are probably the unusual ones where the aggrieved faculty member has a claim that his aca-

69. See UNIV. OF MICH. HANDBOOK, *supra* note 48.

70. *Id.*

democratic freedom has been tread upon. Beyond the AAUP reports, one has to use hearsay and informal reports from those with incomplete knowledge.⁷¹

In the forty-eight years that I have been on the faculty at Michigan, the law faculty has never held a 5.09 hearing with respect to one of its members. The only forced retirement in response to a teaching deficiency that I know of is the one described above. On the other hand, Deans have denied pay raises to several members who failed to publish. In some of those cases the faculty member resigned not long after the Dean's denial. I know of no case in which a faculty member suffered any penalty, much less dismissal, because of poor teaching that was not accompanied by inadequate scholarship.

I find only four cases in the Committee A reports since 2000 where the proposed demotion or dismissal appears to arise from inadequate performance in teaching or research.⁷² In all four cases, the administration cited either poor teaching or research as the reason for termination, non-reappointment, or suspension of the faculty member.⁷³ In two of the cases, Committee A found that the faculty member's disagreements with the administration were the actual underlying cause for the termination of employment.⁷⁴ In one, Committee A considered terminating the professor for a violation of academic freedom because she had discretion over how to evaluate students in her own classroom.⁷⁵ In all four, Committee A found the university's process deficient, because they did not hold hearings, or

71. One informal consideration for both attaining and keeping tenure is collegiality. Being able to "work efficiently with colleagues" or demonstrating "good academic citizenship" are qualities endorsed by the AAUP as criteria for tenure, and are frequently in universities' employee handbooks. However, its subjective nature can make academia a club closed to women and minorities, and threaten academic freedom. See Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U. L. REV. 67, 86 (2006) for why using collegiality as a criteria lends itself to this sort of speculation.

72. See David M. Rabban, *Report of Committee A, 2007-08*, 94 ACADEME, Sep.-Oct. 2008, at 40, 41 [hereinafter Rabban, *2007-08 Report*]; David M. Rabban, *Report of Committee A, 2008-09*, 95 ACADEME, Sep.-Oct. 2009, at 43, 45 [hereinafter Rabban, *2008-09 Report*]; Joan Wallach Scott, *Report of Committee A, 2001-02*, 88 ACADEME, Sep.-Oct. 2002, at 53, 54 [hereinafter Scott, *2001-02 Report*]; Joan Wallach Scott, *Report of Committee A, 2003-04*, 90 ACADEME, Sep.-Oct. 2004, at 61, 67 [hereinafter Scott, *2003-04 Report*]. Of course, a professor who is nominally fired for poor teaching or researching may in actuality be fired because he or she has a disagreement with the administration. The fact that the university makes this claim does not mean it is the real reason for the professor's dismissal.

73. See Rabban, *2007-08 Report*, *supra* note 72, at 41; Rabban, *2008-09 Report*, *supra* note 72, at 45; Scott, *2001-02 Report*, *supra* note 72, at 54; Scott, *2003-04 Report*, *supra* note 72, at 67.

74. See Mary W. Gray, Warner Lawson, Jr. & Margaret Klayton Mi, *Academic Freedom and Tenure: Virginia State University*, 91 ACADEME, Sep.-Oct. 2005, at 47, 48; Hirschel Kasper, George E. Lang & Jean Wilhelm, *Academic Freedom and Tenure: Tiffin University (Ohio)*, 88 ACADEME, Sep.-Oct. 2002, at 53, 54.

75. Rabban, *2008-09 Report*, *supra* note 72, at 45.

student evaluations were collected in a manner inconsistent with both the AAUP and the university's own standards.⁷⁶

My observation of our faculty and my bar stool research on other faculties tell me that five to ten percent of tenured faculty members would fail any reasonable test of their writing or research. By that I mean that five to ten percent of most faculties, where research is required for tenure, have not produced any significant scholarly work in five years. Since all teachers at minimum go to class, we do not have a subset that does no teaching. My guess from observing Michigan and several other faculties is that a somewhat smaller number are unacceptable teachers, and, of course, those who fail the writing test are not necessarily those who fail the teaching test.

IV. ARGUMENTS FOR THE ABOLITION OF TENURE

The reason to abolish tenure is to improve the quality of teaching and research by replacing poorly performing professors with others who are better teachers and stronger scholars. To understand the magnitude of the problem one must have an estimate of the number who fail a fair tenure review. Unfortunately there are no reliable public numbers or percentages on who would fail such a review. Below, I make an estimate that fits with my experience and with the experience of a few others in law schools. Once one has an estimate of the numbers, one must compare the expected damage that a school will suffer from keeping such underperformers on a faculty with the injury that may occur to the school's reputation and to its students.

Let me assume, on modest evidence that a test across all American law faculties would show that seven percent fail to do acceptable research and that five percent fail to do acceptable teaching. And let me assume that about half of the bad teachers are also among the ineffective researchers. This means that around ten percent of any faculty could at one time be dismissed from the faculty if they served under at-will contracts and received a rigorous examination of their work. I also assume that none of those in question perform additional compensating work that might make up for a failure in teaching or research.

Adopting my assumptions that roughly ten percent of the tenured members of every faculty would fail a legitimate examination of their performance in the classroom or in research, and conceding that the tenure contract gives protection against arbitrary or vindictive demotion and dis-

76. See Rabban, *2007-08 Report*, *supra* note 72, at 41; Rabban, *2008-09 Report*, *supra* note 72, at 45; Scott, *2001-02 Report*, *supra* note 72, at 54; Scott, *2003-04 Report*, *supra* note 72, at 67.

missal, can we justify making all professors into at-will or limited term contract employees?

Bad teaching does direct damage to the student. Failure to produce competent research, where research is expected of a faculty, does real but more remote damage to a school's reputation and standing. On a law faculty the economic consequence of a member's underperformance is indistinct. Even with the influence of US News and World Reports rankings, it would take many years of shirking by many faculty members before that shirking would cause an economic pain from falling enrollment. Well before falling enrollment, faculty shirking might cause a decline in a school's reputation. But that decline itself would have only an uncertain economic impact in the form of fewer opportunities for faculty consulting and fewer offers of employment from other law schools. On top of that, one might expect non-economic injuries to the school in the form of a decline in the quality of students and new faculty that the school could attract.

It is easy to say, as I have, that one must compare these faults with the presumed virtues, but such a comparison is hard. One must speculate about a wide range of variables. In a world with perfect knowledge and precise execution the dean will dismiss exactly the right persons, not one more or less. This dean will not be deterred by a romantic attachment to the former tradition of tenure, nor by a belief that one should never be dismissed who has long served, or by the remaining faculty's anger at the dismissal of a beloved colleague. New hires will remain eager to join such a faculty and will not shrink from research topics that are long in germination and not favored by the dean. Academic freedom will be honored as fully as before, and, of course, abolition of tenure will be accompanied by the abolition of the attendant due process procedures enabling the newly untenured faculty to be dismissed without the need to show cause.

V. ARGUMENTS FOR THE RETENTION OF TENURE

A. *Tenure Does Not Protect the Incompetent*

Nothing in the AAUP Principles or local rules, including Section 5.09, bars a dean from dismissing a faculty member for poor teaching or poor scholarship.⁷⁷ In theory that is true, but in practice it is almost certainly false. The due process barriers demanded by the AAUP rules and adopted in local rules like Section 5.09 at Michigan are so formidable that any dean

77. William Van Alstyne, *Tenure: A Summary Explanation, and "Defense"*, 57 AAUP BULLETIN 328, 331 (1971); UNIV. OF MICH. BYLAWS, *supra* note 38, at § 5.09.

who seeks to dismiss a professor for weak research output or inadequate teaching would have to devote a major part of his deanship to the case.

Consider the landscape facing the dean who is about to prosecute a dismissal. Some cases will have gray margins, not black and white. Should we give research credit to one who never writes but who devotes great effort and considerable skill to the editing of others' work? What of the teacher who is worshiped by ten percent and despised by ninety? And how do we deal with the non-writer who nevertheless assumes additional administrative duties in the school?

The hearing itself will be fraught with troubles for the dean. Who does the dean call to give proof that goes beyond student evaluations of teaching incompetence? Students? Colleagues? Experts from other schools on effective teaching? And where does one find prominent professors from other schools who will testify about the inadequacy of the defendant's research?

If dismissal is possible, where are the cases? I found only four cases that might be classed as dismissal for inadequate teaching or research in the AAUP's Committee A reports.⁷⁸ Show me the dean of a law school who has formally proposed to withdraw tenure from a professor for weak teaching or inadequate research. I know of none and I doubt they exist.

Conceding that a dean may often urge a professor to retire and may even give a nonverbal push by withholding a pay raise, I see no evidence that any law school dean is willing to undertake the task of a formal removal of a tenured member who has disregarded a dean's invitation to retire.

B. Abolition of Tenure Will Not Change the Practice

Changing the formal tenure contract might not change the tenure practice. The dean – and others with administrative authority – may believe that the power to fire is illegitimate and at least the dean may fear the angry reaction from his faculty over the firing of their good friend or he may wish to avoid the messy procedural hearing that might attend a dismissal. The dismissal of a senior but untenured member can be expected to excite the same unease in other insecure members and feelings of compassion in fellow travelers that would occur on the dismissal of a tenured member that is discussed above. If that is true, the painful and protracted effort to change

78. See Jennifer Smith, *Reality Catches Up with Storied D.C. Law Firm*, WALL ST. J. (Aug. 8, 2013, 4:05 PM), <http://online.wsj.com/article/SB10001424127887323838204578653982399152600.html>.

the professors' contract from tenured to at-will, will have been wasted and should not be undertaken.

Are the non-contractual barriers to dismissal of senior faculty that high? In many employment settings there is no formal tenure, yet few firings. Consider partners in large law firms, and in other professional partnerships in medicine or accountancy, and think of the many sleepy small businesses where the pay is low but the tenure is perpetual. Closer to home, think of the many law school professors who do not have tenure. At our school there are three kinds of non-tenured teachers, Professors from Practice, Clinical Teachers, and Legal Practice Teachers. These have three-, five-, or seven-year contracts, but only two have ever been dismissed, and those dismissals may be considered denials of tenure, not dismissals, since they were made at the conclusion of a term contract.⁷⁹

There are some counterbalances to these conservative practices. Provosts or other central administrators might be a force for change of the traditional practice. In general, a provost who wishes to raise the performance and status of the entire faculty of a university and who has no particular attachment to any college or to any member of the university faculty can be expected to be a tougher judge than a dean who must live with the consequences of any dismissal. So some provosts can be counted on to push a hesitant dean.

Declining revenue has caused even large law firms to dismiss partners whose positions were thought to be sacrosanct in times of plenty.⁸⁰ Of course, the economic parallel between a law faculty and a group of practicing lawyers or doctors is not perfect. The former earns a salary that is paid indirectly by their students; the latter earn their share of the partnership's profits directly by selling legal or medical services to their clients or patients. If a law or medical partner does less than his fair share there is a direct economic impact on the partnership revenue. There is no such direct relationship between a professor's salary and student revenues in most law schools, but in the long run, other colleges in a university, will tire of carrying the law faculty.

Yet the economic storms that have forced restructuring of law firms in the last decade have now overtaken some law schools and are on the hori-

79. If tenure were abolished but the elaborate dismissal hearing—at which a dean has to prove just cause for not renewing a non-tenured person's contract—is retained, that would be a large impediment against change. Anyone serious about abolishing tenure should also insist on the right to dismiss for any reason or for none. This surely is a place where the substantive rules are stuffed in the interstices of procedure.

80. See Smith, *supra* note 78.

zon for all law schools.⁸¹ The trend in law school enrollment portends an economic tornado that will surely damage the current law school model of large enrollment, big classes and high pay.⁸²

Between 2003 and 2013, the number of fall applicants to law schools declined from just under 100,000 to just over 58,000.⁸³ If one assumes that the average tuition is \$30,000, those numbers represent a decline in law school revenues of \$1.2 billion, or a nationwide tuition decline of roughly 40%. The enrollment decline is driven by the accurate student perception that there are not 58,000 new law positions each year.⁸⁴ It is magnified by the fact that law school tuitions have risen by more than the rate of inflation for each of the years between 2003 and 2013 and by the amount of debt that undergraduates bring into law school.⁸⁵ According to a recent Wall Street Journal article, declining enrollments have already caused some schools to buy a handful of senior professors into early retirement, to warn non-tenured faculty about the possibility of dismissal, and to cut administrative staff.⁸⁶ If the decline in applications that law schools have suffered

81. See Ashby Jones & Jennifer Smith, *Amid Falling Enrollment Law Schools Are Cutting Faculty*, WALL ST. J. (July 15, 2013, 4:39 PM), <http://online.wsj.com/article/SB10001424127887323664204578607810>; *LSAC Volume Data*, LAW SCHOOL ADMISSION COUNCIL, [http://www.lsac.org/docs/default-source/data-\(lsac-resources\)-docs/lsac-volume-summary.pdf](http://www.lsac.org/docs/default-source/data-(lsac-resources)-docs/lsac-volume-summary.pdf) (last visited July 19, 2013).

82. The American Bar Association currently requires law schools to have a high level of tenured faculty positions as a condition of accreditation. They are considering softening that requirement in order to help schools with their budget crises amid falling enrollment. Kent Syverud, dean of Washington University School of Law in St. Louis, told the ABA's task force on the future of legal education, "Law professors and law deans are paid too much . . . [e]ither we have to be paid less, or we have to do more." On August 9, 2013, the Council of the ABA Section of Legal Education and Admissions to the Bar tentatively approved proposed versions of an amendment to the accreditation rules: one requires law schools to offer job security to full-time faculty members short of tenure, and the other only requires schools to have policies in place to protect academic freedom. *Law School Professors Face Less Job Security*, WALL ST. J. (Aug. 11, 2013, 7:18 PM), <http://online.wsj.com/news/articles/SB10001424127887323446404579006793207527958>. The council then sent out both versions for public comment, and they will then be considered by the ABA's House of Delegates. This is unlikely to happen before the ABA's 2014 annual meeting. Charles Huckabee, *ABA Panel Favors Dropping Tenure as a Law School Accreditation Standard*, THE TICKER (Aug. 12, 2013), <http://chronicle.com/blogs/ticker/aba-panel-favors-dropping-tenure-as-law-school-accreditation-standard/64529>.

83. See Jones & Smith, *supra* note 81.

84. See generally NAT'L ASS'N FOR LAW PLACEMENT, *Law School Grads Face the Worst Job Market Yet-Less Than Half Find Jobs in Private Practice*, NALP.ORG (June 7, 2012), <http://www.nalp.org/2011selectedfindingsrelease> (last visited July 19, 2013).

85. See Karen Sloan, *Tuition is Still Growing*, NAT'L L.J. (Aug. 20, 2012), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202567898209&rss=nlj&slreturn=20130619065402> ("The number of applicants to U.S. law schools declined drastically during the past two years [2010-2012], yet the average tuition this fall will climb by more than double the rate of inflation."); *Tuition three times faster than inflation, but some schools buck the trend*, NAT'L JURIST (Feb. 22, 2012), <http://www.nationaljurist.com/content/tuition-three-times-faster-inflation-some-schools-buck-trend> ("Tuition for private law schools grew from an average of \$21,790 in 2000 to \$37,702 in 2010, an increase of 73 percent.").

86. See Jones & Smith, *supra* note 81.

over the last ten years⁸⁷ persists, it will sweep away the traditional practice of lifetime tenure in any place where tenure has been abolished. And if the decline in the number of law students continues after 2013, it will sweep away not only the practice but also the formal tenure contract and more than a few law schools along with it.⁸⁸

At schools like Michigan, with both tenured and non-tenured long-term professors, revenue declines will be particularly troublesome. At a minimum, the presence of long term untenured faculty who teach clinical classes, or the like, will raise issues about any layoff policy that would dismiss all untenured faculty before any who are tenured.⁸⁹ Any school that wishes to keep its clinical program manned by untenured practice professors, may have to dismiss some tenured faculty before all non-tenured clinical faculty are dismissed.

These economic hardships brought on by falling enrollments make it unlikely that any school will persist in the practice of lifetime tenure if the tenure contract were abandoned. Even in the presence of the tenure contract, it will be a powerful force for change in the contract and in its practice.

87. Hollinger, *supra* note 33.

88. Financial trouble can justify termination as well. The AAUP's 1940 Statement of Principles on Academic Freedom and Tenure allows for tenured faculty termination under "extraordinary circumstances" because of a "demonstrably bona fide financial exigency." See AM. ASS'N OF UNIV. PROFESSORS, *supra* note 51, at 112. Since 2000, many more universities used this reason than teaching or researching deficiencies to terminate employment of their faculty members. In such cases, committee A set a high bar for what constitutes extraordinary circumstances. They asserted termination of employment of tenured faculty and faculty who were employed for more than seven years must be the last resort, colleges must undertake sufficient actions to find alternative methods to improve the financial health of relevant colleges, and the faculty must participate in the development of financial reorganization plans. In cases where the university was restructuring to alleviate its financial problems, the AAUP asserted that universities must try to continue employing faculty made obsolete when courses taught by them were still offered or faculty could be trained to teach other courses. The only university committee A found to meet this standard in its investigative reports since 2000 was the Louisiana State University Health Sciences Center in the year following Hurricane Katrina, which greatly damaged the school. Four other schools—Southern University at New Orleans, University of New Orleans, Loyola University New Orleans, and Tulane University—were also damaged and suffered a serious drop in enrollment, but the AAUP censured all four for not affording professors due process or trying to find new positions for them before terminating them. David M. Rabban, *Report of Committee A, 2006-07*, 93 ACADEME Sep.–Oct. 2007, at 64, 66 (2007) [hereinafter Rabban, *2006-07 Report*].

89. Tenure has been thought to include an exception for fiscal exigency. See AM. ASS'N OF UNIV. PROFESSORS, *supra* note 51, at 112. So ironically one might be able to dismiss tenured faculty without liability under the cause of fiscal exigency but be found to have breached a 5 or 7 year term contract by laying off a person who was nominally inferior to the tenured person but who is found to have no fiscal exigency exception in his contract.

C. *Tenure Must Be Preserved to Protect Academic Freedom*

Defenders of tenure prefer to march under the banner of academic freedom.⁹⁰ The public press would never acknowledge poor teaching or weak research as worthy of its protection, but it can be expected to give full-throated defense to academic freedom. Many journalists fancy themselves as protectors of the public good, always ready to attack the powerful and protect the weak; they are fellow travelers of faculty advocates of academic freedom.

The early cases at Stanford, Wisconsin, Chicago and Duke that stimulated the adoption of tenure were academic freedom cases. At least the public record shows no deficiency in teaching or research by the professors that were threatened with dismissal in those cases.⁹¹

The context changes, but the problem persists. Some of the earliest academic freedom cases involved professors teaching Darwin's theory of evolution in colleges that had religious sponsors.⁹² Then came disputes of the early 20th century about unions, strikes, and the like.⁹³ The middle of the 20th century brought Senator McCarthy and the Communist threat.⁹⁴ But who needs protection today when liberal advocates of the First Amendment rule the roost? Perhaps the opponents of affirmative action, or the critics of Israel or of Islam, or advocates of the innate inferiority of some minority groups? In any case the persistent and recurring nature of the problem makes it hard to believe that today's quiescence will last indefinitely.

Today there are few academic freedom cases at the prominent public and private institutions but the continuing trickle of cases in the Committee A reports shows that the issue is still alive. For example, detailing the investigation at Cedarville University in Ohio, Committee A asserted the university's standards "far exceed the limitations on academic freedom on religious grounds Cedarville subscribes to."⁹⁵ A professor at Cedarville was terminated for disagreeing with a new policy that all professors must adhere to a statement on "biblical truth and certainty."⁹⁶ He expressed that disagreement to students, and criticized the administration for issuing such

90. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 37

91. See HOFSTADER & METZGER, *supra* note 1, at 425, 436.

92. *Id.* at 326.

93. *Id.* at 425-40.

94. See Merle Rubin, *How Academic Freedom Fared Under McCarthyism*, CHRISTIAN SCIENCE MONITOR (Oct. 16, 1986), <http://www.csmonitor.com/1986/1016/dbivor.html>.

95. Rabban, *2008-09 Report*, *supra* note 72, at 44.

96. *Id.*

a directive.⁹⁷ At the University of South Florida, a tenured professor of computer science was indicted as a member of a Palestinian terrorist organization.⁹⁸ He alleged his academic freedom was limited because he was not a criminal, just a proponent of Palestine.⁹⁹ After his arrest, the university president dismissed him without a hearing for “abusing his university position by using its name and resources in furtherance of improper, non-educational purposes.”¹⁰⁰ The AAUP investigated, but did not censure the university, because the president acknowledged that a hearing should precede any dismissal, and so offered the professor a hearing as part of a post-dismissal grievance he filed.¹⁰¹

VI. PALLIATIVES

There are at least two things that a school could do to minimize the inefficiencies that attend the tenure contract. The first is to substitute an at-will contract for the tenure contract, but to add a term to that contract to prohibit dismissal or demotion for acts that are thought to be protected by academic freedom. The second is to adopt a periodic post-tenure review, a procedure that is already in use at a number of institutions.¹⁰²

A. *Protecting Academic Freedom by a Term in an At-Will Contract*

At-will employment—under which an employee can be dismissed for any reason unless the dismissal would violate laws against discrimination based on race, gender or ethnic origin—might be a model for a new rule. Applying similar thinking to the issue of academic freedom, a professor could be dismissed for any reason except that he was espousing an unpopular cause or otherwise exercising his academic freedom in a way that was irksome to his superiors. That rule might find trouble in application if a poorly performing professor could make a plausible case that his dismissal was really caused by his advocacy of unwelcome ideas. It seems unlikely, but not far-fetched, that many facing dismissal for poor teaching or research could mount a plausible claim of infringement on academic freedom.¹⁰³

97. *Id.*

98. Joan Wallach Scott, *Report of Committee A 2002-03*, 89 *ACADEME*, Sep.–Oct. 2003, at 77, 79.

99. *Id.*

100. *Id.* at 80.

101. *Id.*

102. *See infra* note 108 and accompanying text.

103. Some examples: a popular English lecturer at North Idaho College did not have tenure, but the administration failed to reappoint her for no specified reason. The AAUP report voiced suspicion she was terminated because the administration had a dispute with her husband. Rabban, *2008-09 Report*,

B. *Post-Tenure Periodic Review*

Post-tenure review has been implemented in 37 states in public schools¹⁰⁴ and is practiced in hundreds of schools nationwide.¹⁰⁵ At a number of these schools there is now more than ten years of post-tenure review practice; so there are some data on the impact of the process. Although some teacher organizations favor post-tenure review,¹⁰⁶ AAUP, the dominant group in higher education, is opposed¹⁰⁷ because “periodic evaluation of existing procedures would bring scant benefit and would incur unacceptable costs, not only in money and in time but in a dampening of creativity and collegial relationships.”¹⁰⁸

By asking about the benefit and comparing it to the cost, the AAUP is asking the right question, but it is hard to see how properly conducted reviews would either “dampen creativity” or “threaten academic freedom.” Because I write mostly on commercial law subjects and my friend and colleague, Bill Miller, writes about the Icelandic sagas, must I disapprove of

supra note 72, at 45. At Our Lady of Holy Cross College in Louisiana, a professor was instrumental in convincing the finance committee to adopt a revised salary schedule that the president ultimately did not adopt. The professor circulated arguments against the president’s position that were increasingly hostile. The president ultimately terminated him, and said he would be paid until the end of his annual contract. All professors had one-year contracts renewable at the administration’s discretion. The professor was not given a hearing or a reason why he was terminated. Rabban, *2006-07 Report*, *supra* note 88, at 67. Lastly, a professor at University of the Columbians in Kentucky created a website that was highly critical of the administration and the university ultimately fired him and his department chair. Scott, *2003-04 Report*, *supra* note 72. The AAUP censured all three universities for failing to provide sufficient due process.

104. CHRISTINE LICATA AND JOSEPH MORREALE, POST-TENURE FACULTY REVIEW AND RENEWAL: EXPERIENCED VOICES 3 (2002).

105. Currently, there are no national statistics available on the precise number of institutions that have post-tenure review policies. Several writers have estimated the percentage to be between 40 and 70 percent. Peter R. Schuyler, *Post-Tenure Review: Policy Effectiveness at Four-Year Private Institutions* (June 2007) (unpublished Ph.D. dissertation, University of Massachusetts) (on file with the University of Michigan Library). One survey of 680 public and private institutions found that 61 percent of respondents had a post-tenure review policy in place and another 9 percent had a policy under development. Beverly Jo Harris, *The Relationship Between and Among Policy Variables, Type of Institution, and Perceptions of Academic Administrators with Regard to Post-Tenure Review* (1996) (Ph.D. dissertation, West Virginia University) (on file with ProQuest Dissertations and Theses). A 2000 Harvard study reported that 48 percent of private institutions had post-tenure review. Anne N. Neal, *Reviewing Post-Tenure Review*, 94 ACADEME, Sep.–Oct. 2008, at 27, 28.

106. Christine M. Licata, *Post-Tenure Faculty Evaluation: Threat or Opportunity?*, 1 HIGHER EDUC. REP. 16 (1986), *microformed on* ERIC No. 270009 (Clearinghouse on Higher Education). However, these organizations oppose post-tenure review if it can result in the dismissal of tenured professors. *Id.*

107. Instead, the AAUP advocates using post-tenure review for faculty development. The AAUP’s softening stance on post-tenure review shows how the trend is strengthening. Adams, *supra* note 71, at 95 (citing AM. ASS’N. OF UNIV. PROFESSORS, POST-TENURE REVIEW: AN AAUP RESPONSE (1999), *reprinted in* AAUP POLICY DOCUMENTS AND REPORTS 50, 50-52 (9th ed. 2001)).

108. Jordan Kurland, *On Periodic Evaluation of Tenured Faculty*, 69 ACADEME, Nov.–Dec. 1983, at 4a, 4a.

his work? I do not think so. In a haste to protect professors from even benign intrusion, the AAUP complains too much. It takes too narrow a view of faculties' capacious taste for all things relating to law from A to Z.

Nor do the data show the value of these reviews to be "scant." As seen from the reviews from the Arizona state university system, the University of Massachusetts system, and the Virginia state university system, the post-tenure reviews appear to be causing professors to shape up, move into retirement, or move out of the professoriate.¹⁰⁹ In Arizona, between 2000 and 2001, 2,711 faculty members were evaluated.¹¹⁰ Nine were found unsatisfactory in teaching, six unsatisfactory in service, and seventeen unsatisfactory in research.¹¹¹ Thirteen were assigned to participate in a Faculty Development Plan, and nine were directed to begin a Performance Improvement Plan.¹¹²

At the University of Massachusetts, before the tenure review process began, 18% of tenured faculty overall signaled their intention to retire within three years and thus had the process waived.¹¹³ Two who rescinded their intention to retire were immediately placed in the schedule for review; 173 tenured faculty members completed the process.¹¹⁴ Of those, sixteen were assigned a development plan in research/scholarship/creative activity, teaching/advising, academic outreach/public service or university service.¹¹⁵ Eighty requested professional development funds, and 94% of those requests received funds.¹¹⁶

At Virginia, of 400 faculty members who were identified by annual evaluations to need a review process, 286 had no needs or problems identified.¹¹⁷ Fifty-two did not complete the review process because they were terminated.¹¹⁸ Twenty-six met all expectations for improvement.¹¹⁹ Thirty-five did not meet expectations, and of those, twenty-one retired, three had mandatory teacher training, two had changed assignments, three had a salary reduction, and two were terminated.¹²⁰

109. Sara A. Hook, *Post-Tenure Review Then and Now: Retrospective and Prospective Study of Its Impact on Faculty and Higher Education*, IUPUI SCHOLARWORKS 9, 16 (Oct. 7, 2007), available at <https://scholarworks.iupui.edu/handle/1805/3018>.

110. *Id.* at 9.

111. *Id.*

112. *Id.*

113. *Id.* at 10.

114. *Id.* at 9-10.

115. *Id.*

116. *Id.* at 10.

117. *Id.* at 17.

118. *Id.*

119. *Id.*

120. *Id.*

At several other universities, the post-tenure review process similarly had a significant impact on the faculty.¹²¹ This information is summarized in a table below. The effect is hardly “scant.”

School	Evaluated	Found Deficient	Development Plan	Retired/Resigned	Dismissed	Other	Time Frame
Kansas State University	*	19	4	4	1		2000-2001
Univ. of Wisconsin-Green Bay	*	*	60	36	1 (“made a career change”)		1994-1999
Arizona state system	2711	23	22	1	0		2000-2001
Univ. of Massachusetts system	398 (identified for review)	*	31	18% retired before evaluation	*	80 requested professional development funds	1999-2000
Univ. of North Carolina	2845	104	*	*	*		1998-2001
Virginia state system	400 (identified for review)	35	8 (change in responsibilities or salary)	25	54		1998-1999-2002-2003

* No data available due to inconsistent reporting formats.

In fact, student data on teaching effectiveness is already available at most schools, and it will hardly be a secret if a professor has not published anything for eight years. Presumably, these reviews need not and do not undertake the kind of painstaking evaluation of the quality of the work that would be done at tenure time.

However, post-tenure review is not free of all problems. What about a professor that thinks and works for several years and then produces a work of which the entire faculty is envious? Somehow that person must be accommodated. I suspect that the free pass for a widely respected but unproductive member might be the more serious problem. Presumably that risk

121. *See id.* (describing the impact of post-tenure review on Kansas State University, University of Wisconsin-Green Bay, University of North Carolina, and the Colorado state university system).

will be minimized by the need to treat all faculty members in the same way. If some shirkers are called out, then it will be hard to ignore others.

In my view we should not give up on post-tenure reviews. Although the data are sparse, it does give hope that these reviews will smoke out shirkers and stimulate them to change their ways, retire, or find new work.

CONCLUSION

I believe it is time to change. It is beyond doubt that tenure injures our students, blocks the way to eager and highly competent professors, and generally degrades the efficiency of our schools. We could abolish tenure and test the water to see if something new is needed to protect academic freedom. Alternatively, we could adopt the “at-will unless” rule described above, or encourage post-tenure review to spread. Every school does not need to adopt the same reform; on the contrary, competition and comparison among the alternatives might inform us about the defects and virtues of each.