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TENURE: ENDANGERED OR EVOLUTIONARY SPECIES

James J. Fishman *

I. INTRODUCTION

Fifteen years ago Ralph Brown, then President of the American Association of University Professors (AAUP) and a law professor at Yale, and Jordan Kurland, then AAUP General Counsel, wrote: “. . .academic tenure is *always* under attack. Usually we hear only grumbling and rumbling, as of distant artillery. But occasionally there is a prolonged fire fight.”¹ Today, we are in one of the latter periods.

Advocates of tenure emphasize its contributions to professional excellence and the quest for truth. These benefits are more important than individual benefits or the costs to those who fail to gain tenure or to universities that lose their flexibility. Critics argue that tenure creates excessive social and individual costs because unproductive tenured faculty hinders opportunities to hire new faculty or implement programmatic innovation.²

This article will review some of the challenges to the system of academic tenure: the efforts to reform, curtail, or eliminate it. It will discuss exogenous factors undermining the institution and then suggest some areas where tenure should evolve, particularly focusing upon academic tenure in legal education. The author argues that the hierarchical structure of traditionally tenured faculty and other faculty, clinicians, and legal writing professors, employed on short or long-term contracts, has undermined academic freedom and tenure.

* © 2005 James J. Fishman. James J. Fishman is a Professor of Law at Pace University School of Law.

1. Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 325, 327 (1990) [emphasis in original].

2. Ernst Benjamin, *Some Implications of Tenure for the Profession and Society*, at <http://www.aaup.org/Issues/tenure/Ebten2.htm> (last visited April 14, 2005). For a summary of the arguments in favor and against tenure, see generally, James J. Fishman, *Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others*, 21 PACE L. REV. 159 (2000).

II. WHAT IS TENURE?

At its simplest, academic tenure merely provides that no person continuously retained as a full-time faculty member beyond a specified and lengthy period of probationary service may thereafter be dismissed without adequate cause.³ Basically, it mandates due process in the firing decision. The original purpose of tenure was to provide economic security, so that scholars could pursue disinterested scholarship and be judged on that scholarship by their peers, rather than by lay employers. Of course, tenure is much more: it implicates notions of academic freedom, justifies participation in university governance, represents part of a social contract that contributes to institutional stability, and—not so often acknowledged—manifests a significant status function that in the law school context reinforces a hierarchy among people in similar full-time roles.

III. THE EROSION OF TENURED POSITIONS

Nationally, there has been an erosion of tenured positions and an increase of non-tenure-track faculty. The AAUP calls this cohort “contingent faculty.”⁴ Some statistics confirm this development. In 1969, 3.3 percent of full-time faculty were hired for non-tenure-track positions.⁵ By the Fall of 1998, twenty-eight percent of full-time faculty were in non-tenure track slots.⁶ Concomitantly, among newly hired full-time faculty, fifty-five percent were in non-tenure track positions.⁷ Other surveys going back a decade have found a majority of new hires were off the tenure track.

A study from the Fall of 2000 by the American Mathematical Society starkly demonstrates the erosion of tenured positions.⁸ Between 1995 and 2000, the number of tenured faculty in mathematics departments in four-year colleges and universities (prime tenure land)

3. William W. Van Alstyne, *Tenure: A Summary, Explanation, and “Defense,”* 57 AAUP BULL. 328 (1971).

4. See AAUP, *Contingent Appointments and the Academic Profession* (Nov. 9, 2003) available at <http://www.aaup.org/statements/SpchState/contingent.htm> [hereinafter *Contingent Appointments*].

5. Gwendolyn Bradley, *Contingent Faculty and the New Academic Labor System*, 90:1 ACADEME 28-31 (2004).

6. See *Contingent Appointments*, *supra* note 4.

7. *Id.*

8. Donna R. Euben, *Tenure: Current Perspectives and Challenges*, (Oct. 2002), available at <http://www.aaup.org/Legal/info%20outlines/legtenur.htm> (last visited April 14, 2005), citing David J. Lutzer, *Statistical Abstract of Undergraduate Programs in the Mathematical Sciences in the United States: Fall 2000 CBMS Survey*, American Mathematical Society (2002).

dropped by about three percent.⁹ The number of tenure-eligible faculty dropped by six percent, and the number of full-time faculty, who were neither tenured nor tenure-eligible, rose by sixty-five percent.¹⁰

The National Center for Education Statistics of the U.S. Department of Education found that twenty-one percent of public research, doctoral, and comprehensive universities had replaced tenured faculty with full-time faculty on fixed-term contracts between 1992 and 1998.¹¹ Additionally, the proportion of faculty whose positions are part-time has increased substantially. In 1970 twenty-two percent of faculty members were in part-time positions. By 1999, this figure had risen to forty-three percent.¹² It is ironic that the decline in tenured positions has been accompanied by an increase in categories of faculty. While the army has twenty-four grades of rank from private to general, Harvard University divides its faculty into forty ranks, ranging from teaching fellow to professor emeritus.¹³

Institutions make little commitment to most contingent faculty or to their academic work. In colleges and universities with large numbers of adjunct faculty or full-timers on a non-tenure track, the faculty as a group become more fragmented, unsupported and destabilized.¹⁴ The ultimate impact of the erosion of tenure could be to cut off the flow of good people into higher education and to seriously affect future scholarship and research.

Yet, it remains premature to say we are seeing tenure's death knell. Despite its seeming erosion, nearly all universities—doctoral and comprehensive—have tenure systems, as do a majority of private baccalaureate colleges and community colleges.¹⁵ One can expect academic tenure to continue to shrink as a proportion of all new positions.

9. *Id.*

10. *Id.*

11. U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, THE CONDITION OF EDUCATION 2003, NCES 2003-067, Table 35-1 at 161. Sixteen percent of all post-secondary institutions with tenure systems reported replacing some tenured positions with fixed term contracts. *Id.* at 69.

12. U.S. DEPARTMENT OF EDUCATION, DIGEST OF EDUCATIONAL STATISTICS 271, Table 228 (2001).

13. Douglas McGray, *Title Wave*, N.Y. TIMES, Aug. 4, 2002, at A23.

14. Bradley, *supra* note 5.

15. About two-thirds of all post-secondary institutions had tenure systems in the Fall of 1998. Andrea Berger, et. al. U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, INSTITUTIONAL POLICIES AND PRACTICES: FINDINGS FROM THE 1999 NATIONAL STUDY OF POSTSECONDARY FACULTY, INSTITUTION SURVEY, 31 NCES 2001-201 (2001) [hereinafter, 1999 STUDY OF POSTSECONDARY FACULTY].

IV. ALTERNATIVE APPROACHES AND ATTACKS ON TENURE

A. *The Use of Contracts in Place of Tenure*

Long term or rolling contracts, occasionally referred to as 'term tenure' in place of traditional tenure, are in place at very few four-year institutions. Under contract systems, the faculty member is initially appointed for one to three years, with the terms then extended to seven or even ten years.¹⁶ Some institutions, particularly those with law schools, have contract systems side by side with tenure.

The simplest way to understand the contrast between a tenure system and one governed by long-term contracts is that under the former, an employee has the burden of proof of showing fitness during the probationary period, and then the burden shifts to the employer to determine whether the employee should be dismissed for cause. Under a contract system, the burden is always upon the employee to prove his or her fitness to continue.¹⁷ Two well-known practitioners of contracts in place of tenure, Evergreen State in Washington and the University of Texas-Permian Basin, have systems with so many procedural protections that it has been referred to as 'tenure by another name.'¹⁸

Empirically, data shows that contract renewals are overwhelming and turnover is quite low.¹⁹ However, renewable contracts have led to serious conflict over academic freedom issues and censure of the institution by the AAUP.²⁰ Such conflicts have a destabilizing effect on academic communities.²¹ To conduct meaningful peer review of faculties with renewable contracts takes an enormous amount of time

16. Fishman, *supra* note 2, at 194. The recent organizing efforts of graduate students, adjunct faculty and medical residents to obtain job security or improvement of working conditions is an effort to obtain some of the protections tenure affords. It is not tenure, however, because contracts alone don't offer the academic freedom protections, the status, nor the traditional rights of shared governance. *Id.*

17. See Ellen Schrecker, *The Incredible Shrinking Faculty: An Interview with Lawrence Poston*, 86 ACADEME 26, 28 (2000).

18. See Robert M. O'Neill, *Alternatives to Tenure*, 27 J.C. & U.L. 573, 577 (2001).

19. See Debbie Goldberg, *Career Options*, WASH. POST, July 27, 1997 at R6 (stating that 83 percent of Hampshire College's ninety faculty have ten-year contracts). For a critique of contract systems, see generally Fishman, *supra* note 2, at 194-98; Michael S. McPherson & Gordon C. Winston, *The Economics of Academic Tenure: A Relational Perspective*, 4 J. ECON. BEHAV. & ORG. 163, 178-80 (1983).

20. See, e.g., Robin Wilson, *Bennington President Fires a Professor Who Criticized Her Fiercely and Openly*, CHRON. HIGHER EDUC., Apr. 28, 2000 at A20. Bennington had previously been censured. AAUP, *Report: Academic Freedom and Tenure: Bennington College*, 81 ACADEME 91 (1995) [hereinafter AAUP Report].

21. AAUP Report, *supra* note 20.

from academic responsibilities such as scholarship, student advising and mentoring, and participation in faculty governance. Finally, it is difficult to see how academic freedom can be protected if no one has tenure.

B. The Market Test of Tenure

A recent effort to sidestep tenure is to offer financial incentives to faculty or faculty candidates, who will eschew tenure or a tenure track position. In one version, the hiring institution offers a prospective employee the choice between a tenure-track appointment and “renewable tenure;” the latter offers a higher starting salary, more lucrative summer grants, and possibly a lighter teaching load. Tenure, it is suggested, will be difficult to attain.²²

A few places have used this approach to encourage tenured faculty to renounce their tenure with promise of compensatory advantages. The most notorious was at the University of Central Arkansas, whose efforts achieved success with but one professor, and earned censure from the AAUP.²³ At Boston University’s School of Management, six of the twelve faculty accepted an offer to receive a higher salary in exchange for renouncing tenure.²⁴ Reward for tenure assumes that the administration will continue such a program. It is based upon trust, but administrators and resources change. Additionally, this approach assumes tenure is only for the benefit of the individual faculty member. Tenure should be considered more than a property right of the individual. It benefits the university community and society. Trading one’s tenure for more money is a wrong to the academic community.

C. The Devaluation of the Faculty

There is a story, probably apocryphal, that shortly after becoming president of Columbia University in 1948, Dwight D. Eisenhower addressed the faculty. He kept referring to the faculty as “you” and the administration as “the university.” Isidor I. Rabi, a Nobel-prize-winning physicist and faculty member, shouted out a correction: “General, we are the university.”²⁵ Times have changed. There is a decrease in the

22. Poston, *supra* note 17, at 27.

23. O’Neill, *supra* note 18, at 577. AAUP, *Academic Freedom and Tenure: University of Central Arkansas*, 86 *ACADEME* 101, 112 (2000) (reporting the circumstances leading to the Bennington censure).

24. Euban, *supra* note 8.

25. In fact, Rabi was a confidant of Eisenhower during his Columbia presidency. *See*

relative importance of the faculty, one result of the increasing corporatization of the university.

Legislators, higher education governing boards, and their administrations have emphasized a number of “market realities” that cumulatively diminish faculty preeminence. Accompanying these have been demands for a greater focus on the bottom line. The costs of higher education have risen more rapidly than other goods and services in recent years.²⁶ New modes of competition have emerged from for-profit educational firms and distance learning internet sites that challenge traditional educational models.²⁷ By its nature higher education is labor-intensive. The major way to reduce costs is to decrease the number of full-time faculty.

The adoption by universities and their law schools of business models of the marketplace has increased the importance of skilled professional administrators. Increasing external support from corporations and ideologically oriented foundations have created important external interest groups.

Higher education and particularly law schools have reacted to U.S. News & World Report’s rankings. Education has become vaudeville. Most significant in the law school context is that potential students increasingly view themselves as consumers, and matriculated ones see themselves as customers. At many law schools the most important appointments are not of the faculty, but the assistant deans of development, admissions, career development and most importantly, communications. Faculty usually has no role in their hiring. These developments are the product of general external changes impacting on the educational landscape.

There also have been formal attempts to undermine faculty influence. Shared governance is a corollary of academic freedom and one of the fundamental principles of the academic tenure system.²⁸ The Association of Governing Boards (AGB) issued an institutional governance statement in 1998 that disconnected shared governance from academic freedom.²⁹ The AGB imported the concept of stakeholder

ROBERT A. MCCAUGHEY, *STAND COLUMBIA* 340 (2003).

26. This is a primary reason for efforts to undermine tenure.

27. See Neil W. Hamilton, *Academic Tradition and the Principles of Professional Conduct*, 27 *J.C. & U.L.* 609-10 (2001).

28. See generally, AAUP, American Council on Education & Association of Governing Boards of Universities and Colleges, *Statement on Government of Colleges and Universities* (1966), reprinted in AAUP *POLICY DOCUMENTS AND REPORTS* 179 (1995).

29. Assn. Governing Boards of Universities and Colleges, *AGB Statement on Institutional Governance*, reprinted in *AGB STATEMENT ON INSTITUTIONAL GOVERNANCE AND GOVERNING IN*

analysis from corporate law.³⁰ Under the new statement, the faculty becomes but one constituency among many that a governing board should consider in reaching its decisions.³¹

D. Post-Tenure Review

The major demand of critics of tenure is to implement some form of post-tenure review. This is a significant development of the last 15 years. In 1989 the AAUP reported that less than one percent of its membership worked at institutions with a post-tenure review policy. In 1998 forty-six percent of 192 four-year institutions had post-tenure review policies.³² By 2000, thirty-seven states had established some form of post-tenure review for public institutions.³³

At its most innocuous, post-tenure review is merely good management and personnel policy. However, critics of tenure use post-tenure review as a second chance to get rid of under-performing faculty. Aggressive efforts to institute post-tenure review policies, which would ease termination of tenured faculty, have generated public battles and have been defeated.³⁴

There is uncertainty as to the percentage of under-performing faculty. Unfortunately, no “deadwood index” exists (where is U.S. News when you really need it?).³⁵ There are a few estimates. Henry Rosovsky, former dean of Harvard’s Faculty of Arts and Sciences, estimated that the deadwood label would apply to under two percent of a major university faculty.³⁶ Brown and Kurland estimate that the percentage of under-performers at institutions where tenure is easily granted is less than five percent.³⁷ Even legislators favoring mandatory

THE PUBLIC TRUST: EXTERNAL INFLUENCES ON COLLEGES AND UNIVERSITIES (2001) [hereinafter AGB STATEMENT]. The 1998 statement differs greatly in tone from the 1966 document.

30. See generally, STEPHEN BAINBRIDGE, CORPORATION LAW AND ECONOMICS 27-29 (2002).

31. See AGB STATEMENT, *supra* note 29.

32. Euben, *supra* note 8.

33. *Id.* There are four types: mandated by state legislatures; required by state systems of higher education; negotiated in collective bargaining agreements; and created voluntarily. *Id.*

34. See e.g., Jennifer Jacobson, *Northeastern U. Professors Reject Tenure Changes*, CHRON. HIGHER EDUC., June 15, 2001 at A10; Denise K. Magner, *Fierce Battle Over Tenure at U. Minnesota Ends Quietly*, CHRON. HIGHER EDUC., June 20, 1997 at A14; Fred L. Morrison, *Tenure Wars: An Account of the Controversy at Minnesota*, 47 J. LEGAL EDUC. 369 (1997).

35. “Deadwood,” the phrase used to refer to under-performing tenured faculty, means anything useless and burdensome. RANDOM HOUSE UNABRIDGED DICTIONARY 512 (2d ed. 1993). Under that definition, such a faculty member could be removed from her post for cause.

36. HENRY ROSOVSKY, THE UNIVERSITY: AN OWNER’S MANUAL 210-11 (1990).

37. Brown & Kurland, *supra* note 1, at 332. Robert B. Conrad and Louis A Trosch estimate

post-tenure review admit that the number of faculty needing improvement or pasture is less than two percent.³⁸

As Harold Shapiro, former president of Princeton, has said: “[w]e should disconnect such ongoing periodic evaluations from the question of tenure itself. Any attempt to link to the issue of tenure and periodic evaluation of tenured faculty, no matter how well-meaning, is, in my judgment, unlikely to strengthen our institutions.”³⁹ The position of the AAUP seems eminently sensible. Post-tenure reviews should be aimed at constructive measures for improvement. It should not be a smokescreen to revisit the tenure decision. Of particular importance, faculty rather than administrators should have primary responsibility for conducting the review. The dismissal standard should remain just cause, and all procedural protections should apply.⁴⁰

If post-tenure review is undertaken, it requires an enormous use of faculty resources to do properly. Because of this, it is time-consuming for faculty. It necessarily will take them away from other responsibilities and can lead to conflict.⁴¹ Universities can get rid of under-performing faculty. Procedures exist to remove unproductive faculty for cause. However, because of the legalization of the process of dismissal, administrators are loath to exercise these rights. Legal proceedings take years to conclude, and many administrators using a cost-benefit analysis find it is easier to leave the under-performers in place. That reflects less on academic tenure than administrative prioritizing. Clearly, dismissing a professor for cause is expensive, takes time and resources, is disruptive, and requires hardballing by the administration. Only about fifty to seventy-five tenured faculty lose their positions for cause annually.⁴² Others avoid the formal dismissal process. They retire, are bought out, or resign.⁴³

that only 10 percent of faculty members are marginally unproductive. Dr. Robert B. Conrad and Dr. Louis A. Trosch, *Renewable Tenure*, 27 J.L. & EDUC. 551, 562 (1998).

38. Denise K. Magner, *U. of Texas Starts System of Post-Tenure Reviews*, CHRON. HIGHER EDUC., Dec. 20, 1996, at A10 (State Senator Teel Bivins: “I believe that less than 2 percent of the professors in Texas are really a problem and would need to have this system in place either to address their short comings, or else be dismissed.”).

39. Brown & Kurland, *supra* note 1, at 343.

40. AAUP Committee on Academic Freedom and Tenure, *Post-Tenure Review: An AAUP Response*, 84 ACADEME 61, 67 (1998).

41. Arguments pro and con are developed by Ira Robbins. Ira Robbins, *Exploring the Concept of Post-Tenure Review in Law Schools*, 9 STAN. L. & POL’Y REV. 387, 393-94 (1998).

42. Carla Anne Robbins, *Crash Course: For Harvard Board, Professor’s Woes Pose Big Dilemma*, WALL ST. J., Oct. 12, 2004 at A1.

43. See e.g., Joann S. Lublin, *Travel Expenses Prompt Yale to Force Out Institute Chief*, WALL. ST. J., Jan. 10, 2005 at B1 (discussing a tenured faculty member, who double-billed

Separating post-tenure review from the rhetoric of termination is the key to its success. As former Yale president Kingman Brewster once wrote:

Any system of periodic review subject to the sanction of dismissal, would both dampen the willingness to take on long term intellectual risks and inhibit if not corrupt the free and spirited exchanges on which the vitality of a community of scholars depends. This, not the aberrational external interference, is the threat to the freedom of the academic community which tenure seeks to mitigate.⁴⁴

V. EVOLUTIONARY NEEDS OF ACADEMIC TENURE

Thus far, we have examined efforts that attempt to chip away at academic tenure. The institution cannot become fossilized, but must react to justified criticisms and changes in the professoriate and society.

A. *Academics' Responsibilities*

Complementing efforts to reduce the protections of tenure is the demand that faculty recognize that tenure's privileges carry with them responsibilities, one of which is ongoing peer review and monitoring of the behavior of one's colleagues. The academic responsibility approach is a kind of a soft-core post-tenure review.

That approach represents an effort to remind faculty that the freedoms and processes of tenure are combined with obligations—which faculty often glides over—the way film-goers view screen credits for wardrobe, makeup and grip. Neil Hamilton of William Mitchell School of Law has written comprehensively and intelligently on this subject.⁴⁵ Tenure is part of a social contract with rights and obligations. Hamilton views post-tenure review as a demand for continuing peer review of tenured professors on a regular basis. Peer review is the linchpin of professional academic freedom. The tradition of faculty self-governance through peer review of professional competence and ethics makes professional *academic freedom* and not the tenure system, which has many parallels in other employment settings, unique. “The principal purpose of academic due process,” says Hamilton, “is to maximize

university and resigned his tenured position).

44. Howard Mumford Jones, *The American Concept of Academic Freedom*, 46 AAUP BULLETIN 383 (1960).

45. See generally, Neil W. Hamilton, *Academic Tradition and the Principles of Professional Conduct*, 27 J.C. & U.L. 609 (2001).

protection of the rights of academic freedom, while providing a means for peers to enforce its correlative obligations.”⁴⁶ In practice, once tenure has been achieved, the intensity of peer review becomes dramatically lower.

Hamilton notes that individual faculty members have duties correlative with the rights of academic freedom and correctly observes there is little discussion of the ethical responsibilities of those within the university. These responsibilities of professional conduct are embedded in the AAUP’s 1915 General Declaration of Principles, and in the 1940 AAUP/AAC Statement of Principles on Academic Freedom and Tenure.⁴⁷ However, he claims that “[a] profession unable to articulate publicly a compelling narrative justifying its privileges and unwilling to fulfill the correlative obligations of its social compact will ultimately be seen as no different from other business enterprises in a market economy.”⁴⁸

The challenge to tenured professors today is “directed at the failure of peer review adequately to enforce the correlative duties of professional competence and ethical conduct following the grant of tenure.”⁴⁹ Administrators may conduct annual evaluations of individual professors’ work in assessing sabbatical or additional resource requests, but these decisions do not involve peer review. Competent review is itself time-consuming and takes tenured faculty away from research, teaching, and other public service. A university’s mission of the creation and dissemination of knowledge is better served by a system that is more forgiving of error than one that is too restrictive. Still, faculty has a “duty to determine when individual professors inadequately meet their responsibilities of professional competence,” and then to take the initiative in getting rid of the incompetent.⁵⁰

Faculty should have the responsibility to develop and nurture departmental, school, or institutional norms of appropriate conduct and competence. Principles of peer review and faculty governance would seem to charge faculty with taking the initiative in dealing with the incompetent colleague or with inappropriate behavior. Unfortunately, most faculty treat non-performing faculty as the dean’s responsibility.

46. *Id.* at 621.

47. See generally, *General Report of the Committee on Academic Freedom and Academic Tenure*, 1 AAUP BULL. 17 (1915), reprinted in 53 LAW & CONTEMP. PROBS. 393 (1990); *1940 Statement of Principles on Academic Freedom and Tenure*, reprinted in AAUP POLICY DOCUMENTS AND REPORTS 3 (1995); Hamilton, *supra* note 27, at 625-37.

48. Hamilton, *supra* note 27, at 614.

49. *Id.* at 622.

50. *Id.* at 649, 651.

Alas, over the years this writer has been a co-conspirator in that attitude. There seems an inherent conflict between the autonomy of faculty research and teaching and the demand for collective action to create and enforce behavior and professional norms. However, tenure creates a responsibility to the community. Hamilton is surely correct that the faculty needs to do more in terms of post-tenure peer review of problem colleagues.

Codes of conduct have a superficial appeal, but academic responsibility is difficult to define concretely, and increasingly subjective when applied to specific cases. One should not be sanguine about the effectiveness of peer pressure and review in difficult cases, though it can work well in setting aspirational norms that most will try to follow. There will be increasing pressure in this area.

B. Lengthening the Probationary Period

One of the most significant changes in higher education is the increased number of women and persons of color who have joined faculties. Two decades ago, ninety percent of full-time faculty were white males. Today women represent thirty-eight percent of full-time faculty. Fifteen percent of full-time faculty are persons of color.⁵¹ Though women represent sixty percent of undergraduate matriculants, and in 2001-2002 for the first time earned more doctorates than men, they are still under represented at all levels in the nation's research universities, particularly among tenured faculty.⁵²

There are many reasons for this disparity, but one is the conflict between family and professional responsibilities, which are particularly harsh to women on the tenure track.⁵³ The time constraints to earn tenure, as well as professional demands, have forced many qualified women and persons of color off the tenure track, perpetuating under representation. Many faculty members' probationary years intersect with the primary years of child bearing and raising. The normal requirement that the six-year probationary clock starts to run with the commencement of hiring forces many young scholars to make a difficult and unfair

51 1999 STUDY OF POSTSECONDARY FACULTY, *supra* note 15.

52 See Robin Wilson, *Women in Higher Education: Where the Elite Teach, It's Still a Man's World*, CHRON. HIGHER EDUC., Dec. 3, 2004 at A8. According to AALS statistics, 75.4 percent of tenured faculty are male and 62.2 percent of faculty on a tenure track, but as yet untenured, are male. Contract professors are 52.9 percent female. Email from Rick White, AALS (Jan. 5, 2005, 11:56 EST) (on file with the Akron Law Review).

53 See Piper Fogg, *Family Time: Why Some Women Quit Their Coveted Tenure-Track Jobs*, CHRON. HIGHER EDUC., June 13, 2003 at A8.

choice: family or career.

Tenure practices need to evolve to attenuate this problem. The American Council on Education has recommended that tenure be more flexible by extending the probationary period for recently hired professors to up to ten years with reviews at set intervals. This longer probationary period would not be available for all faculty, only those who need it. Nor would standards or criteria change.⁵⁴ Complementing flexible probation should be the allowance of part-time status during years of family responsibilities and extended leaves of absence if necessary.

Tenure procedures need to reflect the new demographics and needs of incoming faculty. This is a current need, but if tenure cannot evolve to satisfy the needs of the new demographics, there will be severe problems in the future as the best minds will eschew higher education.

VI. LAW SCHOOL ISSUES

A. A Sidebar on Academic Freedom and Its Relation to Tenure

Academic freedom is sometimes confused with and used as a synonym for tenure. Academic freedom allows professionals to seek and discover, teach, and publish absent outside interference. Tenure is a buttress—a guarantor—of academic freedom. It protects academic freedom through the requirement of academic due process before dismissal. An erosion of tenure places academic freedom at risk.

The procedures of the tenure system ensure that “personnel decisions are based largely on scholarship and teaching ability by placing primary responsibility for hiring and promotion on one’s peers.”⁵⁵ Such procedures “limit the occasions when major personnel decisions will be made.”⁵⁶ They specifically “free[] the mature scholar, after a probationary period, from the primary concern about losing her job.”⁵⁷

Professors often consider academic freedom as a personal right, and use the term academic freedom to refer to liberties they claim through

54. American Council on Education, *An Agenda for Excellence: Creating Flexibility in Tenure-Track Faculty Careers* at 10 (2005), available at <http://www.acenet.edu/bookstore/pubInfo.cfm?pubID=330>.

55. J. Peter Byrne, *Academic Freedom: A Special Concern of the First Amendment*, 99 YALE L.J. 251, 310-11 (1989). This article is the most useful introduction to this subject.

56. *Id.*

57. *Id.*

professional channels against administrative or political interference with their research, teaching, representation, and governance. However, judges and academics have different ideas as to the meaning of academic freedom.⁵⁸ Academic freedom as it relates to the individual faculty member differs from constitutional academic freedom, which concerns legal doctrine and the insulation of scholarship and liberal education from extramural legal interference.

Many academics would be surprised, if not unsettled, to learn that at least in the private university, principles of academic freedom as outlined in the 1940 and 1970 AAUP statements are norms, or perhaps a matter of contract between professor and university, rather than constitutional protections. The constitutional protections in the court decisions relate to the university. Constitutional academic freedom is a qualified right of an academic institution to be free from governmental interference in its core administrative activities—hiring and firing.⁵⁹ Thus, the Supreme Court has protected the corporate capacity of the University to be free from governmental interference. It is that institutional autonomy which is protected.⁶⁰

B. The Hierarchical Structure of Law Faculties

Law schools and their faculties traditionally have had more freedom to structure themselves than the rest of the university, through the framework of their accrediting bodies. Yet most law schools have undermined the system of tenure by creating a hierarchy within the teaching faculty of traditional tenured and tenure-eligible positions, clinical faculty who may be on long-term contracts, and legal writing professors who may be on short or long-term contracts.⁶¹

The law school experience is not the same as growth of contingent faculty in other areas of the university. It is more like placing all members of the German Department on a contract track, and all members of the French Department on tenure-eligible lines. The ABA standards have assisted this development, belatedly allowing clinicians to receive some long-term security “reasonably similar” to tenure. That

58. *Id.* at 254-55.

59. *See Sweezy v. New Hampshire*, 354 U.S. 234, 261-62 (1957) (Frankfurter, J., concurring).

60. *See Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000). “[A]s far as the courts are concerned, administrators may exercise extensive control over curricular judgments so long as they do not penalize a professor solely for his political viewpoint.” Byrne, *supra* note 55, at 301-2.

61. According to the most recent data, 71 percent of law faculty are tenured or on a tenure track; 16.4 percent are contract appointees, and for 12.5 percent there is no data. Email from Rick White, AALS (Jan. 5, 2005, 11:56 EST) (on file with the Akron Law Review).

may be in the form of long-term contracts, but it is not the same as tenure.⁶² Some institutions provide clinicians with tenure. The ABA Standards offer legal writing professors even less protection.⁶³

The typical law school faculty structure is an unfortunate mistake, a self-inflicted wound with significant impact on academic freedom and on faculty solidarity against such attempted intrusions. Law schools should have created separate departments for clinical faculty and legal writing professors with separate tenure standards.⁶⁴ One would not be surprised if faculty in the physics department looked down upon sociology, if not sociologists, as being less rigorous, let alone faculty in the department of journalism or even the school of law. However, once the university creates a department for that discipline, the physicist probably would not suggest a different level of security or protection under the tenure system. The hierarchy created by most law schools has done just that. It's sort of like saying the First Amendment should only

62. A.B.A., STANDARDS FOR APPROVAL OF LAW SCHOOLS, *Chapter 4: The Faculty, Standard 405. Professional Environment* (2004-05), available at <http://www.abanet.org/legaled/standards/chapter4.html>. The standards state:

(b) A law school shall have an established and announced policy with respect to academic freedom and tenure of which Appendix I herein is an example but is not obligatory.

(c) A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members to meet standards and obligations reasonably similar to those required of other full-time faculty members. However, this Standard does not preclude a limited number of fixed, short-term appointments in a clinical program predominantly staffed by full-time faculty members, or in an experimental program of limited duration.

(d) A law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction as required by Standard 302(a)(2), and (2) safeguard academic freedom.

Id.

63. *Id.* at §401(d).

64. Separate departments based on differing teaching methodologies and academic norms would have a significant impact on the structure of law school governance. Tenure decision-making would become more similar to the rest of the university. The initial decision would be made by the department faculty, clinical or legal writing, and then go before a school-wide committee for review, and then be passed onto the university administration. A departmental structure might make more difficult the drifting of clinical or legal writing faculty into more traditional courses, because of the departmental wall. For law school deans, a departmental structure would increase their authority vis-à-vis the faculty. Under present governance structures, deans are at best *primus inter pares* in relation to faculty. Departments, which would have their own budgets, would create an important administrative layer between dean and faculty. This should enhance decanal power and align law deans with the decanal structures of other schools in the university. Law dean tenure might increase. One should not fantasize that faculty would welcome such a change, let alone vote for it.

apply to U.S. citizens with a certain net worth.

C. *Attacks on Academic Freedom*

Theoretically, the same academic freedom exists for the most recently hired adjunct or untenured faculty member as for the most senior tenured professor. The tenured faculty should protect the untenured. It is questionable whether that ideal exists.⁶⁵ The hierarchical structure of law faculties has created fissures where there should be solidarity and undermined tenure and academic freedom.

We tend to think that attacks on academic freedom are relics of the McCarthy era, a time in the words of the writer Harold Brodkey, when the nation “walked on tiptoe.”⁶⁶ Threats to academic freedom exist today.⁶⁷ Arab-Americans have been fired or threatened with dismissal from their positions for being Arab, or for their politics.⁶⁸ Politicians regularly demand that controversial faculty members be fired.⁶⁹ Drug companies have attempted to muzzle the unpalatable results of sponsored research.⁷⁰ In law schools the major threat to academic freedom has been attacks on the activities and clients of law school clinics.

D. *Attacks on Law School Clinics*

Robert Kuehn and Peter Joy have shown in an excellent article, “An Ethics Critique of Interference in Law School Clinics,”⁷¹ that since the

65. See generally, J. Peter Byrne, *Academic Freedom of Part-Time Faculty*, 27 J.C. & U.L. 583 (2001).

66. See Harold Brodkey, *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 Retrospective from the Trenches*, 22 WM. MITCHELL L. REV. 357, 358 (1996).

67. See Patrick D. Healy, *College Cancels Speech Over 9/11 Remarks*, N.Y. TIMES, Feb. 2, 2005 at B1; N.R. Kleinfeld, *Mideast Tensions Are Getting Personal on Campus at Columbia*, N.Y. TIMES, Jan. 18, 2005, at B1; Scott Smallwood, *Colorado Regents Will Investigate Professor Who Compared September 11 Victims to Nazis*, CHRON. HIGHER EDUC., Feb. 2, 2005.

68. See Jeffrey S. Strauss, *Dangerous Thoughts? Academic Freedom, Free Speech and Censorship Revisited in a Post-September 11th America*, 15 WASH. U. J.L. & POL’Y 343, 343 (2004).

69. See David Glenn, *Professor Who Said CBS Memos on Bush Might Not Be Fakes Is Pilloried by Critics Who Want Him Fired*, CHRON. HIGHER EDUC., Oct. 6, 2004, available at <http://chronicle.com/daily/2004/10/2004100602n.htm>; Jennifer Jacobson, *U.S. Lawmaker Urges Columbia U. to Fire Critic of Israel*, CHRON. HIGHER EDUC., Oct. 27, 2004, available at <http://chronicle.com/daily/2004/10/2004102702n.htm>.

70. See Philip J. Hilts, *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.).

71. Robert R. Kuehn & Peter Joy, *An Ethics Critique of Interference in Law School Clinics*,

late 1960s, politicians, attorneys, business interests and university officials have attacked law school clinics and their choices of clients and cases. This is no different an academic freedom issue from outsiders attacking a traditional faculty member's choice of a casebook or the content of her torts course.

This author contacted Professors Kuehn and Joy about the reaction of traditional tenured faculty to the travails of clinics under attack, and whether they thought the law school faculty structure undermined academic freedom.⁷² As to the impact on academic freedom of contract status in place of traditional tenure, they responded that clinical teachers without tenure have felt more vulnerable to political attacks, particularly if the interference was internal. When the controversy arose externally, clinicians have a much greater reason to fear loss of job or otherwise feel pressured to concede or yield some decision-making power in the selection of cases, clients, teaching methods, or goals. Professor Joy added that the absence of tenure influenced many in their choices of clinical cases and led to the self-censorship of potentially controversial cases.⁷³

The reaction of traditional tenured faculty to controversies involving clinics, said Professors Kuehn and Joy, has been a "mixed bag." Some tenured faculty members have been very supportive, recognizing the attacks on academic freedom. Others just don't understand the academic freedom analogue. Some law faculty worried about the effect of the clinics' actions on the law school, have stood silent, or recommended that the clinical professor back off of the case or client. The second-class status of clinical professors at some schools contributed to the lack of respect and appreciation of the clinician's situation.⁷⁴

The hierarchical structure of the law schools and the attenuated protections of academic freedom have, in some cases, made interference in clinics easier, for clinicians are more vulnerable than traditional faculty. This is a significant subject for broader inquiry. If Professors Kuehn and Joy's impressions are widely shared, then legal education should consider broadening the application of tenure, if only to reinforce

71 FORDHAM L. REV. 1971 (2003).

72. Email from Peter Joy, Professor of Law, Washington University in St. Louis, to James Fishman, Professor of Law, Pace University School of Law (Dec. 13, 2004, 05:12 EST) (copy on file with the Akron Law Review).

73. *Id.* He noted that in many situations the controversy arose unexpectedly. *Id.*

74. *Id.* This also was exacerbated by the geographical distance of many clinics from the rest of the law school. *Id.*

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notions of academic freedom.

Tenure will remain under attack, but will survive. It must evolve to meet new needs and challenges. In the law school context, tenure should become more inclusive of all full-time faculty. This would strengthen the institution.