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The Quest for Tenure: Job Security and Academic Freedom

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THE QUEST FOR TENURE: JOB SECURITY AND ACADEMIC FREEDOM

Mark L. Adams⁺

GOD: Arthur, King of the Britons, your Knights of the Round Table shall have a task to make them an example in these dark times.

ARTHUR: Good idea, O Lord!

GOD: 'Course it's a good idea! Behold! Arthur, this is the Holy Grail. Look well, Arthur, for it is your sacred task to seek this Grail. That is your purpose, Arthur . . . the Quest for the Holy Grail.¹

The concept of tenure originated in Europe in the twelfth century.² Several hundred years later, after the termination of several faculty members at Stanford University and other colleges, professors from leading universities in the United States called for the creation of a national association to develop general principles regarding tenure and legitimate bases for the termination of faculty members.³ Tenure is designed to protect a faculty member by safeguarding academic freedom, ensuring a fair process prior to dismissal, and providing job security. In recent years, tenure has come under increasing attack due to the financial costs on academic institutions and concerns regarding the creation of a system of disincentives for teaching and scholarly productivity. In addition, the tenure process has been criticized for denying opportunities to women and other underrepresented groups due to the application of collegiality as a criterion for selection. The end of mandatory retirement has also created difficulties for institutions in the hiring of new faculty members and other employment issues related to an aging faculty.

This Article addresses the issue of tenure as a condition of employment by examining the process for the awarding of tenure as an employment benefit and the impact of tenure on the employment relationship. Next, the Article addresses the nexus between tenure as a condition of employment and the protection of academic freedom, and the role of collegiality in the employment relationship. Finally, the Article examines the future of tenure and the specific problems of an aging faculty, financial challenges to academic institutions, and the increasing use of contract employees.

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1. MONTY PYTHON AND THE HOLY GRAIL (Python (Monty) Pictures, Ltd. 1975).

2. James J. Fishman, *Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others*, 21 PACE L. REV. 159, 163 (2000).

3. *Id.* at 165-66.

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INTRODUCTION

For a professor, tenure is often viewed as the “Holy Grail” of academic employment, a potentially quixotic pursuit that may yield great rewards. Alternatively, tenure has been labeled “[t]he worst form of [university] employment . . . save all of the other[] [options].”⁴

A board game satirizing the tenure process, *Survival of the Witless*, defines tenure as “the key to fame, wealth, happiness and most importantly, to never having to put in a single day’s work again.”⁵ After players are randomly dealt cards for their race, gender, class, and sexuality, they sleep their way to the top, fight over office window politics, and churn out articles that no one reads while waiting for the game-winning book contract.⁶

The purpose of this Article is to explore the relationship between tenure and employment by examining the history of tenure, tenure as a condition of employment, the concerns and obligations of collegiality as a condition of employment, and the future of tenure.

Tenure protects a faculty member by providing academic freedom, job security, and due process prior to dismissal. In recent years, tenure has come under

4. *Id.* at 159; see also HOWARD R. BOWEN & JACK H. SCHUSTER, AMERICAN PROFESSORS: A NATIONAL RESOURCE IMPERILED 240 (1986). The authors state that they could not identify any effective alternatives to the tenure system:

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

Id.

5. See Denise K. Magner, *Play Your Cards Right and You, Too, Can Earn Tenure*, CHRON. HIGHER EDUC. (Wash., D.C.), Sept. 11, 1998, at A16.

6. See *id.*

increasing attack due to the financial burden on academic institutions and concerns regarding the creation of a system of disincentives for teaching and scholarly productivity. In addition, the tenure process has been criticized for denying opportunities to women and other underrepresented groups due to the application of collegiality as a criterion for selection. The end of mandatory retirement has also created difficulties for institutions in the hiring of new faculty members and other employment issues related to an aging faculty.

This Article addresses the issue of tenure as a condition of employment by examining the process for the awarding of tenure as an employment benefit and the impact of tenure on the employment relationship. Next, the Article addresses the nexus between tenure as a condition of employment and the protection of academic freedom, and the role of collegiality in the employment relationship. Finally, the Article examines the future of tenure and the specific problems of an aging faculty, financial challenges to academic institutions, and the increasing use of contract employees.

I. TENURE AS A CONDITION OF EMPLOYMENT

Let's begin the quest. In order to understand the impact of tenure on the employment relationship, a summary of the quest may be helpful. In response to a job notice, a candidate applies for a position. After being interviewed by a group of employees, an applicant is offered a one-year, renewable contract. Following several years of probationary status, an individual's performance with regard to teaching, scholarship, and service is then judged by fellow employees. After a favorable review by co-workers that is affirmed by upper management, the employee receives a contract for lifetime employment, thereby altering the default at-will employment relationship that permits termination for any reason at any time. But is that what has actually occurred when a professor is awarded tenure?

A precise definition of tenure has been stated by Professor William Van Alstyne, former president of the American Association of University Professors (AAUP) and a faculty member at Duke Law School: "Tenure, accurately and unequivocally defined, lays no claim whatever to a guarantee of lifetime employment. Rather, tenure provides only that no person continuously retained as a full-time faculty member beyond a specified lengthy period of probationary service may thereafter be dismissed without adequate cause."⁷

The *1940 Statement of Principles on Academic Freedom and Tenure* of the American Association of University Professors, drafted by faculty and college presidents and endorsed by the Association of American Colleges, representing universities and almost 200 professional organizations, states:

Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men

7. William Van Alstyne, *Tenure: A Summary, Explanation, and "Defense"*, 57 AAUP BULL. 328, 328 (1971) (emphasis omitted).

and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to students and to society.⁸

Tenure provides an important protection through the benefit of job security that offsets the salary differences between those who choose an academic, as opposed to a professional or business, career.⁹ In general, tenure protects faculty members from retribution for the results of their research, for what they say and teach in class, for their actions in fulfilling their duties in university governance, and for their extramural utterances.¹⁰ By requiring a long and rigorous probationary period prior to the guarantee of job security, tenure acts as an employment policy adapted to the unique nature of a professor's job, specifically the time and expense required to train the employee to perform the job duties, the highly specialized nature of a professor's responsibilities, and the difficulty in monitoring the professor's work performance.¹¹

Tenure has come under increasing attack in recent decades, both in the United States and abroad, with the main argument against tenure being that it removes incentives for productivity and unfairly relieves professors of the economic uncertainty suffered by other workers.¹² Because of this concern and

8. AM. ASS'N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (1940), reprinted in AAUP POLICY DOCUMENTS AND REPORTS 3, 3 (9th ed. 2001) [hereinafter 1940 STATEMENT]. Studies of the tenure system have identified it as an economically efficient model. See H. Lorne Carmichael, *Incentives in Academics: Why Is There Tenure?*, 96 J. POL. ECON. 453, 471 (1988); Fritz Machlup, *In Defense of Academic Tenure*, 50 AAUP BULL. 112, 119 (1964); Michael S. McPherson & Gordon C. Winston, *The Economics of Academic Tenure: A Relational Perspective*, 4 J. ECON. BEHAV. & ORG. 163, 182 (1983); Aloysius Siow, *Tenure and Other Unusual Personnel Practices in Academia*, 14 J.L. ECON. & ORG. 152, 153-54 (1998). But see Robert W. McGee & Walter E. Block, *Academic Tenure: An Economic Critique*, 14 HARV. J.L. & PUB. POL'Y 545, 550 (1991).

9. BOWEN & SCHUSTER, *supra* note 4, at 237.

10. AM. ASS'N OF UNIV. PROFESSORS, COMMITTEE A STATEMENT ON EXTRAMURAL UTTERANCES (1964), reprinted in AAUP POLICY DOCUMENTS AND REPORTS 32, 32 (9th ed. 2001); Merton C. Bernstein, *Essay*, in *Praise of Tenure: A Cautionary Essay*, 71 WASH. U. L.Q. 1017, 1019 (1993).

11. McPherson & Winston, *supra* note 8, at 182.

12. See Matthew M. Bodah, *Significant Labor and Employment Law Issues in Higher Education During the Past Decade and What to Look for Now: The Perspective of an Academician*, 29 J.L. & EDUC. 317, 326 (2000); Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 LAW & COMTEMP. PROBS. 325, 327 (1990) ("[A]cademic tenure is always under attack. Usually we hear only grumbling and rumbling, as of distant artillery. But occasionally there is a prolonged fire-fight."); Fred L. Morrison, *Tenure Wars: An Account of the Controversy at Minnesota*, 47 J. LEGAL EDUC. 369, 369-70, 375-76 (1997); William G. Tierney, *Tenure is Dead. Long Live Tenure*, in *THE RESPONSIVE UNIVERSITY* 38, 38-39 (William G. Tierney ed., 1998); AnaMaria Conley, Letter to the Editor, *CHRON. HIGHER EDUC.* (Wash., D.C.), July 17, 1998, at B3 (arguing that faculty should be subjected to similar economic vagaries as professionals in other employment sectors); William H. Honan, *The Ivory Tower Under Siege*, N.Y. TIMES, Jan. 4, 1998, at EL33; Robin Wilson & Sharon Walsh, *Tears in the Fabric of Tenure*, *CHRON. HIGHER EDUC.* (Wash., D.C.), Jan. 10, 2003, at A8. Criticism of tenure is not new, as evidenced in Edward Gibbon's description of Oxford faculty in the eighteenth century:

Instead of animating the under-graduates by the example of diligence, they enjoyed in tranquil indolence the benefactions of the founder, and their slumbers were seldom disturbed by

others discussed below, tenure was officially restructured in England by the Thatcher government in the 1980s, and it has ceased to be offered in many European countries.¹³ Although professors in these countries do not enjoy the full benefits of tenure status in terms of job security, the employment laws in those countries provide far more protection to employees from unjust dismissal than the employment-at-will regime in the United States, with most employees enjoying some form of just cause requirement prior to termination.¹⁴ In addition, the academic freedom of university professors is still a fundamental principle in these countries.

With the founding of the first universities and colleges in the United States, the relationship between a university and a professor was typically contractual for a term of three years.¹⁵ Later, the creation of endowed chairs revised this relationship to award the individual professor a life-term or indefinite appointment.¹⁶ By the nineteenth century, faculty appointments were presumed to be for an indefinite term with dismissal only for cause, but because this presumption was not expressed in the contract of appointment, professors in most jurisdictions were deemed employees-at-will, so a professor could be terminated at any time for any reason.¹⁷

In the latter part of the nineteenth century, the organization of professors into departments based on national specialist organizations, and the professors' research within these narrower fields, created a system in which faculty could be better evaluated by peers, rather than university administrators or lay trustees.¹⁸ Faculty within a department and members of the national organizations who also specialized within the same field were recognized as possessing more knowledge about their colleagues' abilities and contributions to an area of learning than a university administrator.¹⁹ Peer review thus became the mechanism for a university to monitor employees and make informed hiring and promotion decisions.²⁰

the labor of writing, of reading, or thinking. Their discourse in the common room, to which I was sometimes admitted, stagnated in the narrow circle of college business and Tory politics; their deep and dull computations left them no right to censure the warmer intemperance of youth; and their constitutional toasts were not expressive of the most sincere loyalty to the house of Hanover.

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

13. See generally Jean Luc de Meulemeester, *Convergence of Higher Education Systems in Europe: The English and French Example*, 2 EUR. ED. RES. J. 628 (2003).

14. 1 AM. BAR ASS'N SECTION OF LABOR & EMPLOYMENT LAW, INTERNATIONAL LABOR AND EMPLOYMENT LAWS 68 (2d ed. 2003).

15. See Walter P. Metzger, *Academic Tenure in America: A Historical Essay*, in COMM'N ON ACADEMIC TENURE IN HIGHER EDUC., FACULTY TENURE 93, 117-19 (1973).

16. *Id.* at 120.

17. *Id.* at 132-35.

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

19. *Id.* at 46.

20. Metzger, *supra* note 15, at 142-43; Siow, *supra* note 8, at 160.

Following the controversial termination of several faculty members at Stanford University and other colleges between 1900 and 1913,²¹ professors from leading universities in the United States called for the creation of a national association to develop general principles regarding tenure and legitimate bases for the termination of faculty.²² In 1915, the AAUP published the *1915 Declaration of Principles on Academic Freedom and Academic Tenure* describing procedures for dismissal, with the basis of academic freedom grounded in the concepts of professional autonomy and collegial self-governance.²³ The faculty, rather than administrators or trustees, were to judge the fitness of a current member and conduct a fair trial, with the report declaring it inappropriate “that the power of determining when departures from the requirements of the scientific spirit and method have occurred, should be vested in bodies not composed of members of the academic profession[s].”²⁴ With universities charged with the duty to increase the sum of human knowledge and to provide general instruction to students as well as experts for public service, the *1915 Declaration of Principles on Academic Freedom and Academic Tenure* identified the expressive freedom of academics as a corresponding requirement.²⁵

A conference statement signed by the Association of American Colleges in 1925 gave tenure rights to faculty members on long-term or permanent appointments.²⁶ In 1940, the AAUP and the Association of American Colleges negotiated a new set of principles that provided job security based on years of service, and declared that all dismissals, except in cases of financial exigency, must be for cause and reviewed through a trial-type process.²⁷

As normative expressions, the *1940 Statement of Principles on Academic Freedom and Tenure* and related declarations act as private constitutional or contractual agreements at many academic institutions. For example, a typical faculty handbook will include the following statement:

[The university] is committed to academic freedom, for only with such freedom will the members of the University who teach and learn be able to benefit society by judgments and criticisms which might otherwise be withheld because of fear of offending a dominant social group or a transient social attitude. . . .

21. See Fishman, *supra* note 2, at 165-66 (discussing the termination at Stanford University); Metzger, *supra* note 15, at 146; see also Jon Weiner, *Tenure Trouble*, DISSENT, Winter 1998, at 60, 60 (discussing the termination of professors who opposed World War I for pacifist or socialist reasons, including singer Pete Seeger’s father, who was terminated from the University of California at Berkeley).

22. Fishman, *supra* note 2, at 166-67; Metzger, *supra* note 15, at 135.

23. Fishman, *supra* note 2, at 167-68.

24. AM. ASS’N OF UNIV. PROFESSORS, 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE (1915), *reprinted in* AAUP POLICY DOCUMENTS AND REPORTS 291, 298 (9th ed. 2001) [hereinafter 1915 DECLARATION].

25. *Id.* at 295.

26. Metzger, *supra* note 15, at 151-52.

27. 1940 STATEMENT, *supra* note 8, at 3-4; Metzger, *supra* note 15, at 152-53.

Academic freedom guarantees members of the faculty the freedom to investigate, teach, and publish in their various areas of competence without fear of retaliation in pursuit of the truth in the realm of ideas.²⁸

By including this provision in the faculty handbook, these standards become enforceable contract provisions in the faculty member's employment relationship with the university. The employment relationship will be governed not only by the letter of appointment, but also by professional and institutional policies. In addition, courts may look to institutional practices and customs, as well as oral, written, and implied assurances of key administrators that relate to the rights and responsibilities of the parties.

The awarding of tenure thus changes the employment-at-will relationship, in which an employee can be terminated for any reason, by providing two specific protections: first, job security by requiring cause for termination; and second, academic freedom. At a private institution, tenure disputes are governed by contract law, while a dispute at a public university is a matter of state administrative law. This creates important differences regarding matters of proof and available remedies; specific performance is rarely awarded in a wrongful dismissal case involving a private university, in contrast to an order of reinstatement under the applicable state law in a case involving dismissal at a public university.²⁹ State employees will also enjoy constitutional protections, such as the right to privacy and free speech, which may not be available to employees at a private institution, and courts have also held that tenure is a property interest protected by the United States Constitution when conferred by a public institution.

A. Job Security

Under the AAUP guidelines, dismissals, except in cases of financial exigency, must be for cause and reviewed through a trial-type process.³⁰ While the complexity of this process is criticized for making dismissal almost impossible,³¹ the procedure should be rigorous and thorough, considering the significance of the consequences to the individual and the institution. In order to shorten the process without impacting the protection of academic freedom, the employment contract or handbook could require binding arbitration, an alternative recognized by the AAUP.

28. VALPARAISO UNIV., FACULTY HANDBOOK §§ 2.3.3, 2.3.3.2 (2000) [hereinafter VALPARAISO FACULTY HANDBOOK].

29. ARVAL A. MORRIS, DISMISSAL OF TENURED HIGHER EDUCATION FACULTY: LEGAL IMPLICATIONS OF THE ELIMINATION OF MANDATORY RETIREMENT 27-30 (1992); Fishman, *supra* note 2, at 169.

30. *See* AM. ASS'N OF UNIV. PROFESSORS, RECOMMENDED INSTITUTIONAL REGULATIONS ON ACADEMIC FREEDOM AND TENURE (1982), *reprinted in* AAUP POLICY DOCUMENTS AND REPORTS 21, 26-27 (9th ed. 2001); *see also* AM. ASS'N OF UNIV. PROFESSORS, ON INSTITUTIONAL PROBLEMS RESULTING FROM FINANCIAL EXIGENCY: SOME OPERATING GUIDELINES (1978), *reprinted in* AAUP POLICY DOCUMENTS AND REPORTS 230, 230 (9th ed. 2001) [hereinafter FINANCIAL EXIGENCY].

31. *See* BOWEN & SCHUSTER, *supra* note 4, at 243.

An example of tenured faculty losing their positions due to financial exigency would be the restructuring plan recently announced by Tulane University in the aftermath of Hurricane Katrina that will eliminate the majority of doctoral programs and several undergraduate majors, resulting in 233 faculty members being terminated, sixty-five of them tenured.³² Under AAUP guidelines, the university must provide advance notice of the terminations, discuss the plan with the faculty, and provide adequate severance pay.³³

About fifty percent of full-time faculty are tenured, and out of the approximately 300,000 tenured professors in the United States, there are about fifty to seventy-five formal dismissals for cause each year, with other cases informally settled.³⁴ Harvard University has never dismissed a professor for cause in over 300 years, even in the infamous case in which a professor murdered a colleague over a debt and was later hanged for the crime.³⁵

For example, in Colorado—where the question of sufficient cause for dismissal arose after Professor Ward Churchill's reference to victims in the World Trade Center as "little Eichmanns,"³⁶—grounds for dismissal are the following: "professional incompetence, neglect of duty, insubordination, conviction of a felony or any offense involving moral turpitude . . . or sexual harassment or other conduct which falls below minimum standards of professional integrity."³⁷ The University of Colorado has reaffirmed Churchill's right to academic free speech, and has declined to pursue any actions against him based on his statements about the September 11th victims.³⁸

In general, cause has been found to exist based on professional incompetence, illegal activity, or sexual harassment, which may involve illegal activity or a violation of university policies.³⁹ An employee's actions that are

32. Jeffrey Selingo, *Tulane Slashes Departments and Lays Off Professors*, CHRON. HIGHER EDUC. (Wash., D.C.), Dec. 16, 2005, at A1.

33. See FINANCIAL EXIGENCY, *supra* note 30, at 230; Selingo, *supra* note 32.

34. Joann S. Lublin, *Travel Expenses Prompt Yale to Force Out Institute Chief*, WALL ST. J., Jan. 10, 2005, at B1; see also MORRIS, *supra* note 29, at 80; Neil W. Hamilton, *Peer Review: The Linchpin of Academic Freedom and Tenure*, ACADEME, May-June 1997, at 15, 18.

35. See SAMUEL ELIOT MORISON, *THREE CENTURIES OF HARVARD* 282-86 (Harvard University Press 1964) (1936). Professor John W. Webster, who taught chemistry and mineralogy at Harvard College and the Medical School, borrowed money from Dr. George Parkman, a fellow faculty member at Harvard Medical School, and later murdered Dr. Parkman over the debt. *Id.* at 283-84. Professor Webster was hanged in 1850, with the minutes of the Medical School faculty meeting "simply stat[ing] that Dr. Webster was no longer around, that his professional associates 'regretfully took note of action by the civil authorities,' and that they had voted to fill the vacancy that existed 'in Dr. Webster's absence.'" E.J. KAHN, JR., *HARVARD: THROUGH CHANGE AND THROUGH STORM* 87 (1968).

36. For a discussion of the controversy over Professor Ward Churchill's career and statements, see Scott Smallwood, *Inside a Free-Speech Firestorm*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 18, 2005, at A10.

37. Univ. of Colo. Bd. of Regents, University of Colorado Faculty Handbook art. 5, pt. C (2002), <http://www.cu.edu/regents/laws/Article5C.htm>.

38. Smallwood, *supra* note 36.

39. See Brian G. Brooks, *Adequate Cause for Dismissal: The Missing Element in Academic Freedom*, 22 J.C. & U.L. 331, 353-54 (1995); Timothy B. Lovain, *Grounds for Dismissing Te-*

illegal or violate university policy provide a clearer case for cause to dismiss than one based on incompetence. Because dismissal for cause based on incompetence involves subjective standards, they generally are also supported by a “smoking gun,” such as when a professor fails to show up for class, give grades, or is grossly unprepared or disorganized in presentation.⁴⁰ Faculty members have also been dismissed for insubordination in a few cases, although these also tend to involve a smoking gun, such as failing to return on time from a lecture abroad to begin the fall semester when a request to return two weeks late was denied, or failing to address poor teaching by not attending required

nured Postsecondary Faculty for Cause, 10 J.C. & U.L. 419, 422-23 (1983-84); Donna R. Euben, Faculty Termination and Disciplinary Issues, Oct. 24, 2004, <http://www.aaup.org/Legal/info%20outlines/04facdis.htm>. Allegations of immoral behavior must be understood in the context of higher education. See, e.g., *Texton v. Hancock*, 359 So. 2d 895, 896-97 (Fla. Dist. Ct. App. 1978) (finding insufficient grounds for the dismissal of a professor for immorality, where the charges included using profanity in the classroom and drinking heavily in a student’s home, because “Ms. Texton’s conduct must be judged in the context of her more liberal, open, robust college surroundings”). Immoral behavior as grounds for dismissal of faculty members tends to cover sexual misconduct, harassment, and dishonesty. Plagiarism is a typical basis for academic dishonesty. See, e.g., *Yu v. Peterson*, 13 F.3d 1413, 1417-18 (10th Cir. 1993) (upholding termination of faculty member appointment at the University of Utah because of plagiarism found by faculty committee, which determined that Dr. Yu “knowingly held out the disputed paper as his own work, with knowledge that it included extensive duplications or close paraphrasing of the co-authored report” (citation omitted)); *Agarwal v. Regents of the Univ. of Minn.*, 788 F.2d 504, 505-06, 510 (8th Cir. 1986) (upholding university’s dismissal of faculty member for the immoral conduct of plagiarizing a laboratory manual); see also *Filippo v. Bongiovanni*, 961 F.2d 1125, 1128-29, 1132-33, 1139-40 (3d Cir. 1992) (upholding dismissal by Rutgers University of a tenured chemistry professor, relying in part on the university’s adoption of AAUP’s professional ethics statement to find the professor had “exploited, threatened and been abusive” to “visiting Chinese scholars brought to the University to work with him on research projects”); *King v. Univ. of Minn.*, 774 F.2d 224, 225, 229 (8th Cir. 1985) (upholding dismissal of tenured faculty member based, in part, on the evaluations of colleagues and consecutive department chairs about his poor teaching, undocumented research, and low enrollment); *Korf v. Ball State Univ.*, 726 F.2d 1222, 1227-28 (7th Cir. 1984) (upholding dismissal of faculty member for violation of professional ethics based on AAUP’s statement); *Riggin v. Bd. of Trs. of Ball State Univ.*, 489 N.E.2d 616, 619, 632 (Ind. Ct. App. 1986) (upholding dismissal where professor failed to cover relevant topics in the course syllabus, organized lectures poorly, failed to attend class regularly, and failed to provide students the opportunities to meet with him one-on-one); *Stastny v. Bd. of Trs. of Cent. Wash. Univ.*, 647 P.2d 496, 504, 506-08 (Wash. Ct. App. 1982) (upholding termination of tenured faculty member for unapproved leaves of absence, including a trip to Israel during the beginning of the semester, after repeated “liberal grants of absences,” because professor’s conduct related substantially to his fitness as a faculty member); *Yao v. Bd. of Regents of Univ. of Wis. Sys.*, 649 N.W.2d 356, 366-67, 370 (Wis. Ct. App. 2002) (upholding board’s decision to dismiss professor for “intentionally tampering with a colleague’s laboratory materials”); *Trimble v. W. Va. Bd. of Dirs.*, 549 S.E.2d 294, 304-05 (W. Va. App. 2001) (ruling that a school administration violated West Virginia Constitution when it terminated a tenured public higher education teacher with a “previously unblemished record,” for a minor incident of insubordination, specifically the professor’s failure to submit his syllabi using new campus software).

40. See, e.g., *McConnell v. Howard Univ.*, 818 F.2d 58, 59, 62 (D.C. Cir. 1987) (remanding case for further proceedings in breach-of-contract action by professor who challenged his dismissal for “neglect of professional responsibilities”); *Prebble v. Broderick*, 535 F.2d 605, 608 (10th Cir. 1976) (upholding dismissal of tenured faculty member for neglect of duty, which involved professor’s failure to teach eight days of scheduled classes in one semester).

training seminars.⁴¹ Cases involving incompetence and insubordination also typically reflect a history of ongoing problems rather than a one-time incident. In reviewing these dismissals, courts are very deferential to the decision of the university. As long as the university followed the stated procedures for dismissal in a fair manner, the termination will be affirmed.

Similar to the criticism directed at the just cause protection for union employees and civil servants—which asserts that those employees effectively enjoy a no-cause standard, making termination almost impossible—critics of tenure argue that it protects the lazy and incompetent.⁴² In the words of one commentator, tenure “protects not only the thinker, the intellectual pioneer, the social critic but also the inert, the barely competent, the perfunctory reciter of ancient lessons, and the one-time scholar who now devotes his best energies to more lucrative pursuits.”⁴³

Because of the long probationary period prior to the granting of tenure, and the fact that dismissal will effectively end the individual’s academic career, the termination decision should require a detailed, fair review conducted and supported by the judgment of peers.⁴⁴ Furthermore, due process prior to dismissal serves to protect the interests of academic freedom. Due to these concerns, the decision to terminate should be initially made by one’s peers after a careful and fair process as required by the detailed AAUP procedures.⁴⁵ Rather than focusing on the difficulty of removing faculty members, the emphasis should be on the protection afforded to faculty and the need for careful review of a candidate’s qualifications prior to granting tenure. In the vast majority of tenure revocation cases, evidence was presented showing that concerns were raised during the tenure process which continued or became exacerbated after the award of tenure. As with any employment relationship, issues that arise regarding an employee’s productivity, interpersonal relations, and quality will not simply go away over time, particularly when the employee is protected by a just cause standard.

During the six- to ten-year probationary period, the tenured faculty must carefully fulfill their responsibilities as managers in a consistent manner. While peer review is the primary duty of the faculty, university administrators and university counsel play an important role in ensuring consistency between different departments and schools, and also in serving as the final guardians of the gate. When it is remembered that a decision to award tenure involves a commitment of several million dollars in salary and benefits over a thirty- to fifty-year period, the level of scrutiny should dramatically increase. Both faculty and administrators must carefully examine the candidate’s record to de-

41. See, e.g., Stastny, 647 P.2d at 501, 504.

42. See Brooks, *supra* note 39, at 332.

43. ROBERT M. MACIVER, ACADEMIC FREEDOM IN OUR TIME 240 (1955).

44. Fishman, *supra* note 2, at 174.

45. See generally AM. ASS’N OF UNIV. PROFESSORS, STATEMENT ON PROCEDURAL STANDARDS IN FACULTY DISMISSAL PROCEEDINGS (1958), reprinted in AAUP POLICY DOCUMENTS AND REPORTS 11, 11-14 (9th ed. 2001).

termine not only the quality of the individual's teaching, scholarship, and service during the probationary period, but more importantly, the likelihood the individual will continue to grow and be an effective contributor to the academic community.

Tenured faculty members who fail to fulfill their potential as scholars, teach poorly, or create a toxic environment that undermines collegial self-governance are a cost to colleagues, students, the university, and society.⁴⁶ The question is what to do about the deadwood.⁴⁷ When these problems rise to the level of just cause, colleagues and the university must take action to preserve the integrity of both the institution and tenure.

A common refrain against tenure is that it perpetuates mediocrity and results in deadwood faculty members.⁴⁸ The first argument is that deadwood flourishes as mediocre faculty members are awarded tenure and perpetuates a culture of bad teaching, little or no scholarship, and lack of productive service.⁴⁹ This criticism relates to the selection process and the requirement of careful judgment by faculty and administrators before awarding tenure. This aspect of the deadwood problem can be avoided or at least mitigated by instituting fair and rigorous pre-tenure scrutiny.

The second argument asserts that faculty members who have previously demonstrated great scholarly energy and potential are transformed by the system of academic tenure and resulting job security into deadwood.⁵⁰ By eliminating the threat to their livelihood, academics are no longer sufficiently stimulated by the difficult and time-consuming work of teaching and scholarship that initially lead them to achieve tenure status.⁵¹

Although some employees can certainly slip through the process, this fact does not support an elimination of tenure and the resulting loss of job security and threat to academic freedom. Studies of corporate downsizing and the resulting concerns about job security indicate there may be a short-term improvement in the financial condition of the corporation, but the corporation suffers long-term consequences in loss of employee morale, lack of loyalty and trust, and ongoing employment insecurity with no improvement in productivity.⁵² Furthermore, no conclusive evidence demonstrates that tenure adversely

46. Fishman, *supra* note 2, at 186-87.

47. Estimates as to the amount of deadwood in academia range from two to five percent. See HENRY ROSOVSKY, *THE UNIVERSITY: AN OWNER'S MANUAL* 210-11 (1990); Brown & Kurland, *supra* note 12, at 332.

48. See ROSOVSKY, *supra* note 47, at 207 (quoting a speech by Harvard faculty member John Kenneth Galbraith: "Faculty control of appointments *can* sometimes be a means to self-perpetuating quality. It can more especially be a means to self-perpetuating mediocrity. And in a world of change, it can be a powerful tendency to academic obsolescence.").

49. Fishman, *supra* note 2, at 188.

50. *Id.*

51. Machlup, *supra* note 8, at 116-17.

52. See Fishman, *supra* note 2, at 189-90; Adam Bryant, *What Price Efficiency? Focus on Costs May Have Blurred Delta's Vision*, N.Y. TIMES, July 25, 1997, at D1; Rosabeth Moss Kanter, *Show Humanity When You Show Employees the Door*, WALL ST. J., July 21, 1997, at A22.

affects productivity or teaching effectiveness.⁵³ In addition, tenured faculty members not only have rights as previously discussed, but also have obligations for continued professional development and the maintenance of professional standards. Failure to fulfill these responsibilities violates the agreement with the university, one's duty to colleagues and students, and the trust that society puts on the academic institutions. The university must also institute policies to effectively promote faculty development and address problems as they arise.

B. Academic Freedom

The job security provided to academics by tenure is designed to serve principally as a "guarantor of academic freedom."⁵⁴ As defined in the *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, academic freedom protects three key areas: "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action."⁵⁵ A non-legal concept, this freedom gives professors the liberty, established through professional associations, that shields them from administrative or political interference with their teaching, research, service in the university and profession, and institutional and academic self-governance.

Contrary to common notions of academic freedom, from a historical perspective, academic freedom is based "in professional autonomy and collegial self-governance," rather than free speech.⁵⁶ The term "academic freedom" refers to the "rights necessary for the preservation of the unique functions of the university, particularly the goals of disinterested scholarship and teaching."⁵⁷ The nexus between academic freedom and the job security provided by tenure is the requirement that due process be provided prior to termination for cause, which preserves the foundational principle, guiding beliefs, and distinguishing characteristics of a liberal arts education at an academic institution: unfettered objective inquiry supported and challenged by reasoned analysis and discussion.⁵⁸

53. Robert B. Conrad & Louis A. Trosch, *Renewable Tenure*, 27 J.L. & EDUC. 551, 561-64 (1998).

54. See Fishman, *supra* note 2, at 175.

55. 1915 DECLARATION, *supra* note 24, at 292; see also 1940 STATEMENT, *supra* note 8, at 3-4; Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, 53 LAW & CONTEMP. PROBS. 3, 15 (1990) (noting that protection for extramural utterances and actions was included because punishment was more common for public statements and actions outside the university than within the classroom).

56. Haskell, *supra* note 18, at 54.

57. J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251, 262 (1989); see also NORMAN BIRNBAUM, *Students, Professors and Philosopher Kings*, in SEARCHING FOR THE LIGHT: ESSAYS ON THOUGHT AND CULTURE 155, 156-57 (1993) ("Not ideas of any sort, but ideas promulgated according to disciplined and publicly accepted procedures, have rights in the university.").

58. See Fishman, *supra* note 2, at 176; see also Byrne, *supra* note 57, at 288 ("Our colleges and universities are valued because their work and the time we spend in them affirms the worth of free inquiry and the capacity of the trained mind to see things, however partially, as they are. The

By permitting faculty to express or promote what may be judged as unpopular or controversial views, tenure protects the individual from retaliation when engaged in such expression and research.⁵⁹

Rather than viewing tenure as a luxury or bonus provided to faculty without a benefit to the employer, it is more correctly described as the foundational, legitimating cornerstone of a university.⁶⁰ The pursuit of disinterested scholarship and teaching, which is reviewed by one's peers according to the particular discipline's professional norms of competence rather than by the political, social, or ideological views of administrators, trustees, legislators, or the community, free from the threat of discipline or discharge, "protects . . . [both] the individual faculty member [and] the integrity of the university."⁶¹ While tenure and the corresponding academic freedom provide an important benefit to faculty members, they also provide an important benefit to society through the unfettered pursuit of scholarly ideas. In fact, the AAUP's *1940 Statement of Principles on Academic Freedom and Tenure* identifies the primary purpose of tenure as serving and providing a benefit to society by the unimpeded search for truth and its exposition.⁶² Objective, disinterested inquiry tested by the scientific method or subjected to peer review serves as a foundational principle of the modern university, fulfilling the call to benefit society and the public good.⁶³

Absent the job security provided by tenure, professors would be hesitant to engage in the intellectual experimentation and pursuit of new ideas and challenges necessary for rigorous scholarship. For example, with this security, I can make assertions in this Article with which my colleagues, university administrators, and the community may disagree without fear of jeopardizing my livelihood. But this security not only permits a faculty member to pursue ideas that may be controversial; it also encourages investigation and experimentation in areas that may have a high probability of failure. This point is especially

modern university epitomizes a liberal faith that a free people can, like the college itself, cast off authoritarianism without lapsing into total relativism or incoherence.”)

59. See, e.g., ROSOVSKY, *supra* note 47, at 180; see also Ronald Dworkin, *We Need a New Interpretation of Academic Freedom*, in *THE FUTURE OF ACADEMIC FREEDOM*, *supra* note 18, at 181, 187.

60. See, e.g., Louis Menand, *The Limits of Academic Freedom*, in *THE FUTURE OF ACADEMIC FREEDOM*, *supra* note 18, at 3, 4. The author notes that:

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

Id. at 4.

61. See Byrne, *supra* note 57, at 278-79; Dworkin, *supra* note 59, at 187; Fishman, *supra* note 2, at 177.

62. 1940 STATEMENT, *supra* note 8, at 3; see also Machlup, *supra* note 8, at 119, 123-24.

63. See CLARK BYSE & LOUIS JOUGHIN, *TENURE IN AMERICAN HIGHER EDUCATION* 4 (1959); Byrne, *supra* note 57, at 269-88; Hamilton, *supra* note 34, at 15-16.

important in the sciences, where many years, the expenditure of large sums of money, and numerous experimental failures may precede a great success. Such risky ideas can be pursued by tenured faculty members without jeopardizing their employment relationship.⁶⁴ A similar example is provided by the federal judiciary, where life-time appointments permit judges to exercise independent judgment without threats to their employment status, although this notion is certainly controversial today, and is the subject of similar criticism to the job security and freedom afforded to professors by tenure.⁶⁵ Tenure also encourages research and scholarship in areas of knowledge, providing important benefits to society that would not be pursued by industry or other professions due to the lack of marketability or potential revenue.⁶⁶

II. TENURE AND THE ROLE OF COLLEGIALITY

Although the tenure decision is based principally on the candidate's record of teaching, scholarship, and service, a successful candidate may react as Sally Field did in her acceptance speech for the Best Actress Oscar for *Places in the Heart*, where she exclaimed, "you like me, you really like me."⁶⁷ This reaction is due to the role of collegiality in the tenure decision. Yet, too often, people confuse collegiality with congeniality.

Congenial is defined as "[h]aving the same tastes, habits, or temperament; sympathetic; [o]f a pleasant disposition; friendly and sociable: a congenial host."⁶⁸ In contrast, collegial is defined as "[c]haracterized by or having power and authority vested equally among colleagues."⁶⁹

Collegiality impacts the employment relationship in two principle ways. First, it is used as a selection criterion for initial hiring and the tenure decision, either as a stated departmental or institutional policy, or as an informal policy.⁷⁰ Second, tenure-track and tenured faculty members have a duty of collegiality in the fulfillment of their job responsibilities, specifically teaching, scholarship, and service, as well as in fulfilling their dual role as employees and managers in collegial self-governance. The use of collegiality in making tenure and ter-

64. Byrne, *supra* note 57, at 274.

65. See ABA COMM'N ON SEPARATION OF POWERS & JUDICIAL INDEPENDENCE, AN INDEPENDENT JUDICIARY (1997), available at <http://www.abanet.org/govaffairs/judiciary/report.html>; see also Frank H. Easterbrook, *What's So Special About Judges?*, 61 U. COLO. L. REV. 773, 775-776 (1990).

66. See Carmichael, *supra* note 8, at 455; Fishman, *supra* note 2, at 183-84.

67. See Sally Field Information, <http://www.tv.com/sally-field/person/35537/summary.html> (last visited Sept. 20, 2006). For film buffs, she actually stated "I can't deny the fact that you like me, right now . . . you like me." *Id.*

68. *Congenial*, <http://dictionary.reference.com/search?q=congenial> (last visited Sept. 20, 2006) (emphasis omitted).

69. *Collegial*, <http://dictionary.reference.com/search?q=collegial> (last visited Sept. 20, 2006).

70. For a general overview of the role of collegiality in tenure and termination decisions, see KENT M. WEEKS, *MANAGING DEPARTMENTS: CHAIRPERSONS AND THE LAW* 78-86 (1997).

mination decisions has significantly increased,⁷¹ and the application of collegiality in academic employment matters has often been criticized.⁷²

Courts have consistently upheld the right of an institution to consider an individual's ability to work effectively with colleagues when making tenure, promotion, and termination decisions.⁷³ In 1981, the Fourth Circuit introduced

71. See WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 166 (3d ed. Supp. 2000).

72. See Gregory M. Heiser, "Because the Stakes are So Small": *Collegiality, Polemic, and Professionalism in Academic Employment Decisions*, 52 U. KAN. L. REV. 385, 388-89 (2004) (discussing criticisms of collegiality in academic employment decisions); Alvin Snider, *Stifling the Naysayer in an Age of Compulsory Niceness*, CHRON. HIGHER EDUC. (Wash., D.C.), May 7, 1999, at A64 (stating opposition to the expectation of good institutional citizenship and successful and effective interaction with colleagues as a criteria for tenure); see also Perry A. Zirkel, *Personality as a Criterion for Faculty Tenure: The Enemy It Is Us*, 33 CLEV. ST. L. REV. 223, 224 (1984-85) (arguing that judges must more carefully review tenure decisions based on collegiality). See generally Edgar Dyer, *Collegiality's Potential Chill Over Faculty Speech: Demonstrating the Need for a Refined Version of Pickering and Connick for Public Higher Education*, 119 EDUC. L. REP. 309 (1997) (asserting that collegiality used in academic employment matters threatens academic free speech and the integrity of higher education).

73. See generally TERRY L. LEAP, *TENURE, DISCRIMINATION, AND THE COURTS* 107-12 (2d ed. 1995); Ralph D. Mawdsley, *Collegiality as a Factor in Tenure Decisions*, 13 J. PERSONNEL EVALUATION IN EDUC. 167, 176-77 (1999) ("To date, no court has found that the use of collegiality in making tenure decisions is inappropriate. However, judicial conflicts arise not so much as to whether collegiality can be a legitimate factor in a tenure decision but as to whether collegiality has been invoked in a manner that is discriminatory or violative of free speech."); see, e.g., *Levi v. Univ. of Tex.* at San Antonio, 840 F.2d 277, 282 (5th Cir. 1988) ("[T]he future of the academic institution and the education received by its students turn in large part on the collective abilities and collegiality of the school's tenured faculty."); *Curtis v. Univ. of Houston*, 940 F. Supp. 1070, 1075 (S.D. Tex. 1996) (order granting summary judgment) ("In considering a decision to grant that ultimate achievement [promotion] to a professor, the committee *must* take into account not only his quantifiable productivity but also his unquantifiable personality, collegiality, and future or projected performance, among myriad other factors about which the court can only speculate."); *aff'd*, 127 F.3d 35 (5th Cir. 1997) (without opinion); *Bresnick v. Manhattanville Coll.*, 864 F. Supp. 327, 329 (S.D.N.Y. 1994) (stating that in evaluating service to an institution, the teacher's ability to cooperate is particularly relevant when making a decision for a long-term grant of tenure); *Garvey v. Dickinson Coll.*, 775 F. Supp. 788, 798 (M.D. Pa. 1991) (upholding the termination of a faculty member described by college witnesses as being unwilling to cooperate with colleagues, a divisive presence within the department, and unable to cooperate productively with other faculty); *Johnson v. Mich. State Univ.*, 547 F. Supp. 429, 439-40 (W.D. Mich. 1982) (upholding the university's denial of tenure to a black female described by colleagues as having an abrasive personality, engaging in repeated clashes with students and faculty, being an ineffective teacher, and failing to pass medical board examinations), *aff'd*, 723 F.2d 909 (6th Cir. 1983) (without opinion); *Perham v. Ladd*, 436 F. Supp. 1101, 1107 (N.D. Ill. 1977) ("Professional disagreements with members of an academic department are sufficient, nondiscriminatory reasons to deny tenure."); *McGill v. Regents of Univ. of Cal.*, 52 Cal. Rptr. 2d 466, 472 (Cal. Ct. App. 1996) (concluding that collegiality is an appropriate consideration when making a tenure decision); *Univ. of Baltimore v. Iz*, 716 A.2d 1107, 1117 (Md. Ct. Spec. App. 1998) (holding that collegiality is a valid consideration for a tenure decision, and stating, "[b]ecause tenure decisions require subjective judgments regarding candidates' qualifications and because of the long-term commitment a decision of tenure necessarily entails, courts should be wary of intruding into the world of university tenure decisions, absent discrimination or other unlawful action by the university." (quoting *Stern v. Univ. of Okla. Bd. of Regents*, 841 P.2d 1168, 1172 (Okla. Civ. App. 1992))). For a detailed discussion of some of these cases, see Mary Ann Connell & Frederick G. Savage,

the term “collegiality” as a separate criterion for use in tenure and promotion decisions, defining collegiality as “the capacity to relate well and constructively to the comparatively small bank of scholars on whom the ultimate fate of the university rests.”⁷⁴ Courts have given great deference to tenure decisions due to the highly subjective nature of the decision, expressing a reluctance to substitute their judgment for the faculty and administrators responsible for those decisions who have greater experience and expertise in such evaluation. As stated by the First Circuit, “in view of the substantial commitment a university makes to an individual by granting him tenure, universities have a strong need for, and traditionally have enjoyed a wide discretion in, exercising what is largely a subjective judgment in deciding to whom to grant tenure.”⁷⁵ In fact, the Second Circuit has concluded that “[o]f all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision.”⁷⁶ Although most colleges and universities do not expressly identify collegiality as a fourth criterion for tenure, collegiality is often included as part of teaching or service by requiring that faculty “work well with colleagues, demonstrate good academic citizenship, or contribute to a collegial atmosphere.”⁷⁷

The Role of Collegiality in Higher Education Tenure, Promotion, and Termination Decisions, 27 J.C. & U.L. 833, 840-47 (2001).

74. *Mayberry v. Dees*, 663 F.2d 502, 514 (4th Cir. 1981). In the case, East Carolina University, in contrast to most universities, implicitly referred to collegiality in its policies on promotion and tenure by considering a faculty member’s “constructive relationship with colleagues.” *Id.* at 504, 514 n.26.

75. *Lovelace v. Se. Mass. Univ.*, 793 F.2d 419, 422 (1st Cir. 1986); *see also* Perry A. Zirkel, *The Personality Problem*, 80 PHI DELTA KAPPAN 622, 638 (1999) (quoting Dawna Cobb, attorney for the university in *Iz*, 716 A.2d at 1107, who said that the decision represents “common sense that in making a lifetime appointment, it is necessary and proper for the institution to evaluate how the faculty member performs the job, including whether any behavioral difficulties are not in the best interests of the department or the university”).

76. *Faro v. N.Y. Univ.*, 502 F.2d 1229, 1231-32 (2d Cir. 1974); *see also* John D. Copeland & John W. Murry Jr., *Getting Tossed from the Ivory Tower: The Legal Implications of Evaluating Faculty Performance*, 61 MO. L. REV. 233, 246 (1996) (“Traditionally, the courts have been reluctant to interfere in what has been basically deemed an academic exercise.”); Jonathan M. Paretsky, *Judicial Review of Discretionary Grants of Higher Education Tenure*, 83 EDUC. L. REP. 17, 21 (1993) (discussing the reluctance of courts to reexamine administrative evaluation of faculty merit and the deference given to the experience and expertise of administrators).

77. *Connell & Savage*, *supra* note 73, at 834. For example, the Valparaiso University Faculty Handbook includes the following provisions:

2.3.4.5 Acceptability as a Colleague

In addition to support of the University’s purposes as described above, the University also assumes a congenial and collegial relationship among its faculty. This includes civility in discourse and a willingness to “carry one’s share of the load” in teaching, advising, research, committee work, and other forms of University service. The quality of contributions, not merely the numbers of committees and assignments, remains a significant consideration.

.....

2.3.5.1.2.4 Collegiality and Contributions to the Purposes of the University

Faculty should prepare a statement that discusses their service to the University and the community. Briefly describe activities such as committee memberships and offices held, participation in interdisciplinary and general education programs, advising and recruitment

As with any workforce, job satisfaction and productivity increase when a campus enjoys a collegial working atmosphere.⁷⁸ For the institution, “[t]he successful governance of the academic business of the university depends on cooperation.”⁷⁹ Universities and colleges, including fellow faculty members, have a legitimate expectation that a faculty member will cooperate and work in an effective and positive manner in the best interests of the institution rather than in isolation and solely in his or her personal interest.⁸⁰ Failure to do so prevents an institution from fulfilling its mission, and like any business in which employees do not work effectively to achieve common goals, the business will ultimately be unsuccessful.

This duty has also been addressed by the AAUP in its *Statement on Professional Ethics*, stating:

As colleagues, professors have obligations that derive from common membership in the community of scholars. Professors do not discriminate against or harass colleagues. They respect and defend the free inquiry of associates. In the exchange of criticism and ideas professors show due respect for the opinions of others. Professors acknowledge academic debt and strive to be objective in their professional judgment of colleagues. Professors accept their share of faculty responsibilities for the governance of their institution.⁸¹

of students, and working with students outside the classroom. Note activities demonstrating involvement in community service and commitment to social responsibility, such as membership in community organizations and volunteer work. Establishing the quality of such contributions remains equally important as enumerating the number of committees and assignments.

VALPARAISO FACULTY HANDBOOK, *supra* note 28, §§ 2.3.4.5, 2.3.5.1.2.4.

78. See Connell & Savage, *supra* note 73, at 836; Mary Ann Connell & Robert M. O’Neil, *The Role of Civility, Collegial Relationships, and Good Academic Citizenship Among Faculty on the College/University Campus*, Conference Papers, Tenth Annual Conference on Legal Issues in Higher Education, University of Vermont (Oct. 3, 2000) (discussing the costs and benefits of requiring civility among faculty and administrators); cf. Leap, *supra* note 73, at 107-08; 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 663-64 (3d ed. 1996).

79. Mawdsley, *supra* note 73, at 176.

80. *Chitwood v. Feaster*, 468 F.2d 359, 361 (4th Cir. 1972) (“A college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously”); *Watts v. Bd. of Curators, Univ. of Mo.*, 495 F.2d 384, 389 (8th Cir. 1974) (same); *McCauley v. S.D. Sch. of Mines & Tech.*, 488 N.W.2d 53, 59 (S.D. 1992) (same); see also *Peacock v. Bd. of Regents of Univ. & State Coll. of Ariz.*, 597 F.2d 163, 165 (9th Cir. 1979) (affirming the district court’s recognition of the university’s “need to maintain cooperation and loyalty among surgical team members, as a prerequisite to the safe and efficient operation of the medical school”); *Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972) (recognizing the legitimate interest of a university in restricting a teacher’s speech in order to maintain discipline and harmony among employees); *Bresnick v. Manhattanville Coll.*, 864 F. Supp. 327, 328 (S.D.N.Y. 1994) (“Cooperation and collegiality are essential to a department which may be called upon to work with other departments”).

81. AM. ASS’N OF UNIV. PROFESSORS, STATEMENT ON PROFESSIONAL ETHICS (1987), reprinted in AAUP POLICY DOCUMENTS AND REPORTS 133, 134 (9th ed. 2001) [hereinafter STATEMENT ON PROFESSIONAL ETHICS].

Thus, while expressing concern regarding the use of collegiality as a selection criterion, the AAUP does recognize the importance of respect for the opinions of others as well as for each other.⁸²

Using collegiality as a selection criterion may raise contract issues based on the university's handbook or unstated policies. In addition, collegiality, because of its subjective nature, may be used as a pretext for unlawful discrimination, particularly as women and minorities attempt to advance in male-dominated areas of academia. Using collegiality as a distinct selection criterion can also threaten academic freedom by stifling creativity as candidates avoid controversial areas of scholarship as well as other forms of speech. Finally, tenured faculty members have a duty to fulfill their duties and responsibilities in a collegial manner.

A. Breach of Contract

Concerns regarding the use of collegiality as a selection criterion arise when collegiality is not stated as a distinct criterion, but instead is used as a basis to deny tenure to a candidate, thereby arguably constituting a breach of contract. Yet, in addressing breach of contract claims in tenure disputes, courts have consistently found that collegiality is a valid consideration for tenure,⁸³ and even when not expressly identified as a distinct criterion, it plays an essential role in teaching, research, and service.⁸⁴ When tenure decisions are made, the university must examine both objective and subjective components, and often included within the subjective component is an analysis of the candidate's personality. As with other employment decisions, a court may believe the decision to deny tenure reflected poor judgment, but will not overturn the decision unless the candidate can identify an illegal reason.⁸⁵ In evaluating service to an institution, the ability to cooperate is an important factor when making a long-

82. See *id.* at 133-34; see also AM. ASS'N OF UNIV. PROFESSORS, A STATEMENT OF THE ASSOCIATION'S COUNCIL: FREEDOM AND RESPONSIBILITY (1970), reprinted in AAUP POLICY DOCUMENTS AND REPORTS 135, 135 (9th ed. 2001) ("Membership in the academic community imposes on students, faculty members, administrators, and trustees an obligation to respect the dignity of others . . .").

83. See, e.g., *Bresnick*, 864 F. Supp. at 328, 330; *McGill v. Regents of Univ. of Cal.*, 52 Cal. Rptr. 2d 466, 472 (Cal. Ct. App. 1996); *Schalow v. Loyola Univ. of New Orleans*, 646 So. 2d 502, 505 (La. Ct. App. 1994); *Univ. of Baltimore v. Iz*, 716 A.2d 1107, 1122 (Md. Ct. Spec. App. 1998).

84. See *Bresnick*, 864 F. Supp. at 329-30 (holding that the institution was not prohibited from considering deficiencies in the ability to work effectively with other faculty members when evaluating service to university); *Iz*, 716 A.2d at 1122 (holding that collegiality is impliedly embodied within the specified criteria for tenure and plays an essential role in both teaching and service); see also AM. ASS'N OF UNIV. PROFESSORS, ON COLLEGIALLY AS A CRITERION FOR FACULTY EVALUATION (1999), reprinted in AAUP POLICY DOCUMENTS AND REPORTS 39, 39 (9th ed. 2001) [hereinafter ON COLLEGIALLY] ("[C]ollegiality is not a distinct capacity to be assessed independently of the traditional triumvirate of scholarship, teaching, and service. It is rather a quality whose value is expressed in the successful execution of these three functions.").

85. See *Bresnick*, 864 F. Supp. at 328.

term employment commitment due to the requirement of academic self-governance.

B. Pretext for Discrimination

Because of its subjective nature, collegiality may be used as a pretext for unlawful discrimination.⁸⁶ Particularly in the sciences, the use of collegiality as a selection criterion or informal policy has contributed to the difficulty of women and minorities in achieving tenure.⁸⁷ Even when not involving intentional discrimination, the use of collegiality in determining tenure may result in discrimination due to the real differences in which men and women, and people of different races, view the world and relate to others, thereby creating difficulties for women and minorities to achieve tenure.⁸⁸ The use of collegiality may be especially problematic when the policy is informal and lacks standards for consideration.⁸⁹ Yet, in cases alleging collegiality as a pretext for discrimination, courts have generally rejected the plaintiff's assertions, but many of those decisions also included evidence of failure by the plaintiff to adequately fulfill scholarship and teaching responsibilities.

The Seventh Circuit in *Namenwirth v. University of Wisconsin*⁹⁰ affirmed the magistrate's finding of no discrimination in the denial of tenure to a female faculty member in the zoology department, but cautioned that "faculty votes should not be permitted to camouflage discrimination, even the unconscious discrimination of well-meaning and established scholars."⁹¹ In the tenure

86. See, e.g., *Namenwirth v. Bd. of Regents of Univ. of Wis. Sys.*, 769 F.2d 1235, 1243 (7th Cir. 1985) (cautioning that subjective judgments of faculty should not be permitted to camouflage discrimination); *Cooper v. Univ. of Tex. at Dallas*, 482 F. Supp. 187, 195 (N.D. Tex. 1979) (acknowledging that subjectivity is not in itself illegal, but that it does present potential for discrimination), *aff'd*, 648 F.2d 1039 (5th Cir. 1981); see also LEAP, *supra* note 73, at 71-79 (discussing the possibility that discriminatory attitudes may be hidden by the use of subjective standards); *Copeland & Murry*, *supra* note 76, at 244 ("While lack of collegiality and inability to work with others can be a legitimate basis for denial of promotion or tenure, it can also be a pretext for illegal discrimination.").

87. *Connell & Savage*, *supra* note 73, at 847, 850.

88. See *id.* at 847-48 ("[B]ecause there are real differences between the way men and women view the world and relate to others, it is much harder for tenured men to see women faculty as collegial or as 'fitting in,' and it is much harder for those men to be comfortable mentoring junior female faculty members."); cf. Ann H. Franke, *The Courts Assess Faculty Collegiality*, ACADEME, Sept.-Oct. 1996, at 72, 72 ("Evaluating collegiality is a subjective undertaking, and it takes on a special importance when we evaluate people who are different from ourselves.").

89. See *Dyer*, *supra* note 72, at 309 ("Collegiality itself could also use some refinement as a factor in employment decisions. It is not easily defined—not as hard to define as obscenity, but perhaps, like obscenity, it is easier to comprehend by observation than with words."); *Zirkel*, *supra* note 72, at 231 ("Evidence of personality or collegiality is not subject to precise measurement because personality itself is intangible; it is seen only indirectly in the form of behavior and its infringement.").

90. 769 F.2d 1235 (7th Cir. 1985).

91. *Id.* at 1243. As stated by the Seventh Circuit:

The courts have struggled with the problem since Title VII was extended to the university, and have found no solution. Because of the way we have described the problem—the deci-

process, the decision-maker also acts as the source of judgments regarding the qualifications, which would ordinarily defeat the purpose of the discrimination laws. Yet the court recognized that “[t]enure decisions have always relied primarily on judgments about academic potential,”⁹² so “winning the esteem of one’s colleagues is just an essential part of securing tenure.”⁹³ The dissent noted that although subjective esteem can be a key factor in employment decisions, courts “review with great suspicion subjective judgments that adversely affect minorities,” arguing that tenure decisions should not be viewed differently or given greater deference than any other employment decision.⁹⁴

In *Fisher v. Vassar College*,⁹⁵ Ms. Fisher was denied tenure in the school’s biology department.⁹⁶ In vacating the district court’s decision in favor of Professor Fisher, the Second Circuit found that the biology department based its decision to deny tenure, in part, upon her lack of requisite leadership skills and her “difficulty in establishing straightforward, open, trusting, collegial relationships with others in the department.”⁹⁷ Finding these concerns to be valid, nondiscriminatory reasons for the decision to deny tenure and acknowledging that her colleagues were in the best position to judge her collegiality and leadership abilities, the court stated: “The leadership section of the report makes clear that the senior members of the biology department simply did not like Fisher and did not wish to establish a career-long professional association with her. It is arguable that such grounds alone justified the department’s recommendation against tenure.”⁹⁸

The deferential attitude of courts to tenure decisions demonstrated in the cases above is troubling, especially when based on whether a candidate for tenure

sion-maker is also the source of the qualifications—there may be no solution; winning the esteem of one’s colleagues is just an essential part of securing tenure. And that seems to mean that in a case of this sort, where it is a matter of comparing qualification against qualification, the plaintiff is bound to lose.

But there are other sorts of cases. There are cases that involve a *pattern* of discrimination. There are cases in which procedural barriers are placed in the way of members of a certain class. There are cases that involve outright discriminatory judgments. Thus, although we may despair of extricating discriminatory motives from collegial judgments about potential and worth, the outlook is not entirely bleak.

Id. (citations omitted).

92. *Id.*

93. *Id.*

94. *Id.* at 1244 (Swygert, J., dissenting).

95. 70 F.3d 1420 (2d Cir. 1995), *aff’d on reh’g en banc*, 114 F.3d 1332 (2d Cir. 1997).

96. *Id.* at 1430. For a discussion of this case, see Barbara A. Lee, *Employment Discrimination in Higher Education: A Review of the 1997 Judicial Decisions*, 25 J.C. & U.L. 313, 314-17 (1998).

97. *Fisher*, 70 F.3d at 1436. The department report evaluating Fisher for tenure and promotion concluded that she lacked the necessary leadership abilities, stating: “Another part of the problem is that she just doesn’t often speak her mind on matters of departmental concern and thus falls short as an intellectually stimulating colleague and contributor to departmental policy-making. Her deferential attitude has been a continuing source of frustration.” *Id.*

98. *Id.*

is “liked” by her colleagues.⁹⁹ Courts adopt this hands-off approach because of the subjective and intangible nature of the standards and in recognition of the greater expertise of colleagues and administrators, but courts are not hesitant to carefully review employment decisions in other fields that involve discretionary and subjective judgments by employers, and should apply the same review standards as used in other employment areas.¹⁰⁰ Collegiality may be a stated criterion for achieving tenure or a required aspect of teaching and service, but as with any subjective employment standard, it must be fairly and consistently applied and not serve as a mask for individual or institutional discrimination.

C. *Threat to Academic Freedom*

Using collegiality as a distinct criterion or informal policy may threaten academic freedom by chilling faculty debate, stifling dissent on a campus, and limiting the intellectual exchange required for meaningful and significant scholarship.¹⁰¹ Although recognizing that collegiality is an important part of a faculty member’s general performance, the AAUP has stated that collegiality should not be used as a distinct selection criterion because of the potential threat to academic freedom, and should only be applied as a virtue “whose value is expressed in the successful execution” of teaching, scholarship, and service.¹⁰² Requiring a candidate to “evinced a constructive attitude” that “will foster harmony” is contrary to basic principles of academic freedom.¹⁰³ Making a tenure decision based on whether someone is “liked” will limit the free and open debate protected by academic freedom and required for an intellectually rigorous campus.

99. See Carol D. Rasnic, *Litigating the Adverse Peer Review Decision*, 66 EDUC. L. REP. 1, 13 (1991) (“The most perplexing characteristic recurring in equal protection and Title VII tenure denial lawsuits is the hands-off attitude of the courts, even when the plaintiff has presented unequivocal evidence of discriminatory treatment.”).

100. See generally Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 945-78 (1982) (asserting that courts have applied Title VII more strenuously and uniformly to lower-paying, blue-collar jobs than to higher-paying, more prestigious jobs).

101. See Dyer, *supra* note 72, at 309; Perry A. Zirkel, *Mayberry v. Dees: Collegiality as a Criterion for Faculty Tenure*, 12 EDUC. L. REP. 1053, 1059 (1983); Snider, *supra* note 72.

102. ON COLLEGIALLY, *supra* note 84, at 39. In this policy statement, the AAUP asserts the following regarding collegiality:

Relatively little is to be gained by establishing collegiality as a separate criterion of assessment. A fundamental absence of collegiality will no doubt manifest itself in the dimensions of scholarship, teaching, or, most probably, service, though here we would add that we all know colleagues whose distinctive contribution to their institution or their profession may not lie so much in service as in teaching and research. Professional misconduct or malfeasance should constitute an independently relevant matter for faculty evaluation. So too should efforts to obstruct the ability of colleagues to carry out their normal functions, to engage in personal attacks, or to violate ethical standards. The elevation of collegiality into a separate and discrete standard is not only inconsistent with the long-term vigor and health of academic institutions and dangerous to academic freedom, it is also unnecessary.

Id. at 40.

103. *Id.*

The concern focuses on linking collegiality with personality and congeniality, and also on the vagueness and subjectivity of the standard. Yet, evaluation of the other criteria for tenure, teaching, scholarship, and service are also highly subjective. While several of the cases in which a candidate was denied tenure based on a lack of collegiality involved what can be viewed as unpopular conduct, such as holding Marxist beliefs, supporting teacher organizations, or participating in anti-establishment causes,¹⁰⁴ these cases also often involved disruptive conduct that would not be tolerated in any workplace, such as falsely accusing a department chair of embezzling funds, repeatedly using profanity directed at colleagues, creating petty, personal disputes, and engaging in regular criticism of administrators and colleagues.¹⁰⁵

The professor's academic freedom must be balanced against the college's interest in maintaining harmony among co-workers and fostering an efficient workplace. As emphasized by one court, "[a]cademic freedom is not a license for activity at variance with job related procedures and requirements, nor does it encompass activities which are internally destructive to the proper function of the university or disruptive to the education process."¹⁰⁶ As with any enterprise, employees, particularly employees with the managerial responsibilities of faculty members, must interact in a collegial manner in order to fulfill the mission and goals of the institution. Again, the distinction between collegial and congenial must be emphasized to separate the ability to effectively engage in pursuits involving academic freedom and the ability to be friendly.

D. Tenured Faculty

When faculty members are awarded tenure, they become life members in an intellectual community that encourages and requires commitment, discipline, collegiality, and compassion to the university and one's colleagues.¹⁰⁷ Because of the unique nature of the tenured employment relationship, in which faculty are not only employees but also managers due to their authority in academic matters, tenured faculty have both rights and obligations.¹⁰⁸ As emphasized in

104. See Zirkel, *supra* note 72, at 235.

105. See, e.g., *Maples v. Martin*, 858 F.2d 1546, 1548-49 (11th Cir. 1988); *Kelleher v. Flawn*, 761 F.2d 1079, 1081-82 (5th Cir. 1985); *Adamian v. Lombardi*, 608 F.2d 1224, 1225 (9th Cir. 1979); *Roseman v. Ind. Univ. of Pa.*, 520 F.2d 1364, 1366 (3d Cir. 1975); *Harris v. Bd. of Trs. of State Colls.*, 542 N.E.2d 261, 263 n.2 (Mass. 1989); *Sinnott v. Skagit Valley Coll.*, 746 P.2d 1213, 1216-18 (Wash. Ct. App. 1987); *Stastny v. Bd. of Trs. of Cent. Wash. Univ.*, 647 P.2d 496, 500-01 (Wash. Ct. App. 1982).

106. *Stastny*, 647 P.2d at 504.

107. See *MORRIS*, *supra* note 29, at 86; *ROSOVSKY*, *supra* note 47, at 182.

108. See *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 686 (1980) (recognizing the special nature of the tenure employment relationship and the role of faculty in university governance, particularly regarding the authority of faculty in academic matters). The court stated:

The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching

a report by the American Association of State Colleges and Universities, tenured faculty members have an obligation of “continued professional development and maintenance of professional standards.”¹⁰⁹ Tenure also contributes to the stability of the university by establishing a group of academic citizens, bound by a “social contract,” who have a vested interest and institutional allegiance to the success of the university.¹¹⁰

The expectation of collegiality must not end once a faculty member achieves tenure status. Tenured faculty members have a duty of collegiality in the fulfillment of their job responsibilities, specifically teaching, scholarship, and service. Moreover, collegiality is a foundation principle for tenure deriving from the notion of faculty self-governance. In fulfilling their mission, “universities must rely for academic governance on the cooperative and corporate action of [their] facult[ies].”¹¹¹ Under this principle of self-governance, tenured faculty members have a duty to fulfill this responsibility in a good faith manner. This duty is difficult to define, but standards developed in the related areas of labor and contract law provide some guidance, specifically the duty of good faith bargaining in labor law and the doctrine of good faith in contracts. In general, these standards prohibit bad faith conduct that violates the spirit of the contract, denies the other party the benefits of the agreement, or demonstrates a lack of intent to reach common ground. The failure of tenured faculty members to fulfill this responsibility will lead to the inability of the university to be successful and also further the attacks on tenure.

III. THE FUTURE OF TENURE

In the last decade, tenure has come under increasing attack, with a few institutions even eliminating tenure completely.¹¹² In order to preserve the essential character of tenure, several employment relation challenges must be addressed:

methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained . . . charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.

Id.

109. Bodah, *supra* note 12, at 326; *see* Am. Ass’n of State Colls. & Univs., *Facing Change: Building the Faculty of the Future* 11 (1999).

110. ROSOVSKY, *supra* note 47, at 182-83; *see* BOWEN & SCHUSTER, *supra* note 4, at 236-37; MORRIS, *supra* note 29, at 86; *cf.* Morrison, *supra* note 12, at 383 (describing the effort to unionize the faculty in response to the threatened status of tenure); Courtney Leatherman, *Union Movement at Private Colleges Awakens After a 20-Year Slumber*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 21, 2000, at A16 (discussing the institutional instability caused by faculty unions).

111. Mawdsley, *supra* note 73, at 173.

112. Wilson & Walsh, *supra* note 12, at A8. *See generally* NEIL W. HAMILTON, *ZEALOTRY AND ACADEMIC FREEDOM: A LEGAL AND HISTORICAL PERSPECTIVE* (1995) (discussing the episodic nature of threats to academic freedom that generally coincide with external crises in society).

the financial burden on universities, an aging faculty, and an increasing reliance on contract employees.

A. Financial Burden of Tenure

Salaries and benefits comprise the largest portion of an academic institution's budget.¹¹³ In such a highly labor intensive enterprise, the simplest way to address financial concerns is to slash the size of the teaching staff, but this option is not available to a university with regard to tenured faculty except in cases of financial exigency or for cause in the case of individual faculty members.¹¹⁴

Critics of tenure argue that tenure imposes undue restrictions on an institution's flexibility in meeting financial demands, recruiting and hiring a younger and more diverse faculty, and making programmatic changes to address demands and innovations.¹¹⁵ Rather than preserving academic freedom, tenure becomes a mechanism for protecting the lazy and incompetent; thus, faculty do not need the protection for academic freedom because scholarly productivity dissipates after the achievement of tenure.¹¹⁶ Faculty members who are productive do not need tenure status because their employment would not be in jeopardy.

These arguments, however, are not supported by studies of productivity rates, and also fail to understand the relationship between tenure, academic freedom, and job security discussed earlier. Contrary to this argument, productive faculty members need the protection of tenure because they are engaged in discussions involving potentially controversial topics and could be the victim of termination for their scholarship. Moreover, faculty members must be actively engaged in academic governance of the institution without fear of reprisal. It is difficult to make broad generalities regarding faculty productivity rates when comparing different types of academic institutions and disciplines. While some studies do indicate a general decline in scholarly productivity as faculty members age,¹¹⁷ this decline does not directly correlate to the granting of tenure,¹¹⁸ and is generally balanced by an increased interest in teaching.¹¹⁹

Rather than identifying the problem as one that prevents the termination of an unproductive employee, it should more accurately be viewed as a problem

113. See Fishman, *supra* note 2, at 170.

114. See FINANCIAL EXIGENCY, *supra* note 30, at 230; Fishman, *supra* note 2, at 170.

115. See BOWEN & SCHUSTER, *supra* note 4, at 235; COMM'N ON ACADEMIC TENURE IN HIGHER EDUC., *supra* note 15, at 13-14.

116. See COMM'N ON ACADEMIC TENURE IN HIGHER EDUC., *supra* note 15, at 14.

117. ROBERT T. BLACKBURN & JANET H. LAWRENCE, FACULTY AT WORK: MOTIVATION, EXPECTATION, SATISFACTION 204 (1995); Sharon G. Levin & Paula E. Stephan, *Research Productivity Over the Life Cycle: Evidence for Academic Scientists*, 81 AM. ECON. REV. 114, 126 (1991).

118. See James L. Bess, *Contract Systems, Bureaucracies, and Faculty Motivation: The Probable Effects of a No-Tenure Policy*, 69 J. HIGHER EDUC. 1, 15 (1998).

119. BLACKBURN & LAWRENCE, *supra* note 117, at 204 (citing Roger G. Baldwin & Robert T. Blackburn, *The Academic Career as a Developmental Process: Implications for Higher Education*, 52 J. HIGHER EDUC. 598 (1981)).

of providing motivation and incentives for faculty members throughout a long career. Important lessons can be drawn from labor law and unions. Under a collective bargaining agreement, employees generally cannot be disciplined or discharged without just cause. This standard certainly does not prevent companies from doing so, but does impose strict limitations. At the same time, some union workforces are criticized for lower productivity levels. But to identify lower productivity as a symptom of the just cause standard grossly oversimplifies the issue, and fails to recognize that the collective bargaining agreement also typically prevents the use of merit rewards and uses seniority as the sole criterion for wage increases and other benefits. When universities fail to provide incentives—both financial and otherwise—to reward productive faculty, and instead give small or no salary increases to all faculty with no recognition for merit, it creates a system of disenchantment and discouragement. A university instead needs to use a system of rewards to avoid the capital punishment of revoking tenure.¹²⁰

B. Aging Faculty

The national population as a whole is aging, and this trend is magnified in academe. Many professors hired during the great expansion of academe in the 1960s and 1970s are reaching their golden years, and because people live longer and need financial resources to do so comfortably, more professors are delaying retirement. The end of mandatory retirement for faculty following the amendments to the Age Discrimination in Employment Act has created new employment challenges for academic institutions.¹²¹ As the graph below demonstrates, the proportion of tenure and tenure-track faculty members over fifty years of age in the University of North Carolina system has increased in the last twenty years.¹²² Previously, mandatory retirement assured that some

120. See Bess, *supra* note 118, at 17; Donna R. Euben & Barbara A. Lee, Managing Faculty Productivity After Tenure, Oct. 24, 2005, <http://www.aaup.org/Legal/info%20outlines/05facprod.htm>.

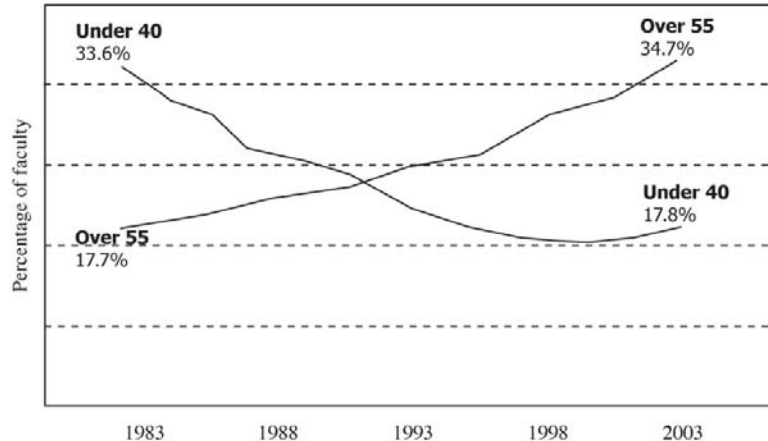
121. See 29 U.S.C. §§ 621-634 (2000).

122. Piper Fogg, *Advancing in Age*, CHRON. HIGHER EDUC. (Wash., D.C.), June 3, 2005, at A6.

positions would become available in order to add to the diversity of the institution by employing a new generation of scholars with innovative teaching and scholarly ideas.¹²³ At the same time, older faculty members are a valuable resource—of teaching experience, institutional history and leadership, and contacts for scholarship and with alumni—that must be preserved and used effectively.

Many universities have instituted early retirement programs, and most faculty members do retire by age seventy.¹²⁴ While these programs can provide effective incentives, especially when employees have concerns over health care costs and sufficient funds for retirement when people live longer, they may simply reward the most deserving faculty while not influencing professors whom the institution desires to accept the offer. Prior to the end of mandatory retirement, a university could simply wait for the retirement of a problematic or underperforming individual instead of pursuing the difficult process to terminate a tenured faculty member. Today, institutions must create flexible work arrangements for older faculty members to effectively use their talents and provide opportunities to hire a new generation of scholars.¹²⁵

Universities need to establish policies and an atmosphere that are conducive to faculty successfully achieving post-tenure goals and expectations. Many universities have instituted a system of formal post-tenure review, and some state legislatures have made such reviews mandatory for state schools. Studies



SOURCE: ANALYSIS OF ANNUAL FACULTY CENSUS DATA OF THE U. OF NORTH CAROLINA SYSTEM BY ROBERT CLARK, PROFESSOR OF BUSINESS MANAGEMENT AND ECONOMICS AT NORTH CAROLINA STATE U., AND LINDA GHENT, ASSISTANT PROFESSOR OF ECONOMICS AT EASTERN ILLINOIS U.

123. See COMM'N ON ACADEMIC TENURE IN HIGHER EDUC., *supra* note 15, at 14 (discussing the impact of the tenure system on the ability of universities to recruit a younger and diverse faculty).

124. See Denise K. Magner, *An Aging Faculty Poses a Challenge for Colleges*, CHRON. HIGHER EDUC. (Wash., D.C.), Aug. 8, 1997, at A10.

125. See Fogg, *supra* note 122.

of post-tenure reviews indicate, however, that the benefits of such reviews are at best modest or merely speculative, and can be quite costly in terms of faculty time and morale.¹²⁶

Yet, the evaluation of faculty performance and assessment of faculty vitality are critical to institutional livelihood. While some form of post-tenure review is simply a good personnel policy, it should not be used as a method to revalidate or revoke tenured status.¹²⁷ In fact, the AAUP has expressly stated its opposition to using post-tenure review for such a purpose because it would effectively undermine the basic notions of tenure.¹²⁸ Instead, the focus of such review should be on faculty development.¹²⁹ As in a law firm or corporation, annual reviews should be conducted by senior administrators such as the dean or department chair, and salary increases and other benefits and privileges should be tied to the attainment of goals and fulfillment of responsibilities, with additional training and support provided to or required of faculty who are found to be deficient in a particular job responsibility. An effective process can serve to strengthen, rather than diminish, the value of tenure in employment, and at the same time, prevent the undermining of tenure when it is viewed as merely a system to protect faculty members from any form of evaluation or accountability.

C. Contract Employees

As faculty members do retire, many of them are being replaced by a rising number of part- and full-time, non-tenure-track contract employees.¹³⁰ In 1970, approximately twenty-two percent of faculty appointments were part-time or adjunct, but now the National Education Association and AAUP estimate that part-time appointments comprise more than fifty percent of faculty nationwide.¹³¹ This shift away from creating long-term tenured faculty relationships is due principally to financial concerns. With state and federal funds being cut, and dramatic increases in costs, especially health benefits, universi-

126. See Brown & Kurland, *supra* note 12, at 342 n.105; *Report of Committee A*, ACADEME, Sept.-Oct. 1990, at 32, 38. But see Ira P. Robbins, *Exploring the Concept of Post-Tenure Review in Law School*, 9 STAN. L. & POL'Y REV. 387, 395 (1998).

127. See Conrad & Trosch, *supra* note 53, at 571 ("The long-term effect of replacing tenure with renewable tenure or other employment control structures could be disastrous not only to academic freedom but to the overall good of higher education." (emphasis omitted)).

128. 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).

129. See *id.* at 50; Brown & Kurland, *supra* note 12, at 342.

130. See Courtney Leatherman, *Growth in Positions off the Tenure Track Is a Trend That's Here to Stay, Study Finds*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 9, 1999, at A14; Brent Staples, Op-Ed, *The End of Tenure?*, N.Y. TIMES, June 29, 1997, § 4, at 14; Robin Wilson, *Contracts Replace the Tenure Track for a Growing Number of Professors*, CHRON. HIGHER EDUC. (Wash., D.C.), June 12, 1998, at A12.

131. AM. ASS'N OF STATE COLLS. & UNIVS., *supra* note 109, at 23; Bodah, *supra* note 12, at 327.

ties are reluctant to make a long-term commitment to a professor.¹³² At the same time, universities have discovered a growing number of people willing to work without the promise of tenure, thereby creating a pool of commuter faculty that flow between institutions in order to cobble together a full-time job.

While the hiring of contract faculty may address the short-term financial concerns of an institution in a manner similar to a company subcontracting or outsourcing work in order to boost its stock price, such a practice can have long-term negative consequences for an academic institution. As professors retire and are replaced by a faculty of independent contractors, the institution loses the benefit provided by dedicated faculty who make a long-term investment in an institution by not only teaching and pursuing scholarship, but also by providing the foundation for the institution's culture, heritage, and indeed soul. A faculty composed of independent contractors who lack job security will not make the commitment required to build the future success of the school. Long-term contracts also do little to protect academic freedom, an essential component of a university.

CONCLUSION

The quest for tenure has ended, and the candidate has achieved the desired job security and academic freedom. But along with these rewards, the faculty member also has important obligations. The job security of tenure status requires the faculty member to act in a collegial manner in fulfilling the obligations of academic governance for the institution by working effectively with colleagues toward the goals of the institution's mission. In addition, tenured faculty must continue to exhibit the highest levels of professionalism in teaching, scholarship, and service. Failure to do so violates their duties under the terms of their tenured status. Moreover, this failure adds fuel to the attacks against tenure that threaten its privileged status. Finally, tenured faculty must carefully and fairly review the qualifications of tenure-track faculty members, provide effective mentoring to guide colleagues, and when necessary, deny tenure.

Colleges and universities also have obligations that derive from the awarding of tenured status to faculty members. First, academic institutions must be vigilant in ensuring a fair tenure process. Second, administrators must work effectively with tenured faculty under the requirement of academic self-governance. Rather than requiring faculty members to relinquish rights, academic institutions can create an environment of expectations, incentives, and flexible work arrangements to provide incentives for tenured faculty, develop procedures to make tenure work effectively, and encourage faculty to fulfill the responsibili-

132. RONALD G. EHRENBURG, *THE CHANGING NATURE OF THE FACULTY AND FACULTY EMPLOYMENT PRACTICES* (2005), http://www.tiaa-crefinstitute.org/research/articles/docs/030106_08_Ehrenberg.pdf; *The Incredible Shrinking Faculty: An Interview with Lawrence Poston*, *ACADEME ONLINE*, May-June 2000, <http://www.aaup.org/publications/Academe/2000/00mj/MJ00Post.htm>.

ties that come with their status as tenured faculty. Tenure will continue to be challenged, and ultimately, it is the duty of tenured faculty to ensure that the institution of tenure continues to fulfill the goals of job security and academic freedom, with all of its rights, privileges, and obligations.