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ABSTRACT

This chapter addresses developments concerning faculty tenure, examines institutional responses to new pressures and the litigation by faculty over those reponses, and explores faculty and administration rights and responsibilities. Academic administrators have realized that the reappointment, tenure, and promotion processes are an opportunity to assess faculty performance. The depressed faculty job market has resulted in a pool of talented applicants with whom a department can replace a nontenured faculty member whose performance proved unsatisfactory. Pressures for educational quality have caused institutions to demand more and higher quality publications, terminal degrees, and other measures of faculty performance. Application of higher standards has generally been upheld by courts. Plaintiffs have usually argued that either the new requirements deny contractual or due process rights or that they constitute employment discrimination. Courts have ruled that both academic departments and administrators can unilaterally raise publications standards and apply them to faculty hired under old rules. Post-tenure review is opposed by the American Association of University Professors, though no direct litigation has resulted. Its legality may be challenged as enrollments decline and demands for accountability increase. Tenured faculty have perceived regulation of their time to influence position autonomy. While procedural protections of tenure persist, the institutional right to determine and to enforce performance expectations from faculty is unrelated to tenure. (CJH)

A New Generation of Tenure Problems: Legal Issues and Institutional Responses

Barbara A. Lee

Academic tenure has been the subject of intense debate in America for decades, a debate which crystallized in the early twentieth century, when the American Association of University Professors (AAUP) was formed,[1] and which has continued unabated to the present. The debate has taken place in the general and scholarly press and literature, in academic and legislative fora and, most especially, in the state and federal courts.

The intensity of the debate is understandable when one considers the issues at stake. The proponents of tenure cite the need to protect faculty from incursions upon their academic freedom by legislators, trustees, and administrators; the role of tenure in increasing the stability of the faculty workforce; and the need to offset low salaries by enhanced economic security.[2] Opponents of the tenure system point to limited institutional flexibility once a sizable proportion of its faculty are tenured, the diminished accountability of tenured faculty, and the difficulty of terminating the employment of tenured faculty.[3] Litigation over tenure issues has focused primarily on the extent of the procedural protections afforded faculty[4] or whether the tenure decision was properly made.[5]

It has been nearly fifteen years since the Supreme Court issued its seminal opinions in *Board of Regents v. Roth* and *Perry v. Sindermann*.[6] Trial and appellate courts, both state and federal, have addressed a multitude of tenure-related disputes; issues such as the limits of de facto tenure,[7] the incorporation of AAUP standards into employment con-

1. R. Hofstadter & W. Metzger, The Development of Academic Freedom in the United States (1955).
2. Commission on Academic Tenure, Faculty Tenure 16 (1973).
3. *Id.* at 14.
4. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972), Perry v. Sindermann, 408 U.S. 593 (1972). *See also* Toney v. Reagan, 467 F.2d 953 (9th Cir. 1972).
5. *See, e.g.*, Brown, *Tenure Rights in Contractual and Constitutional Context*, 6 J. L. & Educ. 279 (1977).
6. *See* cases cited *supra* note 4.
7. *Id. See also* Zimmerman v. Spencer, 485 F.2d 176 (5th Cir. 1973), Sawyer v. Mercer, 594 S.W.2d 696 (Tenn. 1980).

tracts,[8] and the dismissal of tenured faculty in times of financial exigency[9] have been reasonably well settled by the judiciary.

A "new generation" of tenure issues has arisen, however, to occupy the attention of faculty, administrators, and the courts. These new legal issues parallel the changing fortunes of higher education; in the years since *Roth* and *Sindermann*, higher education has faced enrollment declines,[10] demands for greater accountability by legislators, students, and the general public,[11] and a growing emphasis on quality which echoes the somewhat earlier "excellence" movement in elementary and secondary education.[12] Not surprisingly, therefore, the tenure issues addressed recently by the courts have shifted from a delineation of the parameters of faculty tenure rights to the limitations of those rights.

This chapter will address three recent developments concerning faculty tenure: heightened standards for promotion and tenure; periodic review of tenured faculty; and the degree to which tenure conflicts with internal or external demands for faculty accountability. It will examine institutional responses to the "new" set of pressures on higher education, the ensuing litigation by faculty over those responses, and the implications for redefined faculty and administrative rights and responsibilities.

Heightened Promotion and Tenure Standards

The juxtaposition of several factors has resulted, at many institutions of higher education, in heightened performance standards for faculty. Because of the nature of tenure, and the arguments against reviewing faculty after tenure has been awarded,[13] academic administrators have realized that the reappointment, tenure, and promotion processes are often the only realistic opportunity to assess individual faculty performance. Furthermore, the depressed faculty job market has resulted, for many disciplines, in a pool of talented applicants with whom a department can replace a nontenured faculty member whose performance has not satisfied the department's or the institution's expectations. Under pressure from the public or other sources to improve the quality of the education they provide, some colleges and universities have responded

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8. Greene v. Howard Univ., 412 F.2d 1128 (D.C. Cir. 1969). *See also The Role of Academic Freedom in Defining the Faculty Employment Contract*, 31 Case W. Res. L. Rev. 608 (1981).

9. *See, e.g.*, Olswang & Fantel, *Tenure and Periodic Performance Review: Compatible Legal and Administrative Principles*, 7 J. C. & U. L. 1 (1980-81).

10. Carnegie Commission on Policy Studies in Higher Education, Three Thousand Futures (1980).

11. S. Olswang & B. Lee, Faculty Freedoms and Institutional Accountability: Interactions and Conflicts (1984).

12. *See, e.g.*, National Institute of Education Study Group on the Conditions of Excellence in American Higher Education, Involvement in Learning: Realizing the Potential of American Higher Education (1984).

13. *See infra* text accompanying notes 52-70.

by demanding more and higher quality publications, terminal degrees, or other objective and subjective measures of faculty performance.[14]

The responses of institutions to these pressures have resulted in higher performance expectations being applied to new faculty, standards with which incumbents may not have been expected to comply. The resulting "double standard" for junior and senior faculty results in morale problems for both,[15] and in litigation for the college.

Institutions have "raised standards" in one of two ways. Some have begun to insist that faculty hold a terminal degree before being awarded tenure, even if no terminal degree was required for tenure or promotion at the time of hiring. Others have demanded that faculty demonstrate their commitment to research and scholarship by producing a certain number and/or quality of scholarly publications. Challenges to these heightened standards have been brought under several legal theories. In general, plaintiffs have argued either that the new requirements deny them contractual or due process rights, or that the new requirements are a pretext for employment discrimination.[16]

The Terminal Degree Requirement

Whether the faculty member has used a contractual argument or one grounded upon employment discrimination, the burden of the argument is that the institution has applied more stringent requirements to new faculty than it did in the past, and that the faculty member has a legally protected right to be judged under the same standards that were applied to faculty tenured at an earlier time. At public institutions, faculty have argued that they have a property right in the earlier performance standards, especially if the institution has toughened the standards between the time that the faculty member was hired and the time that he or she was evaluated for tenure.

In *Fairchild v. Vermont State Colleges*,[17] Johnson State College denied tenure to an assistant professor of physical education because, although warned several times that the lack of a terminal degree "threatened her prospects for tenure,"[18] she had not completed it. Despite administration testimony that the plaintiff was "an outstanding

14. R. Birnbaum, State Colleges: An Unsettled Quality, in Contexts for Learning: The Major Sectors of American Higher Education (1985).

15. H. Bowen & J. Schuster, American Professors: A National Resource Imperiled (1985).

16. United States policy on affirmative action has increased the numbers of women and minority faculty to some degree, but most of these individuals are as yet untenured. Institutions of higher education are applying heightened performance and educational requirements to members of underrepresented classes, whose access to graduate education and to networks of the scholars who influence publication has traditionally been limited, either by law or by practice. *See, e.g.*, LaNoue, Judicial Responses to Academic Salary Discrimination (1982).

17. 449 A.2d 932 (Vt. 1982). This claim arose under a collective bargaining contract. The plaintiff, although female, did not allege gender discrimination under state or federal laws.

18. *Id.* at 933.

coach and a superior teacher," the college had determined that "even unusually high quality teaching or coaching were not adequate substitutes for a terminal degree."[19]

The plaintiff made several arguments in favor of tenure. First, the faculty handbook stated that the requirements for tenure were "acquisition of a terminal degree in [the] major teaching field *or* 'significant professional, artistic, or scholarly accomplishment.'" The plaintiff argued that she had met the tenure criterion under the "significant accomplishment" prong of the handbook requirement. Furthermore, she argued, a male physical education professor had been awarded tenure without having an earned terminal degree.[20]

The court accepted administrative testimony that the two faculty members were not similar, for the male had "more accomplishments," and thus met the "significant accomplishment" criterion, while the plaintiff had not.[21] In addressing the legality of heightened performance standards, the court noted that the college's interpretation of its tenure criteria was rational because it ensured that "candidates for tenure demonstrate various accomplishments and abilities in addition to those displayed by their performance on the job."[22] The court added that, although the decision was subjective, it did not appear to have been made in an arbitrary or discriminatory manner.[23] The opinion reveals no attempt by the court to require the administration to demonstrate the relationship between a terminal degree and the performance of the plaintiff's job: teaching physical education courses and coaching collegiate sports.[24]

In *Wells v. Doland*,[25] a not-uncommon change in academic leadership led to the denial of tenure to an assistant professor of criminal justice. A new dean of the College of Liberal Arts and a new department head arrived at McNeese State University in Louisiana, and determined that all faculty desiring tenure would be required to hold a terminal degree. After denying tenure to the plaintiff, the department replaced him with an individual who held a doctorate. The plaintiff, using an equal protection theory, argued that the new policy denied his due process rights; however, the court rules that the new "tenure regulations promote a legitimate [state] interest in furthering permanency in the teaching force of universities and in insuring a more competent teaching staff."[26]

19. *Id.* at 934.
20. *Id.* at 933.
21. *Id.* at 935.
22. *Id.* at 934.
23. *Id.*
24. Such a demonstration is frequently required in discrimination cases, especially when a plaintiff alleges that the requirement impacts more heavily on protected class members than on majority individuals. *See, e.g.*, Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 Wm. & Mary L. Rev. 45 (1979-80). *See also* Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945 (1982).
25. 711 F.2d 670 (5th Cir. 1983).
26. *Id.* at 675.

Difficult legal issues have arisen when the performance standards in existence at the time a faculty member is hired shift before the time he or she is evaluated for tenure. Although plaintiffs have raised contractual and due process issues regarding the fairness of "changing the rules" between the hiring and tenure decision, courts have been uniformly unsympathetic to these claims. For example, the Vermont Supreme Court ruled that, if an institution gave the faculty member notice of the new standards, and a reasonable time with which to comply with those standards, then their application to him was not arbitrary, nor a denial of his due process rights.

The faculty member had been hired by Lyndon State College in 1974 as an assistant professor of meteorology, and was told that a doctorate was not necessary for tenure.[27] Two years later, however, the state college system entered a collective bargaining agreement with the statewide faculty union that required a terminal degree for the granting of tenure.[28] Early the next year, the college's dean advised the plaintiff that "although his chances for obtaining tenure were good, the safest course would be to acquire a terminal degree."[29] This conversation, the court ruled, put the plaintiff on notice that the degree was required. Although the plaintiff argued that his tenure denial in 1979 was a surprise, and that he had been misled by the college administration, the court agreed with the state labor board's conclusion that the plaintiff had sufficient notice, for he "had over three years to comply with the new criteria; certainly sufficient time, especially since he had completed the bulk of his work leading to a doctorate degree."[30] In a similar case before the same court one year later, the court affirmed its position in the two earlier cases, ruling that the decision of the president of Johnson State College to deny tenure to an assistant professor of political science for failure to meet the terminal degree requirement was not arbitrary because this plaintiff had been warned *four* years earlier of the need to complete his doctoral degree.[31]

Plaintiffs have been no more successful challenging terminal degree requirements under civil rights theories. In *Campbell v. Ramsey*,[32] the chair of the mathematics department at the University of Arkansas decided not to renew the contract of a female faculty member because she lacked a doctoral degree. The plaintiff argued that the nonrenewal was discriminatory because women were underrepresented among holders of doctorates in mathematics, but the court ruled that, despite the disparate impact on women of requiring a doctorate, "the requirement of a Ph.D., a recognized credential in the academic community, was a legitimate and nondiscriminatory reason for not renewing plaintiff's

27. D'Aleo v. Vermont State Colleges, 450 A.2d 1127 (Vt. 1982).
28. *Id.* This is the same language that was disputed in *Fairchild*, 449 A.2d at 932.
29. *Id.*
30. *Id.*
31. Lewandoski v. Vermont State Colleges, 457 A.2d 1384 (Vt. 1983).
32. 22 Fair Empl. Prac. Cas. 83 (E.D. Ark. 1980).

employment."[33] Furthermore, the court recognized the importance of the doctoral degree requirement to institutional prestige, saying that universities often "raise [their] academic status" by increasing the number of faculty with doctorates, that accrediting agencies monitor institutional quality in part by the number of faculty holding doctoral degrees, and that "the department gets greater flexibility in faculty assignments by hiring a teacher with a doctorate."[34]

The plaintiff in *Scott v. University of Delaware*[35] met with a similar lack of success when he argued that requiring a terminal degree for either hiring or tenure had a disproportionately negative impact upon blacks. In this class action litigation, spearheaded by a sociology professor denied renewal, the plaintiff argued that the duties of most faculty were limited to undergraduate teaching, and that advanced graduate work was not necessary to the competent performance of such duties. The court disagreed, however, ruling that

> while the "Ph.D. or its equivalent" requirement probably has a disparate impact upon blacks, I conclude (1) that this disparate impact is justified by the legitimate interest of the University in hiring and advancing persons who are likely to be successful in adding to the fund of knowledge in their chosen disciplines and effective in the teaching of graduate students in those disciplines.[36]

In both this case and *Campbell*, the court found the requirement of a terminal degree to be not only reasonable but of such significance to the mission of the institution that it overcame legitimate arguments that the requirement disproportionately excluded minorities and women.

The surest institutional defense to a legal challenge of heightened degree requirements appears to be the need to maintain or upgrade the quality of the institution's academic program. In addition to the cases described above, Pennsylvania state courts approved the implementation of a terminal degree requirement for full-time employment in two cases in which part-time faculty had sought the full-time positions, but were found unqualified. In *Kovich v. Mansfield State College*, the court ruled that "educational institutions may impose certain requirements in order to maintain their accreditation."[37] In an earlier case, the plaintiff had challenged the imposition by only one department in the college, of a doctoral degree requirement, asserting that the lack of uniformity of degree requirements resulted in an arbitrary and illegal policy. In this case against Slippery Rock State College, the court asserted:

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33. *Id.* at 84.
34. *Id.* at 86.
35. 455 F. Supp. 1102 (D. Del. 1978), *aff'd*, 601 F.2d 76 (3d Cir. 1979). *cert. denied*, 444 U.S. 931 (1980). Scott's denial was for lack of publication and poor teaching; he did hold a Ph.D., but included the terminal degree issue in his class action litigation. *See* text accompanying notes 46-48, *infra*.
36. 455 F. Supp. 1102 at 1126.
37. 478 A.2d 950, 952 (Pa. Commw. 1984).

> Reasonable minds may differ as to whether the Department of English ...should have a policy requiring an otherwise qualified teacher to have a doctorate as a condition to full-time employment, when other departments in the College do not have such a requirement. Nevertheless, establishment of such policy is the prerogative of the Board of State College and University Directors.[38]

The courts did not appear to have reviewed the criteria against which the college had determined the requirement to be "reasonable"; they appear to have accepted the colleges' claims at face value.

Publication Requirements

A more widespread mechanism for "raising standards" has been the demand for more and better quality publications as a requirement for tenure (and, at some institutions, for renewal). Like the terminal degree requirement, many institutions have insisted that recently hired faculty publish at a higher rate, and in better quality journals, than faculty hired in earlier years. Such standards have led to charges by aggrieved faculty of denials of equal protection, due process, and, in a few cases, of denials of civil rights.

The challenges to heightened publication requirements have generally met the same fate as faculty challenges to a terminal degree requirement. Courts have ruled that, as long as the new requirement was applied uniformly to all faculty who were evaluated for renewal, promotion, or tenure in a particular year, the college or university had the right to demand higher performance levels from its faculty. Furthermore, the courts have left it to the colleges (and frequently to the administration rather than the teaching faculty) to determine the level of quality demanded, whether the faculty member's publications met that standard, and whether the number of publications was sufficient to support a positive tenure decision.[39]

For example, in *Clark v. Whiting*, an associate professor of biology at North Carolina Central University claimed that his equal protection and due process rights were violated when the institution repeatedly refused to grant his requests for promotion to full professor.[40] The basis for the promotion denials was the department's (and the administration's) decision that the plaintiff had "failed to meet the publication requirements requisite to attaining the rank of full professor."[41] In

38. Slippery Rock State College v. Pennsylvania Human Rights Comm'n, 314 A.2d 344, 347 (Pa. Commw. 1974).

39. Judicial deference to academic judgments, whether of individual faculty merit or of the criteria for evaluating such merit, has been analyzed in Lee, *Balancing Confidentiality and Disclosure in Faculty Peer Review*, 9 J. C. & U. L. 279 (1982-83). *See also* Lee, *Federal Court Involvement in Academic Decision-Making: Impact on Peer Review*, 56 J. Higher Educ. 38 (1985).

40. 607 F.2d 634 (4th Cir. 1979).

41. *Id.* at 637.

response to the plaintiff's contention that his three "scholarly publications" (a self-published laboratory manual, his Ph.D. thesis, and an article accepted for publication but not yet in print) were of sufficient quality and quantity to support a promotion to full professor, the court replied that such determinations were up to the academics, not to the courts, and held further that "the determination of such matters by the appropriate university authorities is not reviewable in federal court on any ground other than racial or sex discrimination or a first amendment violation."[42] The court did not explicitly address the issue of the fairness of heightened publication requirements, but implicitly affirmed the institution's right to require greater publication activity by refusing to review the reasonableness of the requirement or the accuracy of the evaluative judgments by the plaintiff's peers.

The Supreme Court of Vermont was similarly unsympathetic to a claim by a professor denied tenure at Lyndon State College that the college failed to accord sufficient importance to his single published article in its decision that, in view of his lack of a terminal degree, he had not demonstrated "significant professional, artistic or scholarly accomplishment."[43] Furthermore, the plaintiff argued, the college did not have the right to distinguish qualitatively between his article, published in the proceedings of the 1977 Lyndon State College Storm Conference, and three publications of a fellow faculty member (who had been granted tenure although lacking a terminal degree) in journals recognized by the American Meteorological Society. The court disagreed, saying that

> the decision [that greater weight is to be accorded writings which are published in recognized professional journals] is within the broad discretion of the Colleges ... is not arbitrary or discriminatory ... [and] is rationally related to the goals of higher education, whatever this Court may think of its underlying wisdom.[44]

Again, the court did not address explicitly the issue of whether heightened publication requirements were *per se* unfair, but implicitly recognized the college's right to require reasonable performance levels, in terms of both quality and quantity of publications, from faculty desiring tenured status.

In several cases, plaintiffs have alleged that the application of tougher publication requirements constituted sex or race discrimination. Again, the courts have disagreed. In *Lieberman v. Gant*,[45] a female English professor charged that male professors had been tenured in the past with publication records substantially weaker than hers. Although external reviewers had criticized the quality of Dr. Lieberman's publications, she had challenged the qualifications of the reviewers, and had

42. *Id.* at 641.
43. D'ALeo v. Vermont State Colleges, at 1130.
44. *Id.*
45. 630 F.2d 60 (2d Cir. 1980).

alleged that the communication from the department chair soliciting their views had prejudiced the reviewers against her. The Court of Appeals for the Second Circuit affirmed a trial court ruling that the department had applied fair and rational standards to the evaluation of her qualifications for tenure, and no discrimination was found.

Another federal court reached a similar conclusion in *Scott v. University of Delaware.*[46] The Sociology Department had recommended against reappointment for Dr. Scott because he had not published at all during his first three-year contract with the university. Ironically, it was the department's first attempt to apply heightened standards in the reappointment process, and they resulted in the nonrenewal of a protected class member. Nevertheless, the trial court ruled, and the Court of Appeals for the Third Circuit agreed, that the department had applied reasonable and fair standards to the nonrenewal decision, and that the conduct of the faculty "at a time when a change in departmental philosophy was bringing very heavy emphasis to the area of scholarship" was fair and nondiscriminatory.[47] Minority plaintiffs in other cases in which an insufficient publication record has been cited as the basis of the tenure denial have been similarly unsuccessful in alleging that discrimination was the basis for the negative decision.[48]

It appears that the argument of protected class members that heightened publication standards are discriminatory when applied to minority candidates for tenure in recent years, after more lax standards had been applied to white males, has been virtually eliminated because of the consistency with which the courts have ruled in colleges' favor. The Court of Appeals for the First Circuit summed up the judicial approach in these cases: the plaintiff "must show that he was subjected to a different standard *because of* his race or national origin" (or sex or religion). The court concluded that heightened performance standards are "a result of increased competition for tenure positions — variously described as 'the new professional situation' the college[s] found [themselves] facing ... and 'the golden moment for strengthening the faculty.'"[49]

While the foregoing analysis of cases demonstrates the extent to which the judiciary will defer to the qualitative judgments of academics as to the appropriate performance standards for faculty, it is significant in other ways as well. Although the tenure criteria in the Vermont State Colleges cases were negotiated with the faculty union and incorporated in the collective bargaining agreement,[50] other cases demonstrated that

46. Scott v. University of Delaware, at 931.

47. *Id.* at 1122.

48. *See, e.g.*, Manning v. Trustees of Tufts College, 613 F.2d 1200 (1st Cir. 1980). *See also* Cussler v. University of Maryland, 430 F. Supp. 602 (D. Md. 1977).

49. Banerjee v. Board of Trustees of Smith College, 495 F. Supp. 1148, 1161 (D. Mass. 1980), *aff'd*, 648 F.2d 61 (1st Cir.), *cert. denied*, 102 S. Ct. 671 (1981).

50. Incorporation of tenure criteria in a collective bargaining contract would, of course, mean that the administration would not be able to change the criteria unilaterally during the life of the contract.

either the academic department or the administration could unilaterally raise the performance standards and could also apply those new standards to faculty hired under the old rules.[51]

Post-Tenure Review: Legal and Ideological Challenges

Post-tenure review raises hackles among college faculty and their professional associations. The arguments against post-tenure review have been primarily ideological rather than legal. Faculty leaders of the American Association of University Professors (AAUP) have argued that such a practice creates a "permanent condition of probation," and that "any process that allows colleges to decide repeatedly whether a faculty member is competent to stay on is a variation of 'term tenure,' which is an oxymoron."[52]

In response to the issue of post-tenure review, the AAUP has adopted a "Statement on the Evaluation of Tenured Faculty." The burden of the statement is:

> The Association believes that periodic formal institutional evaluation of each postprobationary faculty member would bring scant benefit, would incur unacceptable costs, not only in money and time but also in a dampening of creativity and of collegial relationships, and would threaten academic freedom.... The association cautions particularly against allowing any general system of evaluation to be used as grounds for dismissal or other disciplinary sanctions. The imposition of such sanctions is governed by other established procedures, enunciated in the 1940 *Statement of Principles on Academic Freedom and Tenure* and the 1958 *Statement on Procedural Standards in Faculty Dismissal Proceedings*, that provide the necessary safeguards of academic due process.[53]

Although the AAUP statement stresses the importance of adhering to the "established procedures" for determining the fitness of faculty for continued employment and the due process protections required before a tenured faculty member is dismissed, the arguments against the issue of post-tenure review appear to be ideological, not legal.

Others disagree with the AAUP, however. Olswang and Fantel assert that

> tenure ensures against the infringement of academic freedom, but it does not insulate faculty from fair assessments of their competence to perform appointed duties. Periodic reviews themselves do not violate

51. *See, e.g.*, Scott v. University of Delaware, at 931. *See also* Lieberman v. Gant, 630 F.2d, at 60, Wells v. Doland, 711 F.2d, at 670.

52. Perry, *Formal Reviews for Tenured Professors: Useful Spur or Orwellian Mistake?* Chron. Higher Educ., Sept. 21, 1983 at 25, 27.

53. *Statement on Evaluation of Tenured Faculty*, 69 Academe 14a (1983).

> the principles of academic freedom; they simply assess performance in order to provide information which may be used for a variety of purposes—the reviews merely provide a fair evaluation of a colleague's ability, or inability, to successfully complete assigned duties, based upon the standards for faculty established at the institution.[54]

In assessing the legality of post-tenure review, it is necessary first to determine the actual protections afforded by tenure. Tenure is the set of procedural protections established, either by contract or by statute, to guarantee that faculty employment decisions will be made on the basis of the faculty member's performance rather than on the basis of his or her views or other matters unrelated to the quality of the faculty member as a teacher and scholar.[55] But tenure may be removed for certain reasons, usually incorporated into the contract or statute which conferred tenure rights; typical reasons supporting the removal of tenure are incompetence, moral turpitude, neglect of duty, and insubordination.[56] As long as the tenured faculty member is afforded due process in the determination of whether the reasons alleged to support a tenure removal are valid and the process determines that academic freedom rights have not been abridged, the faculty member's legal rights have not been violated. This principle is confirmed by the *1940 Statement on Academic Freedom and Tenure* of the AAUP, which states that tenure may be "terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies."[57] Thus, the policy statement of an opponent of post-tenure review acknowledges that tenure is not a lifetime guarantee of employment.

As noted above, the state and federal courts have confirmed the right of faculty and administrators to determine the standards and criteria for granting promotion and tenure, and have generally refused to review such determinations.[58] Similarly, institutions have the legal right to determine the criteria for termination of tenure, subject to applicable state laws or contracts in effect. As Olswang and Fantel note, even the AAUP has acknowledged that the definition of adequate cause for the removal of tenure in its *1958 Statement on Procedural Standards for Faculty Dismissal Proceedings* is an institutional prerogative.[59] Therefore, unless state law forbids it or the institution has explicitly agreed not to evaluate tenured faculty in a contract, either collectively nego-

54. Olswang & Fantel, *supra* note 9, at 26-7.

55. *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234 (1957). For a history of the development of academic freedom in the United States, *see* W. Metzger, The American Concept of Academic Freedom in Formation (1977).

56. Lovain, *Grounds for Dismissing Tenured Postsecondary Faculty for Cause*, 10 J. C. & U. L. 419 (1983-4). *See also* Olswang & Fantel, *supra* note 9.

57. American Association of University Professors, Academic Freedom and Tenure, 1940 Statement of Principles, in AAUP Policy Documents and Reports (1977).

58. For a discussion of judicial review of promotion and tenure decisions, *see* Lee, *Federal Court Involvement*, *supra* note 39.

59. Olswang & Fantel, *supra* note 9 at 11.

tiated or otherwise, it would appear that post-tenure review is the legal prerogative of the institution's administration.[60]

Despite the substantial judicial deference to academics as the appropriate group to set performance criteria and to evaluate their subordinates or peers against those criteria, a cautionary note is in order. The commentators and many academic administrators agree that faculty should be closely involved in any post-tenure review process, and that the subjective determinations of a faculty member's competence should be made by peers, not by administrators.[61] While a strong faculty role may not be required from a strict legal perspective,[62] courts have recognized in cases challenging negative promotion and tenure decisions that the "tenured faculty ... are in the best position to make these judgments."[63]

The mechanics of post-tenure review are not unfamiliar to academe, for tenure protections require institutions to conduct a performance review of any tenured faculty member before the individual is separated from employment. Both the state and the federal courts have upheld terminations of tenured faculty when the reviews have complied with substantive fairness and the due process guarantees of the tenure contract or statute.[64] However, conducting post-tenure reviews of all faculty, whether or not they have been identified through other means as "problem" faculty, is viewed as a different matter because it changes the nature of the tenure guarantee from one of autonomy to a heightened accountability to maintain both one's scholarly or teaching qualifications and one's standard or level of performance.

A review of cases revealed no litigation concerning the legality of post-tenure review alone. In fact, most post-tenure reviews which have been litigated have occurred in conjunction with a "problem" faculty member who the institution then attempts to terminate "for cause."[65] In such cases, faculty generally challenge the procedures used,[66] claim first amendment violations[67], or both. And judicial review of such cases has been limited to the fairness of the procedures and the degree to which the

60. In some states, the public sector bargaining law would not permit the administration of a public college or university to negotiate away management's right to evaluate its employees, including faculty, because performance review is a management prerogative, *see, e.g.*, State v. Supervisory Employees, 78 N.J. 54 (N.J. 1978).

61. *See, e.g.*, Olswang & Fantel, *supra* note 9. *See also* Perry, *supra* note 52.

62. *See, e.g.*, Chung v. Park, 514 F.2d 382 (3d Cir. 1975), where the Third Circuit stated that "the administration of the internal affairs of a college and especially the determination of professional competency is a matter peculiarly within the discretion of a college administration." *Id.* at 387.

63. Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1357 (W.D. Pa. 1977).

64. *See, e.g.*, Chung v. Park, 514 F.2d 382. *See also* Adamanian v. Jacobsen, 523 F.2d 929 (9th Cir. 1975), Lehmann v. Board of Trustees of Whitman College, 576 P.2d 397 (Wash. 1978).

65. *Id.*

66. *See, e.g.*, Chung v. Park, 514 F.2d 382.

67. *See, e.g.*, State *ex rel.* Richardson v. Board of Regents, Univ. of Nevada, 269 P.2d 265 (Nev. 1954).

decision was based upon faculty performance issues rather than the faculty member's ideas or beliefs.[68]

The absence of litigation concerning the legality of post-tenure review may indicate only that few institutions conduct such reviews, rather than suggesting that such litigation would be unlikely. It also may indicate that, where post-tenure review does occur, it has been developed with the cooperation of the faculty, and is essentially a faculty responsibility.[69] It is not unlikely, however, that the legality of post-tenure review will be challenged in the future as enrollments decline, demands for accountability increase, and the concept of updating professional credentials gains increased acceptance.[70]

The Compatibility of Institutional Accountability and Tenure

Analyzing the legal status of post-tenure review suggests a broader issue: the relationship between a college or university's need to be accountable to its funding sources (especially in the public sector), and the rights of tenured faculty. Again, no case law precedent addresses this issue specifically, but the implications of heightened demands for accountability have particular importance for the concept of tenure.

Institutions are facing demands from state legislators, government agencies, professional associations, and the public at large to justify the way that resources are expended, the way that faculty spend their time, and the manner in which faculty interact with students. While some issues are mixed questions of ethics and law (such as personal relationships between faculty and students), others influence the employment relationship between faculty and the institution. These accountability demands shift the image of faculty as a "community of scholars" to a group of employees who owe a full day's work to the employer in exchange for a full day's pay.[71]

One issue of special importance to tenured faculty has been the attempts of institutions to regulate the amount of time a faculty member may spend on external activities. A majority of the research and doctoral-granting institutions in the United States have promulgated policies on faculty consulting; some specify a maximum number of days per week or month that a faculty member may devote to external activities,

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68. *See* Lovain, *supra* note 56.

69. *See, e.g.*, at the University of Delaware, the faculty senate developed a system of post-tenure review as a response to legislative discussions regarding the continued viability of tenure at state colleges and universities. *See* G. LaNoue & B. Lee, Beyond the Published Opinion: The Consequences of Academic Discrimination Litigation (forthcoming).

70. Recertification or upgrading of professional credentials is developing among the medical, allied health and legal professions. For example, several states require lawyers to attend professional training seminars annually as a condition of maintaining their license. *See* Olswang & Fantel, *supra* note 9, at 29.

71. *See* Olswang & Lee, *supra* note 11, at 23-4.

while others limit the amount of money a faculty member may earn from such activities.[72] The assumptions behind such regulations are that

> persons who engage in outside work may neglect their teaching duties, their students, or their institutional responsibilities. Faculty members have full-time jobs and, like executives, owe all of their time to the institution.

If an institution promulgates a faculty workload policy, or a policy which limits external activities in some way, violation of such a policy by a faculty member, whether tenured or untenured, may be grounds for termination for cause.[74] Just as the courts have found heightened performance standards to bear a rational relationship to the mission of an educational institution, so, too, have they found consulting policies to be lawful, and not violative of a public employee's due process rights.

> Plaintiffs have no constitutional right to engage in the unlimited private practice of medicine while holding a public position of employment ... the income limiting agreements ... [are] rationally related to the espoused legitimate goals of fostering full-time devotion to teaching duties.[75]

Private sector colleges and universities, relieved of constitutional due process requirements, need only incorporate such requirements into their institutional policies and enforce them as contracts.

Demands for regulation of faculty conduct also have occurred in relation to perceived conflicts of interest between faculty responsibilities as employees of an academic institution and relationships with external organizations which may be funding their research. For example, some research universities have developed policies which forbid faculty to accept grants from sponsors who attempt to control when or how the research results are published.[76] Others limit the right of faculty to serve on the board of directors or to hold a financial interest in organizations which fund the faculty member's research.[77] Although these issues have not been litigated extensively, the analogy from cases on heightened performance standards and the regulation of external activities would suggest that, if the institution could articulate the relationship between the policy and the quality of the education it provides, most courts would find the policy an acceptable exercise of administrative power.

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72. Dillon & Bane, *Consulting and Conflict of Interest*, 61 Educ. Rec. 52 (1980).
73. H. Yuker, Faculty Workload: Research, Theory, and Interpretation (1984).
74. *See, e.g.*, Gross v. University of Tennessee, 448 F. Supp. 245 (W.D. Tenn. 1978), *aff'd*, 620 F.2d 109 (6th Cir. 1980).
75. *Id.* at 248.
76. Olswang & Lee, *supra* note 11, at 46.
77. Bouton, *Academic Research and Big Business: A Delicate Balance*, New York Times (Magazine), Sept. 11, 1983, at 62-3.

Accountability demands limit the autonomy of tenured faculty in other ways which have combined ethical and legal implications. For example, the judicial interpretations of title VII's limitations on sexual harassment not only protect students from abuse, but provide an additional "cause" for the termination of a tenured faculty member.[78] Similarly, institutional responses to allegations of scientific misconduct (plagiarism, falsification of data, abuse of confidentiality, or violations of regulations governing funded research) may result in the discipline or discharge of tenured faculty members.[79] A faculty member's tenured status does not shield him or her from compliance with either legal or ethical requirements, but merely provides a series of protections for the faculty member which regulate the institution's investigation of the allegations and its determination of the sufficiency of grounds for discipline or discharge.[80]

Summary

The foregoing analysis suggests that a combination of environmental factors (heightened accountability demands, reduced mobility for faculty, and limited growth or actual decline), when added to judicial deference to the "business judgments" of academics concerning performance requirements and evaluation,[81] have limited the degree to which tenure can protect faculty from regulation by external as well as internal forces.

The analysis, therefore, suggests a response to the following criticism of tenure by a respected commission:

> Some of the criticisms of tenure are valid, as knowledgeable and candid proponents of tenure have always admitted. No system involving the judgment of persons can ever be foolproof; tenure decisions have on occasion been wrong and will continue to be. People change as they grow older; the powers and energies of some will decline, and some will decide to coast and take it easy. Institutions wishing to upgrade themselves have in fact found their efforts impeded by the presence of certain faculty members, who were perhaps competent enough by the earlier standards but mediocre by the new.[82]

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78. 42 U.S.C. § 2000(e) (1972). The EEOC Guidelines concerning sexual harassment are published at 29 C.F.R. 1604.11.

79. Olswang & Lee, *Scientific Misconduct: Institutional Procedures and Due Process Considerations*, 11 J. C. & U. L. 51 (1984).

80. *Id.*

81. Judicial deference to the decisions of administrators concerning policies which further the institution's mission is similar to the judicially-created "business judgment" rule, where "courts will not review the correctness of management's bona fide judgment." Whittlesey v. Union Carbide, 567 F. Supp. 1320 (S.D.N.Y. 1983), *aff'd on other grounds*, 742 F.2d 724 (2d Cir. 1984).

82. Commission on Academic Tenure, *supra* note 2, at 19-20.

The response of courts to the legality of heightened performance expectations has uniformly affirmed the right and the power of institutions to implement new standards. While the cases have been litigated in the context of untenured faculty challenging stricter tenure standards, nothing in the cases nor in the AAUP standards themselves suggests that an institution is forever bound by the performance standards that existed at the time an individual faculty member was granted tenure. While the procedural protections afforded by tenure remain undiminished, the right of a college or university to determine for itself the quality and quantity of performance that it will expect from its faculty, and to enforce those requirements vigorously, appears, to be unrelated to tenure.