

American University Washington College of Law

From the SelectedWorks of Ira P. Robbins

Spring 1998

Exploring the Concept of Post-Tenure Review in Law Schools

Ira P Robbins



SELECTEDWORKS™

Available at: http://works.bepress.com/ira_robbins/41/

Exploring the Concept of Post-Tenure Review in Law Schools

by
Ira P. Robbins

Faculty in American law schools and universities often view the award of tenure as an inviolate guarantee of job security.¹ From this perspective, any attempt to monitor the level and quality of a tenured professor's work infringes on academic freedom. Recently, however, academics have argued that shielding the performance of tenured faculty from serious review potentially may be a disservice to the academic institution.² Critics complain that schools sacrifice professional accountability when deficient performance goes undetected and uncorrected.³ Most recently, the University of Minnesota Law School, where "tenure is no longer untouchable," addressed these issues.⁴

Deficient performance, of course, can have different roots and manifestations. Some professors, perhaps inadvertently, drift away from their mission of serving the law school and the scholarly community.⁵ Others may enter

Because it can be seen both as a tool to foster professional development and as a process for imposing penalties, post-tenure review has had a mixed reception in the academic community.

a mid-career slump or may no longer be able actively to satisfy their responsibilities due to advanced age.⁶ Alternatively, some may experience a stressful life event or suffer from an identifiable and treatable problem that prevents them from fulfilling their professional responsibilities.

Senior faculty members who are extremely underproductive or detached from their work (in teaching, scholarship, and/or service to the law school and broader university communities) arguably represent the worst form of deficient performance. They are often termed "deadwood."⁷ They simply do not contribute, in any important sense, to the well-being of the institution.

How does this problem persist?⁸ One reason is that some colleagues, out of a sense of duty to support one another, occasionally cover for their lax counterparts.⁹ Another answer is that the tenure system protects all academics, even those whose contributions are not considered worthwhile by their contemporaries, because of the chance that future scholars might find their work valuable.¹⁰ Some argue that the possibility that a few scholars will not make any meaningful contributions at all is the cost of preserving academic freedom.¹¹

How should the institution respond when tenured faculty occupy positions and consume resources that could be devoted to new faculty members who are more energetic and productive? Is there adequate recourse for

Ira P. Robbins is the Barnard T. Welsh Scholar and Professor of Law and Justice at American University, Washington College of Law, where he chaired the Committee on Rank and Tenure from 1994-1996. The author is grateful to Aelish M. Joyce, Sarah C. Lindsey, Ruth Ann Lowery, Joshua S. Millard, and Tina M. Schaefer for their excellent research assistance, and to the American University Law School Research Fund for providing financial assistance.

correcting the problem without interfering with academic freedom?

Depending on how it is defined and implemented, a system of post-tenure review might be one answer for providing a viable mechanism of quality control. If it is seen as a tool to foster professional development, then post-tenure review may benefit not only the institution and academia as a whole, but also the individual professor as well. Ideally, a system of post-tenure review would bring the faculty together in a spirit of collegiality,¹² so that constructive criticism and feedback would be available to a professor whose passion for the law, teaching, and scholarship simply required reinvigoration or some beneficial re-examination. On the other hand, if the institution were to use post-tenure review primarily as a process for imposing penalties, with a view toward dismissing tenured faculty, it would certainly meet substantial criticism.

It is thus no wonder that the concept of post-tenure review has had a mixed reception in the academic community.¹³ For many of the reasons summarized above, the American Federation of Teachers and the National Education Association both favor post-tenure review when used for faculty development.¹⁴ In contrast, the American Association of University Professors (AAUP) opposes the idea: "[P]eriodic formal institutional evaluation of each post probationary 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."¹⁵ The AAUP argues that existing quality controls such as peer review of grants and publications, student evaluation of teaching performance, periodic salary reviews, and departmental review programs already improve the performance of tenured faculty members.¹⁶

This article examines the considerations for evaluating whether to adopt a system of post-tenure review. Part I discusses the primary issues prompting the post-tenure review debate and explains the growing controversy. Part II explores the arguments articulated by faculty and administrators for and against post-tenure review. Part III presents theoretical models of post-tenure review and highlights prominent aspects of systems currently utilized in the United States. Part IV compares these theoretical models to the existing systems and considers how to adapt post-tenure review to the unique milieu of the law school. Part V presents studies that have evaluated post-tenure review systems. Part VI discusses the kind of professors whom post-tenure review might identify and suggests potential responses to deficient performance, including alternatives to post-tenure review.

I. ISSUES PROMPTING THE POST-TENURE REVIEW DEBATE

This section surveys the issues that have prompted the post-tenure review debate: public demand for accountability and the recent elimination of mandatory retirement in academic institutions.¹⁷

A. PUBLIC DEMAND FOR ACCOUNTABILITY IN INSTITUTIONS

Higher education has come under attack¹⁸ as tuition costs continue to rise¹⁹ and access to such education lessens for the middle class. The system of tenure, often regarded by the public as a tool for protecting the "idle and inert,"²⁰ has emerged as a focal point for criticism. One detractor complained: "Much of what is wrong with American education at all levels today is tied up with the boundless self-indulgence that results when people have guaranteed jobs."²¹ The apparent grant of lifetime job security may be "resented because it implies stability of employment in an age of change and occupational turmoil."²²

While some observers recognize the benefits of tenure, others believe that these benefits do not outweigh the costs: "While tenure can save out-of-pocket expenses . . . it also increases overall costs, decreases flexibility, disenfranchises the paying consumer of education, increases dependence on unaccountable insiders, and makes it nearly impossible to remove incompetent and unnecessary professors."²³

Law schools have not escaped the criticism: "If you can't gain admission to heaven, the next best thing is probably being a law college professor with tenure. It's virtually impossible to lose the job and you certainly won't perish if, as is likely the case, you don't publish."²⁴

While the critiques of educational institutions may seem harsh and unfair, schools will have to become more responsive to the demands for accountability in order to regain the public's support. Public institutions may receive more pressure to reform from citizens. All schools, however, whether public or private, must address the demands of their consumers—students.²⁵

B. ELIMINATION OF MANDATORY RETIREMENT IN ACADEMIA

In addition to public demand for accountability, a recent change in the Age Discrimination in Employment Act (ADEA) has intensified the debate over post-tenure review.²⁶ In 1967, Congress enacted the ADEA to protect older workers, employees between the ages of forty and sixty-five, from discrimination in the workplace.²⁷ A 1978 amendment raised the age limit for forced retirement to seventy. In 1986, ADEA amendments

introduced a special rule for tenured faculty that allowed mandatory-retirement policies for faculty of 70 years of age.²⁸ Congress repealed this statutory exemption for colleges and universities effective January 1, 1994.²⁹ Since then, no university has attempted to uphold a mandatory-retirement scheme in the courts, and American courts have yet to decide on the legality of mandatory retirement of tenured faculty.³⁰

Some fear that mandatory retirement might impinge on the ability of a university to maintain an environment that is conducive to academic freedom.³¹ The prohibition against mandatory retirement might place a great strain on academia by requiring universities to retain older faculty members, even those performing at deficient levels. With mandatory retirement no longer serving as one solution to the problem of poor performance by tenured faculty, academic institutions are seeking alternative solutions, including post-tenure review.³²

II. MAJOR FACULTY CONCERNS THAT MUST BE ADDRESSED WHEN CONSIDERING THE IDEA OF POST-TENURE REVIEW

Any institution that considers implementing post-tenure review must contemplate the potential effects of a system on the rights and morale of tenured professors, as well as on the well-being of the institution as a whole. Faculty members have two fundamental interests at stake: academic freedom and job security. Traditionally, these interests were addressed solely through tenure.³³ More recently, however, some commentators have argued that the concept of post-tenure review can be reconciled with both academic freedom and job security.³⁴ This section of the article surveys the range of views on these two major areas and considers other concerns that faculty members may have about post-tenure review.

A. ACADEMIC FREEDOM

Tenure has always represented a sacrosanct safeguard of academic freedom,³⁵ largely because of the fear that McCarthy-esque harassment of academicians could occur subtly under the guise of one evaluation scheme or another.³⁶ Pursuant to this view, academic freedom guarantees professors a certain level of autonomy with regard to the material they choose to teach, the methods they use to teach, and the research in which they engage.³⁷ Some authors have argued that academic autonomy cannot be absolute, however, because there is a countervailing need for accountability.³⁸ Absolute autonomy has also faced challenges from commentators who do not confine academic freedom to the teaching and research responsibilities of faculty members.³⁹

How can the warring ideals of accountability and autonomy be reconciled? William Hollingsworth suggests that the mission of an academic institution can be divided into two spheres: a transmission-of-knowledge objective and a truth-seeking objective.⁴⁰ In the first realm, a professor serves the institution and its students. Here, professors must cede some of their autonomy because the institution demands accountability.⁴¹ The second sphere is that of research and outside service. In this realm, the professor serves the larger academic community by attempting to uncover truth. Autonomy is crucial in this realm because subtle coercion threatens to deter scholars from pursuing their sincere interests and from publishing books and articles that threaten the status quo.⁴² Within this scheme, post-tenure review is appropriate only in the first realm. Functions such as research and writing should be subject to review only with substantial circumspection.⁴³

The concern that all professors would be held to a standard of "publish or perish" guides Hollingsworth's desire to insulate the scholarly enterprise from post-tenure review. This standard of performance, which Hollingsworth calls the "Widgets Producer model of productivity,"⁴⁴ unyieldingly demands periodic publication of research findings.⁴⁵ Professors who pursue long-term research projects that may not result in published findings for years after their inception receive unfavorable evaluations under this standard. In addition, the standard penalizes researchers who collaborate with others⁴⁶ or those who justifiably abandon a project after several years of work because they rethink its value.⁴⁷ Hollingsworth contends that tenured law professors should be "exempt from the threat of publish or perish... . [E]xcept in clear cases of sloth the exemption is an essential component of postprobationary academic freedom, properly understood."⁴⁸

B. JOB SECURITY

Tenure may be seen as a "social contract"⁴⁹ in which the professor and the institution trade costs in return for benefits. The academician forgoes the higher wages that the market might allow⁵⁰ in order to gain academic freedom,⁵¹ long-term employment stability,⁵² the ability to commit to long-term projects,⁵³ and a guaranteed salary. The institution reaps related benefits: it maintains a relatively stable staff⁵⁴ and can occasionally offer attractive positions to prospective faculty members. In addition, the institution need not exhaust resources to perform periodic monitoring after the probationary period.⁵⁵ A major risk of awarding tenure, of course, is that the decision will prove unwise, leading to inefficiency in its allocation of resources as the faculty member becomes less productive.⁵⁶

Some faculty object to post-tenure review because it upsets the social contract's balance of costs and benefits. They argue that subjecting tenured professors to periodic formal reviews trivializes the initial grant of tenure. Since tenure is awarded only after a lengthy and presumably thorough probationary period, the procedure already adequately tests the merit of accomplished faculty, who then should not be subject to periodic "re-tenuring."⁵⁷

Other commentators assert that post-tenure review is not incompatible with the institution of tenure.⁵⁸ Tenure is no more an absolute grant of job security than academic freedom is an absolute good. In some instances, accountability to students or peers might advance learning and "academic values" more than academic freedom does.⁵⁹ Those who argue in favor of accountability claim that tenure must not be seen as an unconditional grant of employment.⁶⁰ In the same vein, William W. Van Alstyne of Duke Law School has said that tenure "lays no claim whatever to a guarantee of lifetime employment."⁶¹ Rather, he contends, "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*."⁶² To those who claim that the probationary period has presumptively established the tenured professor's merit, Van Alstyne responds that academic due process still allows for the dismissal of tenured professors:

It is but a limited statement that each faculty member possessing [tenure] . . . is thought worthy of a rebuttable presumption of professional excellence in continuing service to the institution. Thereafter, when termination of [the professor's] services is sought for any reason inconsistent with that presumption, it requires only that the burden of justification be fairly discharged under conditions of academic due process by those with whom it properly rests.⁶³

C. INSTITUTIONAL CONCERNS

Faculty may share other concerns about the benefits and practicality of post-tenure review that reflect their interest in a quality environment in which to teach and do research. Some argue that post-tenure review is a waste of "scarce resources of faculty time and money for identifying a small number of underperformers" and generates ill will and competition among faculty members.⁶⁴ Others see evaluation of tenured faculty as a beneficial "mechanism for identifying resource targets"⁶⁵ that engenders no more factionalism than is already present in the process of promotion and tenure.⁶⁶ The

competing arguments regarding post-tenure review may be summarized as follows.⁶⁷

Proponents contend that the benefits of post-tenure review outweigh its possible costs. The expense incurred in the review might result in substantially improved performance by reinvigorated faculty, leading to the efficient use of resources and avoidance of social costs from continuing inadequate instruction or research. The failure to implement post-tenure review could damage the spirit or morale of the institution because the school would then effectively ignore the professional development of its faculty. Furthermore, the system of review could be merged with decisions about merit pay, promotion, or dismissal for cause to improve administrative efficiency.⁶⁸ Advocates of post-tenure review also argue that the absence of such a process would threaten the entire system of academic management, deans and department heads included: if "institutions don't assess their own performance, others—either state or commercial organizations—will."⁶⁹ Given today's political currents, post-tenure review might be seen as a way to ward off "interference by outside constituencies suspicious of tenure."⁷⁰

Critics counter that existing methods of evaluation render a post-tenure review scheme superfluous and wasteful.⁷¹ While the concept might have "promise as a method of delivering individually designed resource supplements to faculty members with . . . real need for them,"⁷² it results in a predictable approval and a trite development plan.⁷³ Since evaluating faculty effectiveness in classroom teaching requires more time than is required to evaluate legal scholarship, post-tenure review might overemphasize the value of research and prod professors to neglect their teaching duties in order to publish.⁷⁴ Moreover, opponents argue, post-tenure review allows deans and department heads to avoid doing their jobs; they should have face-to-face discussions with weak faculty members,⁷⁵ rather than create committees or subcommittees to act as a buffer between the dean and individual faculty.

Post-tenure review also raises the specter of increased factionalism among tenured professors. Some doubt that an institution can implement such a system without sacrificing collegiality.⁷⁶ This concern may have particular weight at schools or in departments that already suffer from deep political divisions. All factions must be included in the development of post-tenure review;⁷⁷ if the process is to succeed at these institutions, the evaluations must be conducted with appropriate sensitivity.⁷⁸ In this sense, post-tenure review shares the danger that accompanies tenure in the first place.⁷⁹ Ultimately, the faculty must consider the mission and climate of the institution,⁸⁰ as well as the benefits and

pitfalls of tenure itself, in deciding whether to introduce post-tenure review.

III. MODEL POST-TENURE REVIEW PROGRAMS AND REPRESENTATIVE SYSTEMS

If Swygert and Gozansky are correct that post-tenure review is compatible with academic freedom and job security, then administrators (presumably with faculty involvement) must devise a system of review that preserves the traditional safeguards of tenure. Commentators who have studied the productivity of tenured faculty have suggested various systems of evaluation to reinvigorate faculty and boost productivity. Although any institution must tailor a post-tenure review program to its own mission, context, and culture, the following models illustrate the range of possible systems. A great deal more has been written on the topic of post-tenure review of university faculty in general than of law professors in particular. If read together, however, these two branches of literature suggest mechanisms of post-tenure review that might function well in a particular law school.

A. SWYGERT AND GOZANSKY'S PERIODIC PEER REVIEWS AND FACULTY COLLOQUIA

Michael Swygert and Nathaniel Gozansky have posed two alternative models—periodic peer review and faculty colloquia—for the review of tenured law professors. Each model is premised on extensive faculty involvement in the process of evaluating colleagues. Under the model of periodic peer review,⁸¹ each senior law-faculty member undergoes reviews of his or her productivity every one or two years (no greater than three-year intervals are recommended). The person under review, tenured faculty, and the dean participate in the review session, held in an informal group-discussion format that should last no longer than one hour. Prior to the review, the professor being evaluated is asked to submit a dossier containing information relating to his or her professional development, such as a list of publications or awards and any works in progress. The tone of the discussion should be informal and non-threatening. Its spirit should be one of "collegial caring."⁸² The goal of the discussion is not to intimidate the faculty member, but rather to provide collegial support and feedback for the individual's professional growth.

The standard of review is whether the faculty member is "engaged in professionally and institutionally worthwhile projects beyond teaching."⁸³ In considering what is worthwhile, the reviewers should eschew

consideration of a faculty member's political or ideological orientation: "A tenured faculty member should not be placed in jeopardy because his or her colleagues disagree with the substance, direction, or thoroughness of scholarly activity."⁸⁴ To allow normative judgment of the ideological bent of the professor would be a severe encroachment on academic freedom.⁸⁵

This system of periodic peer review has several purported benefits. It facilitates the exchange of suggestions and fresh insights among colleagues, underscores the importance of persistent rather than sporadic involvement in activities outside the classroom, emphasizes the service obligations of the law-teaching profession, fosters a collegial pride that could encourage individual motivation,⁸⁶ and stems faculty inactivity.⁸⁷

Swygert and Gozansky offer another model of review—faculty colloquia—as a secondary option⁸⁸ for law schools that cannot implement the faculty peer-review method due to faculty apathy, competition, or some other reason.⁸⁹ Under this model, approximately every year⁹⁰ senior faculty members make presentations to their colleagues on works in progress. (The authors leave it to individual law schools to decide whether to include presentations by junior faculty as well as senior faculty.) As with periodic peer reviews, the climate for faculty colloquia should be one of constructive conversation, with discussion and debate following the presentation. This system is even more informal in tone than the periodic peer review because there is no "hour of judgment."⁹¹ Scholarly activity is encouraged rather than coerced.⁹²

B. UNIVERSITY OF HAWAII: HIERARCHICAL STRUCTURE

The University of Hawaii ("Hawaii") is one of several state universities with a significant research and graduate mission that has implemented a system of post-tenure review.⁹³ The department chairs serve the primary evaluative role at Hawaii, unlike in the Swygert and Gozansky system of peer review.⁹⁴

Three basic principles guided the framers of Hawaii's post-tenure review system.⁹⁵ First, the review should reflect the nature of the individual's field of work and conform to fair and reasonable expectations as recognized by faculty peers in the relevant department or discipline. Second, the review must present no threat to an individual faculty member's tenure. Third, the evaluation must encourage professional growth and thereby enhance the contributions of those involved.

The system of post-tenure review in place at the University of Hawaii has far more structure than either of the two models offered by Swygert and Gozansky. Initially, faculty within each university department

prioritize expected standards of performance, which then make up the departmental guidelines.⁹⁶ Each year, faculty members file a résumé-type document with the department chair, reporting professional accomplishments for the previous year.⁹⁷ The chair then notifies those faculty members who are due for review. Untenured faculty and those who have been reviewed within the last five years or have been awarded promotions, tenure, or a merit salary increase⁹⁸ are exempt. Faculty members who are up for review submit to the department chair any additional information that they would like to have considered.

The department chair then evaluates the faculty member's performance against departmental guidelines. If the faculty member compares favorably, the review ends. If the chair finds deficiencies in teaching, research, or service, however, a faculty development plan will be devised. Should the faculty member desire feedback from colleagues in designing the plan, a committee of peer faculty is available to help. The department is authorized to commit resources to implement the faculty member's plan, and the dean's approval can be sought if implementation requires extra-departmental resources.

While the Hawaii plan designates the department chair to carry out post-tenure review, there are provisions to include other members of the institution when a dispute arises. For example, if the chair and the faculty member cannot agree that performance has been deficient, a university-wide faculty evaluation-review committee will be called upon to make a final decision. Should the department chair and faculty member fail to formulate a mutually agreeable development plan, the dean of the particular school will be called upon to mediate the dispute.

C. UNIVERSITY OF WISCONSIN: REVIEW OF SUPERLATIVE AND DEFICIENT FACULTY

In April 1993, in response to a mandate of the Board of Regents, the University of Wisconsin ("Wisconsin") implemented a post-tenure review system.⁹⁹ The primary focus of Wisconsin's review system has been to foster professional development¹⁰⁰ rather than to punish poor performance.¹⁰¹ The review of faculty has been linked with the merit process already in use, as a response to faculty members' concern that the review would create unnecessary bureaucracy.¹⁰² Pursuant to the review system, all tenured faculty members will be reviewed every five years by one or more tenured professors.¹⁰³ In addition, the system of post-tenure review itself will be evaluated annually.¹⁰⁴

This version of post-tenure review ensures that all tenured faculty members will be reviewed several times during their careers. Thus, the Wisconsin system is

considered to be less punitive than the Hawaii system because the reviews are not conducted as a result of poor performance in the past. The Wisconsin system was created both to reduce faculty anxiety about the reviews and to foster excellence.¹⁰⁵ In addition, each department's executive committee must establish written criteria and procedures concerning the post-tenure review process.

The review examines a faculty member's performance over the previous five years with reference to his or her dossier and career plans for the future. The reviewer(s) may interview others who have knowledge of the faculty member's work.¹⁰⁶ After completing the review, the reviewer(s) must provide the professor with a copy of the report, to which the professor may file a written response. The appropriate dean maintains all of these documents. The review system does not include a provision for a career-development plan.

The departments keep records of the reviews completed and the department chairs annually report the outcome of the reviews to the dean. Wisconsin's policy of post-tenure review does not include language concerning actions that would be taken as a result of a poor evaluation. Since the policy enumerates procedures for recordkeeping and documentation, however, it is likely that the reviews could be used as evidence toward dismissal for cause.

D. UNIVERSITY OF COLORADO: A SYSTEM OF REWARDS

The Board of Regents instituted post-tenure review at the University of Colorado ("Colorado") in 1982.¹⁰⁷ Colorado implemented the post-tenure review program as a part of a movement to "define, strengthen and qualify tenure" in the early 1980s.¹⁰⁸ Its original purpose "was to identify faculty members whose excellent work could be enriched by targeted [and] specialized support and those whose flagging efforts might be invigorated by thoughtfully designed and delivered aid."¹⁰⁹ Thus, Colorado's system of post-tenure review revolves around funding: the system seeks to foster faculty productivity by providing additional resources.

Each faculty member is subject to peer review once every five to seven years. Reviews can be made in conjunction with the annual merit reviews.¹¹⁰ The review process includes an examination of the professor's dossier, a written report by the reviewer(s), and the development plan, if needed.¹¹¹ According to a comparison study conducted by the Florida Board of Regents, the most effective part of the Colorado system of review is the "requirement for self-evaluation against a set of previously agreed upon standards."¹¹²

E. VIRGINIA POLYTECHNIC INSTITUTE: TERMINATION AS A CONSEQUENCE

In 1996, the State Council of Higher Education for Virginia mandated that all state colleges and universities develop a system of post-tenure review.¹¹³ As a result of this mandate, Virginia Polytechnic Institute ("Virginia Tech") designed a system of post-tenure review that will be implemented in 1998.¹¹⁴ Virginia Tech designed the program to provide for termination as a possible consequence of chronically poor performance.¹¹⁵ In the past, it was difficult to dismiss a tenured faculty member for consistently poor performance. Attempts to dismiss for this cause typically ended in a conflict between the department head and the faculty member and resulted in litigation.¹¹⁶

The post-tenure review program will begin with the faculty of each department creating minimum standards that will be used during the annual evaluations currently employed by Virginia Tech.¹¹⁷ This program focuses on the subgroup of professors whose performance is deficient. "It would have been wonderful to have used periodic review of all faculty as an occasion to celebrate their many extraordinary contributions, but we couldn't justify the time that such review would consume."¹¹⁸ Thus, the only faculty members who will be evaluated are those who receive an "unsatisfactory" evaluation for two consecutive annual reviews.¹¹⁹

The peer review, conducted by the departmental promotion and tenure committee, can result in certification of satisfactory performance¹²⁰ or certification of deficiencies. If the professor's performance is determined to be deficient, then the committee can recommend dismissal for cause, a sanction other than dismissal,¹²¹ or a period of remediation.¹²²

IV. COMPARING THE ALTERNATIVES

This section of the article compares the different systems of review at the institutions discussed above with the models proposed by Swygert and Gozansky. It also examines the applicability of the various systems to the law school setting.

A. RATIONALES AND RESULTS

An analysis of the different systems indicates that there are three driving forces behind the implementation of post-tenure review: faculty development, faculty discipline, and academic accountability. Most universities declare faculty development as their primary rationale. These universities claim that their purpose is to foster growth in the areas of teaching, scholarship, and service. The University of Wisconsin and University of Colorado systems best exemplify this rationale. Their

purpose is to nurture professional development for all faculty members. This focus is consistent with Swygert and Gozansky's models of periodic peer review and faculty colloquia; both seek to create "a spirit of collegial caring,"¹²³ support, and feedback.

Some institutions articulate faculty discipline as a second rationale for implementing systems of post-tenure review. Their procedures are punitive in nature and provide for the dismissal of tenured faculty members who have records of poor performance. Virginia Tech's system, for example, provides for the termination of tenured professors performing at deficient levels. The theory underlying a punitive system contradicts the principles set forth by Swygert and Gozansky.

The third rationale behind the implementation of post-tenure review is the desire to meet demands for accountability from outside constituencies. This rationale is likely the primary objective of legislatures when they mandate post-tenure review systems by statute.¹²⁴ Swygert and Gozansky do not emphasize this factor, but it is becoming increasingly important with the public's growing demand for accountability.

Post-tenure review seems superfluous without some clear policy that attempts to solve the problem of sub-par performance. If the faculty members are generally productive, then Swygert and Gozansky's models of informal intercollegial support may work to encourage a faculty member to be more productive.¹²⁵ If an institution has a widespread problem of faculty deficiencies, then for purposes of both accountability and budgetary responsibility, invocation of a termination process might prove to be the better course.

The feasibility of post-tenure review in any school depends greatly on its purported rationale. Given the politically charged climate that often permeates law schools, a punitive system might threaten academic freedom in law schools more so than in other academic institutions. Even the developmental rationale may be unable to co-exist effectively with the politics of a law school. On the other hand, law schools, too, must remain accountable to their students.

B. FACULTY INVOLVEMENT

Most systems involve some form of review by faculty peers. The degree of peer involvement in different systems varies from minimal participation to extensive cooperation. Swygert and Gozansky's models for law schools have the highest level of peer involvement. An examination of the various other systems, however, illustrates that such extensive peer involvement is far from universal.

At the University of Hawaii, faculty members are involved in formulating the standards for review in each

department, but they do not perform the actual evaluation. The department chair conducts the review. Faculty members become involved as reviewers only if there is a dispute between the department chair and the individual under review.

At Virginia Tech, faculty members create the minimum department standards used in the post-tenure review process, and perform the reviews as well.¹²⁶ Similarly, the Wisconsin and the Colorado programs place peer faculty members at the core of the process.

The notion of peer involvement in post-tenure review systems may be a different question for law schools than for universities as a whole. There are several factors that might be considered in determining the appropriate level of peer involvement: the size of the school, the political climate, the lack of internal departments, and the dean's role and relationship with the faculty. Typically, law school faculties are much smaller in size than other divisions of academic institutions. With small-scale faculties, the deans may have more time to devote to each faculty member; in addition, annual merit evaluations may be sufficient, rendering peer reviews superfluous. Furthermore, anonymity for peer reviewers would likely be more difficult to provide in law schools than in larger institutions.

Additionally, a highly charged political environment, which is characteristic of many law schools, may be detrimental to the effectiveness of faculty involvement in the peer-review process. Factionalization in a law school may render professors unable to provide honest, objective, accurate reviews of their peers, as well as reviews that would not be respected by the recipient, thus resulting in faculty participation being wholly ineffectual. In this scenario, both the vengeful peer review and the mutual back-scratching type of peer review are possible and will undermine the integrity of a post-tenure review system.

One answer to this difficulty may be to have greater university participation in the process. As a discrete academic unit, law schools often are not subject to the same direct control and oversight as are other university subdivisions. In the peer-review process, however, the involvement of university administrators and faculty in the law school's peer-review process might serve to defuse partisan tensions. Although faculty at a relatively autonomous law school may resent such apparent encroachment, university participation may be the price that a law school has to pay to have a fair and respected post-tenure review system.

Another answer is that, since law school faculty members elect their deans, a trusted, well-respected dean who poses no competitive threat to individual faculty members may be a more effective reviewer than would a

fellow professor. On the other hand, peer reviews may be more necessary in a smaller faculty, because the dean may be more willing to overlook deficient performance when the professor is a close colleague or friend. Further, for a dean to review more than a handful of tenured faculty each year may take too much time from his or her many other responsibilities.

The foregoing are factors that will have to be weighed. Circumstances will undoubtedly vary from one law school to another. Thus, schools should consider the needs of their faculty and make decisions regarding faculty involvement in the review process accordingly.

C. TIME INTERVALS

Swygert and Gozansky recommend that post-tenure reviews occur at least every three years.¹²⁷ None of the universities surveyed in this article performs reviews that often. Hawaii and Wisconsin evaluate every five years; Colorado evaluates every five to seven years. At Virginia Tech, it is possible that a faculty member will never receive an evaluation. The frequency of evaluations depends on faculty needs, available resources, and the institution's rationale for adopting post-tenure review.

Like faculty involvement, the issue of time intervals raises different questions for law schools than for other academic institutions. Since the process of review can be costly, for example, monetary considerations will arise. It may be that private law schools are in a better position than public law schools to afford programs that provide for more frequent review and, therefore, may be more inclined to implement them. The focus on accountability, however, may be more acute in the public context.

Also, administrators should consider whether their faculty have the requisite time to perform effective peer evaluations.¹²⁸ Because law school faculties are smaller in size, the time demands may not be as burdensome as they are at other colleges or schools within a university. On the other hand, it is probably true that the smaller the faculty the greater the committee burden already for each individual; to add to this burden might be both unwarranted and counterproductive. Moreover, there may be less of a need in law schools for frequent reviews, as unproductive members are easier to identify within the smaller pool of faculty. Contrariwise, law schools that select many of their faculty from high-powered, highly stressful law practices may find a greater percentage of their faculty who suffer from burnout and mid-career slumps; at these schools, reviews with greater frequency might make more sense.

Each law school should consider these issues and factors carefully, and make decisions with respect to the frequency of reviews in accordance with the school's individual characteristics.

V. STUDIES EVALUATING POST-TENURE REVIEW

Several universities have conducted studies of their post-tenure review process. These evaluations served an essential purpose: to determine whether the review process was working effectively to achieve its objectives.

To evaluate systems in use, one investigator sent questionnaires to twenty-six different universities that had some form of post-tenure review process.¹²⁹ Some of the respondent universities had implemented summative reviews (merit/salary based); others had implemented formative reviews (developmental, periodic, non-salary based).¹³⁰ The results of the study indicated that most of the respondents favored post-tenure review¹³¹ and believed that it was beneficial to the university, although the systems were more effective with star faculty than they were with faculty performing at deficient levels.¹³²

The problems most frequently mentioned by faculty and administrators were: ineffective implementation and development plans for faculty performing at deficient levels, lack of a reward system, inadequate training of evaluators, and lack of mechanisms to measure competence.¹³³

Most respondents agreed that the reviews should identify faculty performing at deficient levels, but there was little agreement on whether the reviews were effective in serving that purpose.¹³⁴ Many respondents recommended that there be both implementation of faculty development programs with multiple sources of input,¹³⁵ and material consequences for favorable as well as unfavorable reviews, typically in the form of development plans or recognition and incentives.¹³⁶

In 1989, all four of the University of Colorado campuses conducted a study on the implementation and success of post-tenure review.¹³⁷ The study consisted of questionnaires and interviews of faculty members, deans, department chairs, and administrators who had taken part in the post-tenure review system.¹³⁸ The responses ranged from cautious optimism, to mild offense, to violent offense, to outright indifference.¹³⁹ Respondents consistently articulated concerns over scarce resources and regrets of time and energy expended.¹⁴⁰ Many believed that a post-tenure review process was unnecessary to identify deadwood because everyone already knows who is underproductive. The results of the study indicated that proponents and opponents agreed that post-tenure review cannot succeed if it is intended or designed to threaten or revoke tenure.¹⁴¹ Respondents viewed post-tenure review as promising only if designed as a mechanism for re-energizing faculty members with less energy and lifting already productive members to new levels.¹⁴²

Based on its study, the University of Colorado recommended to its Regents the following: the purpose of post-tenure review should be faculty development; a resource base of \$250,000 should be set aside annually for the post-tenure review system; a written report with recommendations and thorough feedback on results of all reviews should be provided to the faculty through conferences with the review committees; external reviews should always be permitted, and should be required when there is a difference of opinion or upon request; and the office of the Vice President for Academic Affairs should develop a clear definition of excellence in faculty performance that addresses teaching, research, creative work, and service and considers the mission of the department or the institution.¹⁴³

Madeleine Goodman evaluated the effectiveness and the results of the post-tenure review system at the University of Hawaii.¹⁴⁴ The review process produced some expected results of fulfilled professional-development plans, as well as some unanticipated outcomes.

When the administration announced the names of the professors to be reviewed, the university experienced a surge of extramural grant submissions.¹⁴⁵ Faculty members submitted 5.7 % more grants than in the previous year, and funding for those proposals rose seventeen percent.¹⁴⁶

In the first review period, 245 professors (twenty-four percent of the tenured faculty) were eligible for review, because they had not received promotions or merit adjustments in the previous five years.¹⁴⁷ Upon announcement of the professors scheduled for review, thirty-seven faculty (fifteen percent of the faculty under review) decided to retire, thus exempting them from further evaluation.¹⁴⁸ Of the 206 professors who underwent review in the first cycle, the department chairs determined that 144 (seventy percent) had no deficiencies.¹⁴⁹ Forty-six faculty (twenty-two percent) were identified as exhibiting deficiencies; these faculty devised development plans to address their weaknesses.¹⁵⁰ The remaining sixteen professors (eight percent) appealed the findings of the department chairs.¹⁵¹

After evaluating the system, administrators modified the format of the development plans. The new format requires the plans to do the following: identify specific deficiencies; list objectives that address those deficiencies; specify activities to implement the plan; and establish timelines for meeting the objectives.¹⁵² In addition, department chairs will review the professors' progress annually, and, if necessary, may commit funds for implementing the plans.¹⁵³

During the six years that Hawaii used the modified post-tenure review system, 618 tenured faculty members

(fifty-eight percent) were evaluated; seventy-two have created professional development plans.¹⁵⁴ While disciplinary action might feasibly have been employed, it "has remained only a potential, important as a possibility in a few extreme cases, but not yet actually invoked."¹⁵⁵ Goodman concluded that "the program has tended to enhance faculty morale and the faculty's sense of purpose and engagement in their disciplines."¹⁵⁶

VI. FURTHER QUESTIONS

A. WHAT KINDS OF PROFESSORS WILL BE IDENTIFIED THROUGH POST-TENURE REVIEW?

The concept of post-tenure review presupposes a standard of performance against which individual faculty members are to be measured. Several authors have illustrated the types of deficiencies that they believe post-tenure review can identify and correct by describing prototypical professors who have some of the characteristics associated with nonproductivity.

Goodman, for example, after evaluating the results of the first round of post-tenure review at the University of Hawaii, described four distinct types of faculty members that the review process had identified:¹⁵⁷ the professor suffering from a "mid-career slump"; the "aging faculty member"; the "alienated full professor"; and the "nonfunctioning professor."¹⁵⁸ Goodman suggested ways for dealing with each of these deficient faculty members.

The professor who is caught in a "mid-career slump,"¹⁵⁹ according to Goodman, has simply fallen into a rut. He or she may have ceased performing innovative research and instead focuses on teaching routine classes; this professor needs some reinvigoration of interest. This can be accomplished through a well-crafted development plan featuring concrete research objectives. The faculty member may also benefit from some assistance in coordinating applications for grants and the like.

The professor who is no longer able to manage full schedules of both teaching and research because of advancing years should, according to Goodman, be dealt with in a spirit of respect and compromise. Such an individual would benefit from a reasonable and flexible restructuring of duties. Strong performance in one area should offset some deficiencies in another, so that a very strong teacher should be forgiven for shortcomings in the area of research.¹⁶⁰

Goodman's third prototype, the "alienated full professor,"¹⁶¹ requires a different approach, because the problem is not that the faculty member is incompetent or nonproductive, but rather that the individual has become estranged from the mainstream of the department. The lack of common ground between the professor and the faculty may be due to some fundamental ideological or

philosophical difference of opinion. In such a situation, there will be inherent friction between the professor and any administrative official who attempts to evaluate professional performance. The review process may need a mechanism such as a faculty-wide committee.

The fourth type of professor perceived by Goodman may be called the "nonfunctioning professor."¹⁶² This faculty member simply has some identifiable and perhaps treatable problem (personal, emotional, or life event) that prevents proper performance of professorial duties. In some institutions, the shortcomings of this individual will have long been undetected because fellow faculty, in a spirit of collegiality, have adhered to a tradition of "covering for" another who was having trouble. A properly implemented system of post-tenure review, however, may provide an opportunity for the faculty peers to document these shortcomings without violating institutional norms of collegial support.¹⁶³

While Goodman's typology (written to apply to an entire university system) refers to various types of inadvertent neglect or boredom, Swygert and Gozansky have focused on only one type of "deficient" professor: the underpublished, tenured law professor.¹⁶⁴ In their investigation, forty-four percent of tenured law professors evaluated had no "publication events" during the three to four years prior to the study.¹⁶⁵ This result demonstrated that there was a crisis of "underutilization of the law teaching profession's intellectual resources"¹⁶⁶ in the legal community. In order to spur greater productivity (ostensibly measured in terms of frequency of publication), Swygert and Gozansky suggested the periodic peer review and faculty colloquia models.¹⁶⁷ Their ideal remedy for this type of deficiency is peer encouragement.

Education-law attorney Brian Brooks believes that "categorizing" certain types of behavior which provide grounds for dismissal. . . neglects the essential inquiry: why does the particular behavior amount to adequate cause for dismissal?"¹⁶⁸ He formulated a test to determine when a professor's performance is deficient.¹⁶⁹

The first part of the test requires the institution to identify professors who exhibit "an inability or unwillingness to contribute to the advancement of truth and knowledge through effective teaching, research, scholarship and contributions to the community."¹⁷⁰ Second, the professor must exhibit an inability or unwillingness to perform his or her duties "for such a period of time that improvement is unlikely, or be so egregious that rehabilitation is improbable or impractical."¹⁷¹ The third prong requires that the professor's academic peers make the findings regarding incompetence.¹⁷² The final element is that the findings "should be examined in light of the general

understandings and customs of the particular university and the academic community as a whole."¹⁷³

In contrast to the previous commentators, law professor William Hollingsworth opposes post-tenure review in law schools. Instead of suggesting criteria for describing archetypal professors whom he would like to see identified through a system of post-tenure review, he describes professors whom he believes might be improperly branded by peers through such a review.¹⁷⁴ For example, he points out that post-tenure review may single out a professor for sanction merely because he or she has engaged in nonconventional research.¹⁷⁵ If this professor were to be earmarked for being an allegedly "unreasonable" scholar, this would violate his academic freedom. Hollingsworth concludes that there should be no standard of "reasonableness" in the field of legal scholarship.¹⁷⁶

B. HOW SHOULD THEY BE DEALT WITH?

Advocates of post-tenure review characterize the ideal goal of any system as professional development rather than punishment.¹⁷⁷ The traditional views of tenure as a guarantor of academic freedom and job security make the threat of dismissal problematic.¹⁷⁸ But when, if ever, should a faculty member be placed at risk of other penalties?

For those who oppose the dismissal of tenured faculty for alleged underproductivity in any event,¹⁷⁹ several lesser sanctions may appear to be feasible. For example, access to scholarly support (research assistance, books, travel allowances, secretarial help) might be restricted. This measure is arguably inappropriate, however, since the Association of American Law Schools wrote into its bylaws the duty of member schools to support the scholarship and academic freedom of its faculty.¹⁸⁰

Might salary reductions be an appropriate measure to penalize underproductivity? Hollingsworth argues that salary cannot comfortably be keyed to productivity because the non-market component of a professor's value cannot be easily measured.¹⁸¹

What about "counseling" by the dean to encourage an individual to be more productive? Hollingsworth concedes that this approach could be of some value, but only if the dean is fair and open-minded and does not attempt to dictate the research goals of the professor.¹⁸² Indeed, providing advice within a genuinely open dialogue represents "permissive caring,"¹⁸³ the opposite of coercion, but only as long as the advice is not "so repetitive as to become nagging."¹⁸⁴

Other possible sanctions include academic probation or loss of tenure. At the University of New Mexico, for example, a deficient professor can be placed on a two-

year probation.¹⁸⁵ If the professor then fails to "demonstrate improvement in the area of teaching," he or she can lose tenure.¹⁸⁶

C. WHAT ARE THE ALTERNATIVES TO POST-TENURE REVIEW?

Several alternatives exist for those schools that believe that post-tenure review is unnecessary or infeasible. The AAUP proposes quality controls, such as periodic salary reviews, peer review of grants and publications, student evaluations of teaching performance, and departmental review programs.¹⁸⁷ In addition, whether or not an institution uses post-tenure review, it has the option of removing faculty for adequate cause. The following discussion surveys these alternatives to post-tenure review.

Many institutions require annual evaluations of faculty to determine the extent of salary increases. As one professor has noted, "we are rated annually according to the quality and quantity of our accomplishments in teaching, research and scholarship, and service."¹⁸⁸ These review mechanisms are not perfect substitutes for each other, however. Merit evaluations look to past performance and are directly connected to salary increases. Post-tenure reviews, by contrast, focus on professional development and career objectives.

One creative approach to post-tenure review, now in use at Nova Southeastern University's Shepard Broad Law Center, involves the use of "five-year plans," or "personal blueprints."¹⁸⁹ This method of review—"[a] multi-year professional plan that addresses individual productivity [and which] will be useful in warding off outside intrusion"¹⁹⁰—calls for each faculty member to outline his or her professional goals in the areas of teaching, scholarship, and service. As part of the program, the dean "review[s] each individual plan in conjunction with all others to determine if [the school's] overarching institutional needs will be served if the proposed personal blueprints are accepted."¹⁹¹ The plans, as well as the resulting rewards—including salary increase, course package, class schedule, and level of research assistance¹⁹²—are made public. "In this way, all of us will share what we plan to give to the common enterprise, how we expect to be measured, and how we want to be rewarded. . . [T]his process will allow each of us to more fully appreciate the quality and diversity of our contributions to the institutional mission."¹⁹³ Nova's hybrid approach incorporates the forward-looking aspects of other methods of post-tenure review. It also eliminates some of the politics associated with peer review. On the other hand, with the dean as the sole reviewer of each professor's proposed plan, close friendships between the dean and individual faculty may be hard to ignore. In

addition, this scheme is time-intensive, particularly in the years that the dean is considering whether to accept faculty plans. (In intervening years, the faculty member would be measured against the already-accepted plan.)

Student evaluations of a faculty member provide another means by which to measure the professor's performance. An effective teaching-evaluation process will inquire into students' opinions of, among other things, the professor's ability to communicate the course material and expectations, to organize the course, and to stimulate student interest.¹⁹⁴ "Consistently poor evaluations, solicited over a period of time, strongly indicate that a professor is not performing his classroom duties competently."¹⁹⁵ Thus, student evaluations used in this manner may serve as a substitute for post-tenure review. These evaluations only measure the professor's teaching ability, however, and do not inquire into contributions in the areas of research, scholarship, and service. Nor are student evaluations the only method—or even the best method—for assessing teaching performance.

Termination of faculty is another alternative to post-tenure review. The AAUP allows for dismissal of faculty members for "adequate cause."¹⁹⁶ The American Bar Association has adopted AAUP's statement as its suggestion for law school tenure policy.¹⁹⁷ Neither body, however, clearly defines "adequate cause."¹⁹⁸ The Commission on Academic Tenure articulated a definition in 1973, stating that adequate cause in faculty dismissal proceedings should be restricted to "(a) demonstrated incompetence or dishonesty in teaching or research, (b) substantial and manifest neglect of duty, and (c) personal conduct which substantially impairs the individual's fulfillment of his institutional responsibilities."¹⁹⁹

One author has divided into categories the types of causes that the courts have allowed for dismissal of faculty: insubordination, neglect of duty, incompetence, and moral turpitude.²⁰⁰ The fact that many tenure cases develop into legal disputes suggests that institutions contemplating the adoption or implementation of a post-tenure review system should also consider the legal consequences of that system. A tenure contract has been deemed to confer property rights, for which due process must be provided. Brooks suggests that, as long as procedural due process has been followed, the courts will generally leave undisturbed a negative outcome based on adequate cause.²⁰¹ He defines due process as "notice of the names of those making allegations and the nature and factual basis of those allegations, a reasonable amount of time to present a defense, and a hearing before an actually impartial and unbiased tribunal, committee or board."²⁰² Brooks notes, however, that, if First Amendment or other public policy considerations outweigh the cause for

dismissal, then the court may find against the institution.²⁰³

The possibility of litigation makes dismissal for cause both costly and time-consuming for the institution. Schools may also have difficulty demonstrating adequate cause if they have not previously documented the professor's performance. Consequently, this option may prove to be impractical for institutions that do not use post-tenure review.

VII. CONCLUSION

Prevailing political winds shaped the post-tenure-review debate and dropped it on the doorstep of the academy and the legislature, leaving questions about the value of tenure. Current conceptions about the proper role of tenure in academic institutions, as well as the enduring mission or spirit of each law school, inform the decision to inaugurate post-tenure review and the evaluation process itself. Even if tenure can accommodate increased accountability through post-tenure review, faculty members must weigh their capacity for apolitical, reasoned peer evaluation against the possibility that systemized criticism would do more harm than good. Though borne by a gust of good intentions, such evaluations could leave the school poorer, divided, and listless. On the other hand, post-tenure review has the potential to enrich students, faculty, the law school, and the society at large. But post-tenure review is only one response to the problem of underproductive faculty. Whether to adopt this response depends on the context and culture of the institution. It may well be that, at a law school that has a trustworthy, fair, and open-minded dean, a formal system of post-tenure review is unnecessary. It may also be that, at a school that has a deeply divided faculty, a formal system of post-tenure review is unworkable. Within these extremes, there are many alternatives.

NOTES

¹ See, e.g., Michael I. Swygert & Nathaniel E. Gozansky, *The Desirability of Post-Tenure, Performance Reviews of Law Professors*, 15 STETSON L. REV. 355, 360 (1986). Swygert is Professor of Law at Stetson University; Gozansky is Professor of Law at Emory University. See also Stephen Happel, *In Defense of Tenure*, WALL ST. J., Oct. 28, 1996, at A18 ("America's postsecondary education system isn't perfect, but tenure has helped make it one of the most successful institutions in the nation.").

² See Wallace D. Loh, *Law Faculty in the 21st Century: Responding to Megatrends and New Realities*, AALS

NEWSLETTER 1, 5 (Nov. 1996) ("[A] survey of 5000 faculty by the Carnegie Foundation for the Advancement of Teaching found that 26 % of all faculty agreed with the statement that 'Abolition of tenure would, on the whole, improve the quality of higher education.'").

³ E.g., Madeleine J. Goodman, *The Review of Tenured Faculty: A Collegial Model*, 61 J. HIGHER EDUC. 408, 409 (1990). Goodman is Dean of the College of Arts and Science at Vanderbilt University. See also David Leonhardt, *Tenure: An Idea Whose Time Has Gone*, BUS. WK., Oct. 21, 1996, at 130 ("Many see tenure . . . as an outdated system that drives up costs and lessens accountability.").

⁴ Chris Klein, *Tenure Is No Longer Untouchable at the University of Minnesota*, NAT'L L.J., Feb. 3, 1997, at A20 (noting that tenure may be revoked in cases of "grave misconduct manifestly inconsistent with continued faculty appointment"). The determination of grave misconduct is made by peer review. *Id.* The definition of grave misconduct, however, is unclear. *Id.* "To paraphrase Justice [Potter] Stewart,' [University of Minnesota Law School] Dean Sullivan said, . . . 'We can't define it, but we'll know it when we see it.'" *Id.* See generally William H. Honan, *University of Minnesota Regents Drop Effort to Modify Tenure*, N.Y. TIMES, Nov. 17, 1996, at 21 (examining post-tenure review at the University of Minnesota Law School); *Touching the Tenure Button*, WASH. POST, Nov. 14, 1996, at A20 (editorializing about tenure debate at Minnesota and nationwide); Rene Sanchez, *Minnesota Faculty Regents Put Tenure to the Test*, WASH. POST, Nov. 9, 1996, at A1, A10 (examining tenure debate). For an insider's report on the Minnesota tenure battle, see Fred L. Morrison, *Tenure Wars: An Account of the Controversy at Minnesota*, 47 J. LEGAL EDUC. 369 (1997).

⁵ See Brian G. Brooks, *Adequate Cause for Dismissal: The Missing Element in Academic Freedom*, 22 J.C. & U.L. 331, 347 (1995). The faculty member evinces "an inability or unwillingness to contribute to the advancement of truth and knowledge through effective teaching, research, scholarship and contributions to the community." *Id.* See also *infra* notes 168-175 and accompanying text (discussing Brooks' test for adequate cause).

⁶ See Goodman, *supra* note 3, at 418-22 (setting forth her typology of cases). See also *infra* Part VI.A (considering Goodman's classifications).

⁷ Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 325, 331-32 (1990). Brown is Simeon E. Baldwin Professor Emeritus at Yale Law School. Kurland is Associate General Secretary of the American Association of University Professors.

⁸ Recognizing that the problem of deadwood exists does not mean that it is a widespread problem by any means. Statistics on the issue are lacking. Dean Henry Rosovsky of Harvard University provided an educated guess: "[T]he label deadwood would apply only to under 2 percent of a major university faculty; that is my totally unscientific conclusion." Brown & Kurland, *supra* note 7, at 332.

⁹ Goodman, *supra* note 3, at 422. See also Neil W. Hamilton, *Peer Review: The Linchpin of Academic Freedom and Tenure*, ACADEME, May-June 1997, at 15, 18-19.

¹⁰ Brown & Kurland, *supra* note 7, at 332.

¹¹ *Id.* at 332.

[T]enure does safeguard academic freedom. [But] it does so at a cost, in the occasional case where a tenured scholar becomes deadwood, yet does not function so poorly as to warrant removal. The [school] in that case is not getting its money's worth, especially when deserving candidates are available for the poorly filled position.

Id.

¹² The process of peer review could "create a protected environment in which feedback can be accepted with a minimum of defensiveness and ego damage" if it is handled carefully. See John Mixon & Gordon Otto, *Continuous Quality Improvement, Law, and Legal Education*, 43 EMORY L.J. 393, 478 (1994). Mixon is Law Alumni Professor at the University of Houston Law Center. Otto is Associate Professor of Decision and Information Science at the University of Houston College of Business Administration.

¹³ The views of several authors are featured prominently in this article. Madeleine Goodman favors post-tenure review as a way to help wayward university professors regain their academic vitality. See *infra* Part VI.A. Michael Swygert, writing with Nathaniel Gozansky, favors post-tenure review of law professors as a way to increase productivity. See *infra* notes 81-92 and accompanying text. William Hollingsworth opposes post-tenure review of law professors, saying it would violate academic freedom. See *infra* note 37; *infra* notes 174-176 and accompanying text.

¹⁴ Christine M. Licata, *Post-Tenure Faculty Evaluation: Threat or Opportunity?*, Higher Educ. Rep. No. 1 at 16, Association for the Study of Higher Education (1986), microformed on ERIC No. 270009 (Clearinghouse on Higher Education). These organizations oppose post-tenure review only if it can result in the dismissal of tenured professors. *Id.*

¹⁵ *Id.* at 26 (citing American Association of University Professors, *On Periodic Evaluation of Tenured Faculty*, ACADEME, Nov.-Dec. 1983, at 14a). See also William H. Honan, *The Ivory Tower Under Siege*, N.Y. TIMES, Jan. 4, 1998, § 4A (Education Life), at 33, 36 (*inter alia*, discussing AAUP position).

¹⁶ *Id.* at 408. One commentator has criticized the AAUP for defending the academic freedom of professors solely from the threats of administrators. Although the AAUP has "recogniz[ed] that academic freedom includes adherence to professional norms and that professors can abuse autonomy," the organization has "not been sufficiently vigilant in identifying and investigating faculty abuse." David M. Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405, 1406 (1988).

¹⁷ Demands for accountability and mandatory retirement motivated Kentucky to implement post-tenure review. University of Kentucky Faculty Senate Meeting Minutes, Nov. 8, 1993 (on file with author).

¹⁸ See generally NEIL HAMILTON, *ZEALOTRY AND ACADEMIC FREEDOM: A LEGAL AND HISTORICAL PERSPECTIVE* (1995) (identifying seven discrete waves of zealous criticism leveled against higher education since the Civil War, including modern attacks).

¹⁹ See Shawn Tully, *Finally, Colleges Start to Cut Their Crazy Costs*, FORTUNE, May 1, 1995 at 110. Between 1980 and 1995, tuition at private colleges increased from an average of \$3200 to \$11,000. *Id.*

²⁰ *Paychecks for Life?*, RICHMOND TIMES-DISPATCH, Apr. 5, 1995, at A6.

²¹ Thomas Sowell, *Tenure Versus Teaching*, FORBES, Nov. 21, 1994, at 96.

²² Manuel T. Pacheco, *An Experiment; Arizona International Campus May Become a Test Site for Tenure*, ARIZ. DAILY STAR, Jan. 11, 1996, at 11A. See also Leonhardt, *supra* note 3.

²³ Robert W. McGee & Walter E. Block, *Academic Tenure: An Economic Critique*, 14 HARV. J.L. & PUB. POL'Y 545, 546 (1991).

²⁴ Warren, Possey & Tybor, *Not to Publish is Not to Perish*, CHICAGO TRIB., Dec. 11, 1985, at 1.

²⁵ Nova University's Shepard Broad Law Center, a private law school in Florida, recently abolished tenure in favor of five-year continuing contracts. See Klein, *supra* note 4, at A20.

Currently, one-third of Nova University's law faculty is employed in this manner. *Id.* Each professor's teaching, scholarship, and service are reviewed before the end of the five-year period to determine whether the contract should be renewed. *Id.*

²⁶ See Marc L. Kesselman, *Comment, Putting the Professor to Bed: Mandatory Retirement of Tenured University Faculty in the United States and Canada*, 17 COMP. LAB. L.J. 206, 206 (1995).

²⁷ *Id.*

²⁸ 20 U.S.C. § 1141 (1986).

²⁹ 29 U.S.C. § 631 (1986).

³⁰ See Kesselman, *supra* note 26, at 206.

³¹ *Id.* at 214.

³² It is arguable whether the 1994 change will have a significant effect on mean retirement ages. The American Association for the Advancement of Science (AAAS) reported that the presence or absence of a mandatory-retirement policy has no effect on the mean retirement age of tenured faculty. The AAAS concluded that the 1994 change does not require modifications to the existing tenure system, and that post-tenure review as a response to the change in law would be a drastic and unnecessary measure. Albert Rees & Sharon P. Smith, *The End of Mandatory Retirement for Tenured Faculty*, 253 AM. ASSOC. FOR THE ADVANCEMENT OF SCIENCE No. 5022 (Aug. 23, 1991).

³³ The definition of tenure itself is not without controversy. Fifty-eight years ago, the AAUP formulated the following definition:

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

1940 Statement of Principles on Academic Freedom and Tenure, reprinted in AAUP POLICY DOCUMENTS & REPORTS 3 (1990), cited in Harry F. Tepker, Jr., *Good Cause and Just Expectations: Academic Tenure in Oklahoma's Public Colleges and Universities*, 46 OKLA. L. REV. 205, 207 (1993).

³⁴ "At least a few institutions and academicians are beginning to understand that periodic performance appraisals of tenured

faculty competence can be accomplished without threatening or eroding the academic and political freedoms afforded by tenure." Swygert & Gozansky, *supra* note 1, at 363. See Honan, *supra* note 4, at 21 ("Fred L. Morrison, a University of Minnesota law school professor who has been a faculty leader in the negotiations [for post-tenure review] said '[t]he new proposal, in my view, meets all of the faculty concerns for academic freedom, due process and protection of employment.'").

³⁵ Controversy over the definition of this term parallels the debate over the proper scope of academic liberty or autonomy. First, consider the definition advanced by William W. Van Alstyne of Duke Law School:

"[A]cademic freedom" is characterized by a personal liberty to pursue the investigation, research, teaching, and publication of any subject as a matter of professional interest without vocational jeopardy or threat of other sanction, [except] upon adequate demonstration of an inexcusable breach of professional ethics in the exercise of that freedom.

William W. Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in *THE CONCEPT OF ACADEMIC FREEDOM* 59 (Edmund L. Pincoffs ed., 1975), quoted in Burton M. Leiser, *Threats to Academic Freedom and Tenure*, 15 *PACE L. REV.* 15, 43 (1994). An editorialist for *The New York Times* advanced a less charitable definition in 1916:

Academic freedom, that is, the inalienable right of every college instructor to make a fool of himself and of his college by . . . intemperate, sensational prattle about every subject under heaven, to his classes and to the public, and still [stay] on the payroll or be reft therefrom only by elaborate process, is cried to all the winds by the organized dons.

Kesselman, *supra* note 26, at 209 n.9 (internal citations omitted).

³⁶ Brown & Kurland, *supra* note 7, at 362. "Tenure protects research from being quashed and people from being punished for their expression. And it protects people against arbitrary actions by administrators. Abolishing it would create open season on selected faculty." Arthur Raines & William H. Wallace, *Tenured and Untouchable . . . As Faculty Ought to Be*, *WASH. POST*, Dec. 3, 1996, at A15.

³⁷ See William G. Hollingsworth, *Controlling Post-Tenure Scholarship: A Brave New World Beckons?*, 41 *J. LEGAL EDUC.*

141, 146 (1991). Hollingsworth is a Professor of Law at The University of Tulsa College of Law. See also Jeremy Epstein, *Academic Tenure Isn't Just a Matter of Money*, *NAT'L L.J.*, Dec 8, 1997, at A24 (concluding that, since tenure helps to promote robust public debate, it "does not simply protect the tenured; it protects all of us"); Happel, *supra* note 1.

³⁸ See Goodman, *supra* note 3, at 409.

³⁹ See, e.g., Rabban, *supra* note 16, at 1421 (recognizing the "[a]cademic freedom of the peer review body to make professional judgments without external pressure").

⁴⁰ Hollingsworth, *supra* note 37, at 145.

⁴¹ See *id.* at 156-57. Hollingsworth concedes that a compromise of autonomy is necessary in the classroom: "Although academic freedom in the classroom should be defined very liberally, it must accommodate some need for professional reasonableness in order to protect students' right to learn." *Id.*

⁴² *Id.* at 146. See also Licata, *supra* note 14, at 26 (noting possibility that faculty members would face pressure to conform to the views of their colleagues or avoid controversial research subjects). Alternatively, at politically liberal academic institutions, coercion might deter researchers who would defend the status quo but fear being branded "politically incorrect."

⁴³ "[B]efore we presume to review the scholarly performance of our tenured colleagues with eventual dismissal being even a remote and indirect possible consequence, we are obliged to confront and resolve a host of issues concerning 'legal scholarship,' academic freedom, and tenure." Hollingsworth, *supra* note 37, at 146.

⁴⁴ *Id.* at 158. See also Denise K. Magner, *Beyond Tenure*, *CHRON. HIGHER EDUC.*, July 21, 1995, at A13: "It's absolutely necessary to have periods of quiescence, periods of incubation, that to the outside observer appear to be wastes of time." *Id.* (internal quotation marks omitted).

⁴⁵ Alternatively, professors who are deterred from exploring their true interests in print through subtle coercion might respond to this disincentive by focusing on their transmission-of-knowledge objective.

⁴⁶ See Stewart Macaulay, *Frank Remington: Defining the Law Professor's Job*, 1992 *WIS. L. REV.* 553, 553 n.2 (noting difficulty of ascertaining the extent of an individual's contribution to a group project during peer review).

⁴⁷ Hollingsworth, *supra* note 37, at 160. Indeed, Hollingsworth contends that a "publish early and publish often" requirement penalizes the most valuable research efforts because a professor places herself at greater risk of "an unpublishable or . . . acutely embarrassing published outcome" by pursuing more creative topics. *Id.* at 169.

⁴⁸ *Id.* at 141. See Peter Applebome, *Profit Squeeze for Publishers Makes Tenure More Elusive*, N.Y. TIMES, Nov. 18, 1996, at A1 (noting that tenure procedures may have to change due to publishers' reduced willingness to publish "economically marginal books").

⁴⁹ HENRY ROZOVSKY, *THE UNIVERSITY: AN OWNER'S MANUAL* 183 (1990) (quoted in Brown & Kurland, *supra* note 7, at 333).

⁵⁰ Brown & Kurland, *supra* note 7, at 333.

⁵¹ *Id.* at 334.

⁵² *Id.* at 333. This stability may be articulated as "the assurance that one can get on with one's work without much interference, that one has status in the company of learned men and women, [and] that one can grow old without fearing the axe of age discrimination." *Id.*

⁵³ *Id.* Tenure protects the ability of tenured faculty members to commit to long-term projects because positive judgments about the value of an individual's contribution to the legal research community can only be made in retrospect, years later. See Rabban, *supra* note 16, at 1426-27.

⁵⁴ The related benefit of having a stable staff is obviously contingent on the career choices of many professors, for "[t]enure commits the institution to the individual but not the individual to the institution." *Report of the Association of American Law Schools Special Committee on Tenure and the Tenuring Process*, 42 J. LEGAL EDUC. 477, 480 (1992).

⁵⁵ Brown & Kurland, *supra* note 7, at 334. Such continuous monitoring of specialized faculty, it is said, is unnecessary and costly in time and resources, partly because only an equally specialized peer can properly perform the review. *Id.*

⁵⁶ See *id.*

⁵⁷ William Hollingsworth points out that pre-tenure evaluation during the probationary period is tolerated merely because it is a temporary restriction on the individual's autonomy. The ultimate goal is to certify that a professor has demonstrated professional growth so that he or she can be trusted to "self-define and self-regulate his or her own mission." See Hollingsworth, *supra* note 37, at 156.

⁵⁸ See Swygert & Gozansky, *supra* note 1, at 325 n.2.

⁵⁹ See generally Rebecca Eisenberg, *Academic Freedom and Academic Values in Sponsored Research*, 66 TEX. L. REV. 1363, 1374 (1988), cited in Rabban, *supra* note 16, at 1406-07 n.6.

⁶⁰ As one professor has written:

Tenure status is never meant to convey permanent ownership of office or faculty position without regard to quality of work or meritoriousness after the granting of such status. Rather, the status is granted upon the implied condition that the officeholder will continue the high level of service, quality, and merit for which it was awarded.

Letter from Howard L. Oleck, Professor Emeritus of Law, Stetson University Law School, to Michael I. Swygert and Nathaniel E. Gozansky (1985), quoted in Swygert & Gozansky, *supra* note 1, at 355.

⁶¹ William W. Van Alstyne, *Tenure: A Summary Explanation, and 'Defense'*, 57 AAUP BULL. 328 (1971), quoted in Brown & Kurland, *supra* note 7, at 325.

⁶² *Id.* See also *infra* Part VI.C (considering issue of adequate cause).

⁶³ *Id.*

⁶⁴ E.g., Marianne Wesson & Sandra Johnson, *Post-Tenure Review and Faculty Revitalization*, ACADEME, May-June 1991, at 54.

⁶⁵ *Id.* at 55.

⁶⁶ See *infra* note 79 (observing that tenure process may foster factionalism).

⁶⁷ For a report of competing arguments for and against tenure, see Raines & Wallace, *supra* note 36.

⁶⁸ Licata, *supra* note 14, at v. At American University, Washington College of Law, the relevant Faculty Manual language on post-tenure review states: "Tenured faculty will be evaluated at least triennially by the Committee on Rank and Tenure and apprised of the results." Washington College of Law, Faculty Manual 24 (1991). Despite this directive, the Rank and Tenure Committee has never conducted post-tenure review. Many faculty believe the reason is that the committee has implicitly delegated the function to the Dean, who conducts annual merit reviews for the purpose of determining the level of salary increases.

⁶⁹ Licata, *supra* note 14, at 38 (quoting former Secretary of Education and current head of Empower America, William J. Bennett). See also Brooks, *supra* note 5, at 358 ("[T]he academic community must step forward and fulfill its policing function. . . Considering the alternative, outside interference with academic decisions, it seems a small price to pay.").

⁷⁰ Wesson & Johnson, *supra* note 64, at 54. The American Association of University Professors recognized the protective aspect of post-tenure review as early as 1915, warning that, if professors "should prove [themselves] unwilling to purge [their] ranks of the incompetent and the unworthy, or to prevent the freedom which [they] claim[] in the name of science from being used as a shelter for inefficiency, for superficiality, or for uncritical and intemperate partisanship, it is certain that the task will be performed by others." HAMILTON, *supra* note 18, at 166 (citing AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE 1915 DECLARATION OF PRINCIPLES 170 (1915) (citation omitted)).

This concern will probably be more acute at public, rather than private, institutions. Fearing the specter of state regulation, some institutions have introduced their own systems of post-tenure review. See Associated Press, *U. Va. Ponders Post-Tenure Job Reviews*, RICHMOND TIMES DISPATCH, Apr. 5, 1995, at B1. Professor Richard Chait of the University of Maryland said, "I think institutions have been politically astute to recognize [that] . . . post-tenure review may just quell some of that dissent." *Id.* See also Manuel T. Pacheco, *An Experiment: Arizona International Campus May Become a Test Site for Tenure*, ARIZ. DAILY STAR, Jan. 11, 1996, at 11A ("The University of Arizona is experimenting with post-tenure review on their own initiative. . .without waiting for external pressure.").

⁷¹ See *supra* note 53. But see Magner, *supra* note 44, at A13 (arguing that annual performance reviews no longer motivate faculty effectively because less money for merit-pay increases is available). An Associate Professor of Law at Suffolk University Law School replied that tenured faculty members face other forms of pressure to maintain positive performance "in order to attain the rank of full professor [or] . . . a chaired professorship." Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U.L. REV. 367, 381 (1990).

⁷² Wesson & Johnson, *supra* note 64, at 54.

⁷³ *Id.*

⁷⁴ See Scordato, *supra* note 71, at 402.

⁷⁵ Magner, *supra* note 44, at A16. See also Wesson & Johnson, *supra* note 64, at 54.

⁷⁶ See Mixon & Otto, *supra* note 12, at 440. The authors suggest that law professors will resist changes that challenge their individual positions because they are at the center of an educational system and profession that encourage adversarial negotiating and emphasize external incentives for performance. *Id.* at 456.

⁷⁷ See Licata, *supra* note 14, at 8 ("[T]he principle of tenure is not the culprit[.] . . . the individual interpretation and application of it is . . . The problems with which tenure is clearly implicated arise not from anything in the principle itself but from deficiencies in the operation of the tenure system in individual institutions.").

⁷⁸ See *supra* note 12 (noting that protected environment of peer review requires careful administration).

⁷⁹ "The tenure system, by definition, adversely effects quality[.] . . produc[ing] personal insecurity, factions, internal conflict and tragedy." Mixon & Otto, *supra* note 12, at 479. It "violates the quality principle that employees be hired carefully, because tenure review anticipates that the unfit will be identified and rejected." *Id.*

⁸⁰ Licata, *supra* note 14, at v. See Brooks, *supra* note 5, at 354 (stating that conclusions from post-tenure review should reflect "the general understandings and customs of the particular university and the academic community as a whole.").

⁸¹ Swygert & Gozansky, *supra* note 1, at 364.

⁸² *Id.* at 366.

⁸³ *Id.*

⁸⁴ *Id.* at 365. Swygert and Gozansky emphasize that it is crucial to limit the scope of the review to the existence of activity, not whether the activity is praiseworthy. *Id.* at 365 n.76.

⁸⁵ But see Hollingsworth, *supra* note 37, at 146 n.32. Hollingsworth explicitly criticizes Swygert and Gozansky's suggestions. He feels that, despite their verbal commitment to avoid the evaluation of research content, their use of elusive terms like "scholarly activity" and "worthwhile" invites just this type of normative evaluation.

⁸⁶ Deficient tenured professors might also be motivated by the embarrassment of reviewing others' performance. Judging others might be a compelling reminder of their own professional responsibilities.

⁸⁷ See Swygert & Gozansky, *supra* note 1, at 364.

⁸⁸ *Id.* at 367.

⁸⁹ *Id.* at 368.

⁹⁰ Faculty colloquia may occur more frequently than this. Emory Law School, for example, holds them on a monthly basis. *Id.* at 368 n.85.

⁹¹ *Id.* at 369.

⁹² *Id.*

⁹³ Goodman, *supra* note 3, at 410. It is not clear whether this university-wide program of review extends to law faculty.

⁹⁴ This difference may simply reflect the fact that Swygert and Gozansky proposed models for peer review in law schools; university-wide systems and structures may necessarily be different.

⁹⁵ Goodman, *supra* note 3, at 413.

⁹⁶ Goodman stresses that faculty receptivity to the plan was largely the result of allowing the faculty to contribute to the formulation of standards. *Id.* at 415.

⁹⁷ *Id.* at 413-15.

⁹⁸ Merit salary increases have not been available at the University of Hawaii since 1987, but this provision was included in case such funds became available subsequently. University of Hawaii at Manoa, Procedures for Evaluation of Faculty, June 1994, at 1 n.1.

⁹⁹ University of Wisconsin at Madison Faculty, *Policy on the Review of Tenured Faculty*, Faculty Doc. 1001b (adopted Apr. 19, 1993). Georgia's public colleges and universities started reviewing tenured faculty in 1996. The system is quite similar to that employed at the University of Wisconsin; both were developed by Stephen Portch, now chancellor of the university system in Georgia. See Reagan Walker, *In This Age of Job Anxiety, Tenure's Time May Be Up*, ATL. J. CONST., Apr. 30, 1995, at G1.

¹⁰⁰ Post-tenure review systems commonly try to foster professional development. For example, Kentucky designed its system "to provide effective evaluation, useful feedback, appropriate intervention, and timely and affirmative assistance to ensure that every faculty member continues to experience professional development and accomplishment during the various phases of his or her career." University of Kentucky Faculty Senate Meeting, Nov. 8, 1993.

¹⁰¹ Betsy Draine, *Plan for Post-Tenure Review Focuses on Career Development*, UW Press Release (Feb. 10, 1993) <<http://www.wisc.edu>>.

¹⁰² University of Wisconsin at Madison Faculty, *Policy on the Review of Tenured Faculty*, Faculty Doc. 1001b (adopted Apr. 19, 1993).

¹⁰³ *Id.*

¹⁰⁴ Other schools have provided for re-evaluation of post-tenure review policies. See, e.g., University of Kentucky Faculty Senate Meeting Minutes, Nov. 8, 1993 (mandating that the system be reviewed after four-year trial period).

¹⁰⁵ See also Magner, *supra* note 44, at A16 ("The point [of post-tenure review] is not just to reform bad professors; it's also to recognize and assist good ones The reviews . . . will provide an occasion for roses as well as brickbats.") (internal quotation marks omitted).

¹⁰⁶ *Id.* The program does not stipulate whether these third parties are faculty members or persons outside of the university.

¹⁰⁷ Wesson & Johnson, *supra* note 64, at 53.

¹⁰⁸ *Id.* at 54.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 53 (quoting amendment to the Laws of Regents (adopted Oct. 22, 1982)).

¹¹¹ *Id.* The policy does not state, however, how many faculty peers are involved in the review process.

¹¹² James Harper, *Up for the Regent's Review Today: Should Professors Get More Elaborate Evaluations After Tenure?*, ST. PETERSBURG TIMES, Dec. 13, 1995, at 4B.

¹¹³ Virginia Polytechnic Institute, Commission on Faculty Affairs Resolution 1995-96B: Post-Tenure Review Process, Mar. 8, 1996. For information about the CFA resolution and policies on post-tenure review, contact Paul Metz via email at pmetz@vt.edu.

¹¹⁴ Virginia Polytechnic Institute, Post-Tenure Review Implementation Timetable, Apr. 8, 1996.

¹¹⁵ See *infra* Part VI.C.

¹¹⁶ Paul Metz, Presentation on Post-Tenure Review to Academic Affairs Committee, Apr. 1996.

¹¹⁷ See Virginia Polytechnic Institute, Faculty Handbook § 2.9.1, Annual Evaluation and Salary Adjustments.

¹¹⁸ Metz, *supra* note 116.

¹¹⁹ Virginia Polytechnic Institute, Faculty Handbook § 2.9.4, Post-Tenure Review.

¹²⁰ *Id.* This finding rebuts the unsatisfactory evaluation. The review is then complete. An unsatisfactory rating in any subsequent year constitutes a first violation; in other words, the professor gets a clean slate.

¹²¹ *Id.*

¹²² *Id.* Virginia Tech's remediation is essentially the professional development plan at Kentucky. At Virginia Tech, however, the department chair reviews the professor's progress at least twice annually. The plan does not designate a time period for implementation. The chair provides the review committee with a written report after each meeting and at the end of the time period for remediation. Then the committee can give the professor a satisfactory rating or recommend a sanction, including dismissal. *Id.*

¹²³ Swygert & Gozansky, *supra* note 1, at 366.

¹²⁴ For example, New Mexico adopted a post-tenure review system by statute. See N.M. STAT. ANN. § 21-1-7.1 (Michie 1978 & Supp. 1995).

¹²⁵ *Id.*

¹²⁶ Virginia Tech Faculty Handbook § 2.9.4, Post-Tenure Review. The departmental promotion and tenure committee conducts the reviews.

¹²⁷ Swygert & Gozansky, *supra* note 1, at 364-67.

¹²⁸ Some faculty members feel that peer review is not worth their time or effort. One faculty member evaluating Colorado's post-tenure review system stated that "he felt strangled by the university bureaucracy and regarded the demand that his department conduct the review as just another diversion from the real work of teaching and scholarship that he and his colleagues would like to pursue." Wesson & Johnson, *supra* note 64, at 56. See Richard Edwards, *Can Post-Tenure Review Help Us Save the Tenure System?*, ACADEME, May-June 1997, at 26, 31 ("[T]he imposition of post-tenure review will cost resources, most particularly faculty (and administrators') time, and . . . meaningful, nonsuperficial reviews will cost more than trivial ones."). If a university or law school's faculty felt that peer reviews would be a waste of precious time, then perhaps

Swygert and Gozansky's faculty colloquia model would be most appropriate, since it demands the fewest faculty hours of all of the systems.

¹²⁹ Halee Burg, *Memorandum on Post-Tenure Faculty Evaluation*, in EMPLOYMENT ISSUES IN HIGHER EDUCATION: A LEGAL COMPENDIUM 233, 255 (Jean S. Sagan & Thomas P. Rebel eds., 1995).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* This response could be attributed to the respondents' belief that the development plans were inadequate and ineffective at reinvigorating underperformers among the faculty.

¹³³ *Id.* at 256.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Wesson & Johnson, *supra* note 64.

¹³⁸ *Id.* at 53-54.

¹³⁹ *Id.* at 54-55.

¹⁴⁰ *Id.* at 55.

¹⁴¹ *Id.* at 56.

¹⁴² *Id.* at 55-56.

¹⁴³ *Id.* at 56-57.

¹⁴⁴ See Madeleine J. Goodman, *The Review of Tenured Faculty at a Research University: Outcomes and Appraisals*, 18 REV. HIGHER EDUC. 83 (1994).

¹⁴⁵ *Id.* at 87.

¹⁴⁶ *Id.* For the eight years preceding the implementation of post-tenure review, the annual growth rate for funding of grants had been less than three percent. *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* This rate of retirement was more than double the normal rate among tenured faculty, effectively returning the retirement

rate to what it had been prior to the uncapping of the mandatory retirement age in 1986. *Id.* Goodman acknowledged that a desire to avoid review had caused some of the retirements, but responded that "the university has every right to expect its senior faculty, no less than its probationers, to maintain fair and reasonable levels of academic performance and achievement, as understood by their faculty peers." *Id.* at 93.

¹⁴⁹ *Id.* at 87.

¹⁵⁰ *Id.* at 88.

¹⁵¹ *Id.* Of those 16 faculty members, three received favorable rulings from the appeals committee, five retired, seven formulated development plans, and one "was reassigned to a more congenial unit." *Id.*

¹⁵² *Id.* at 91-92.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 88. Of those 72 faculty members, 28 had overcome their deficiencies by June 1993. Twenty professors who had formulated development plans left the university (19 retired, one died). Twenty-four of the faculty members were still working on their development plans at the time of Goodman's 1994 publication. *Id.* at 88-89.

¹⁵⁵ *Id.* at 93.

¹⁵⁶ *Id.*

¹⁵⁷ See Goodman, *supra* note 3, at 418-22 (setting forth typology of cases).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 418.

¹⁶⁰ *Id.* at 419.

¹⁶¹ *Id.* at 420.

¹⁶² *Id.* at 421.

¹⁶³ *Id.* at 422.

¹⁶⁴ Swygert and Gozansky's million-dollar question—perhaps literally—is, "[w]hat, if anything, can be done to increase the level of productivity among senior law faculty members?" Swygert & Gozansky, *supra* note 1, at 356.

¹⁶⁵ *Id.* at 357-59. The study is documented in Michael I.

Swygert & Nathaniel E. Gozansky, *Senior Law Faculty Publication Study: Comparisons of Law School Productivity*, 35 J. LEGAL EDUC. 373 (1985).

¹⁶⁶ *Id.* at 356.

¹⁶⁷ See *supra* Part III.A (identifying Swygert and Gozansky's recommendations).

¹⁶⁸ Brooks, *supra* note 5, at 335.

¹⁶⁹ *Id.* While Brooks' test concerns when faculty should be dismissed for adequate cause, it also helps to determine what to look for when performing post-tenure reviews.

¹⁷⁰ *Id.* at 347. Brooks notes that inquiry into a professor's involvement should focus only on whether the participation is "competent." Evaluating the professor's views is not allowed. *Id.* at 348.

¹⁷¹ *Id.* at 347. This element presumes that remedial actions short of dismissal have failed, and that dismissal is a last resort. *Id.* Post-tenure review should suggest a suitable plan of action to reform severely deficient performance. Career-development plans would provide the professor with direction and allow for improvement before the severe action of dismissal was considered.

¹⁷² *Id.* at 347. This element presumes that academic freedom will be protected, because only experts will make determinations of competence. *Id.* at 354. Brooks also stresses that the administration cannot participate in peer review: "Their opinions and attitudes are too easily colored by budgets, recruiting and internal university politics rather than the requirements of academic freedom." *Id.* at 358.

¹⁷³ *Id.* at 347.

¹⁷⁴ Hollingsworth mailed questionnaires to law school deans around the country asking them to predict how several hypothetical professors would be dealt with after a round of post-tenure review. See Hollingsworth, *supra* note 37, at 147-48.

¹⁷⁵ Hollingsworth's hypothetical Professor N. Toto, for example, devotes all his time to the study of the world's major languages. His goal: to write the definitive "universal law of nations" in order to save humanity. The issue posed by the hypothetical is whether an apparently "unreasonable" choice of research of material should lead to reprimand. *Id.* at 151-66.

¹⁷⁶ [A]t least with respect to threat of termination, academic freedom necessitates that the tenured

professor be free of a professional reasonableness requirement as to her scholarship. No matter how lax, liberal, or otherwise "reasonable" any such reasonableness requirements may be, it would perpetually indenture the individual to a coercive consensus whose endless tyranny cannot be justified.

Id. at 155.

¹⁷⁷ Several phrases have been used to describe this goal, such as George Geis' notion of "formative evaluation" and Charles Larsey's "post-tenure development." See Goodman, *supra* note 3, at 409 (discussing various formulations of the concept of post-tenure review as a tool of professional development).

¹⁷⁸ See *supra* Parts II.A and II.B (addressing academic freedom and job security, respectively).

¹⁷⁹ Hollingsworth is such an opponent of dismissal. He says that termination of Professor N. Toto (discussed *supra* note 175 and accompanying text) would be unjustified because it would subordinate scholarly freedom to lesser values. Hollingsworth, *supra* note 37, at 162. These lesser values include the prestige of the university and alleged correlations between publication frequency and classroom effectiveness. *Id.* at 161-62.

¹⁸⁰ *Id.* at 163.

¹⁸¹ *Id.* at 164-65.

¹⁸² *Id.* at 165-66.

¹⁸³ *Id.* at 171.

¹⁸⁴ *Id.*

¹⁸⁵ N.M. STAT. ANN. § 21-1-7.1 (Michie 1978 & Supp. 1995).

¹⁸⁶ *Id.* The statute does not state whether the faculty member would then go through the tenure process again or would be dismissed for cause.

¹⁸⁷ Goodman, *supra* note 3, at 409.

¹⁸⁸ Sam G. Riley, *Reviewing Tenure in a Justifying Era, Profs Must Justify Their Work*, ROANOKE TIMES & WORLD NEWS, Oct. 1, 1995, at G3.

¹⁸⁹ Memorandum from Joseph D. Harbaugh, Dean, Nova Southeastern University, Shepard Broad Law Center, to Faculty (Mar. 27, 1997) (on file with author).

¹⁹⁰ *Id.* at 1.

¹⁹¹ *Id.*

¹⁹² *Id.* at 2.

¹⁹³ *Id.* at 3.

¹⁹⁴ Brooks, *supra* note 5, at 356.

¹⁹⁵ *Id.*

¹⁹⁶ 1940 Statement of Principles of Academic Freedom and Tenure, and Interpretive Comments, *reprinted in* AAUP POLICY DOCUMENTS AND REPORTS 3-9 (1984), *cited in* Swygert & Gozansky, *supra* note 1, at 361.

¹⁹⁷ American Bar Association, *Standards for Approval of Law Schools and Interpretations*, Annex 1 (1995).

¹⁹⁸ Periodically, the AAUP has promulgated Statements on Professional Ethics to clarify the ethical obligations of the teaching profession. See HAMILTON, *supra* note 18, at 174-75 (providing text of 1966 Statement and comparing it to similar AAUP Statement published in 1970).

¹⁹⁹ COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, *FACULTY TENURE* 75 (1973), *cited in* Brown & Kurland, *supra* note 7, at 328.

²⁰⁰ Robert M. Hendrickson, *Removing Tenured Faculty For Cause*, 44 EDUC. L. REP. 483, 491 (1988), *cited in* Brooks, *supra* note 5, at 335 n.25.

²⁰¹ See Brooks, *supra* note 5, at 335.

²⁰² *Id.* at 335 n.21.

²⁰³ *Id.* at 335 n.22. Brooks also points out that, at private colleges and universities, tenure disputes remain primarily matters of employment agreements. First Amendment protection, however, is strongly implicated at public institutions. *Id.* at 342.

