

Boston College Law Review

Volume 61
Issue 9 *Electronic Supplement*

Article 2

11-11-2019

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Recommended Citation

Margit Livingston, *Tenure Revisited*, 61 B.C.L. Rev. E.Supp. 1.-12 (2019),
<https://lawdigitalcommons.bc.edu/bclr/vol61/iss9/2>

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TENURE REVISITED

MARGIT LIVINGSTON*

Abstract: This essay explores the timeless issue of whether law professors should be entitled to unrestricted tenure. Tenure for all academics, including legal ones, has been controversial since its inception. Supporters of tenure assert that it is the only effective guarantee of academic freedom. Without it, professors could—and would—be discharged for espousing unpopular opinions and theories. On the other hand, lifetime tenure for academics can breed mediocrity, complacency, and even resentment. My essay argues that tenure for law professors should be retained in a modified form. I examine three fictional case studies that illustrate the pitfalls of tenure. I then propose that although law professors should be eligible for tenure after the normal probationary period, law schools should institute a system of rigorous post-tenure review and explore other solutions as well. My proposals, I hope, retain most of the benefits of tenure while chipping away at its shortcomings, which often operate to the detriment of law students.

INTRODUCTION

I am a long-standing beneficiary of tenure for law professors. I have been teaching law full-time for decades, and have been a tenured full professor for over 30 years. So what follows may seem somewhat hypocritical—as a beneficiary of tenure, I am now questioning its continued desirability in law teaching. This essay will explore the advantages and disadvantages of tenure and conclude that tenure, in its current form, has disadvantages that outweigh its benefits as a whole.

Tenure in academia dates its origins to the twelfth century in Europe and gained momentum in the nineteenth and twentieth centuries.¹ Its purpose was to promote academic freedom by providing job security.² No longer could professors be fired because of controversial views. Over time, additional justifications for tenure have been offered, particularly for law professors: it incentivizes highly qualified individuals to leave lucrative private legal practices to

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* Vincent de Paul Professor of Law, DePaul University College of Law. All references to hypothetical law professors are just that—hypothetical. Any resemblance to any particular person is purely coincidental.

¹ James J. Fishman, *Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others*, 21 PACE L. REV. 159, 163 (2000); *Tenure*, AM. ASSOCIATION OF UNIV. PROFESSORS, <https://www.aaup.org/issues/tenure> [<https://perma.cc/8MN2-9S3H>] (“The modern conception of tenure in US higher education originated with the 1940 *Statement of Principles on Academic Freedom and Tenure*.”); see Stephen J. Leacock, *Tenure Matters: The Anatomy of Tenure and Academic Survival in American Legal Education*, 45 OHIO N.U.L. REV. 115, 123 (2019).

² Albert H. Yoon, *Academic Tenure*, 13 J. EMPIRICAL LEGAL STUD. 428, 429 (2016).

enter the academy; it builds a cadre of professors who are committed to the institution's long-term welfare; and it allows faculty members to focus on developing scholarship in a thoughtful and thorough manner, without fear of treading on "sacred cows."³

All these justifications carry weight, without doubt, and represent a boon to the law academy. At the same time, faculty members sometimes abuse tenure, knowing that they cannot be fired or even disciplined, except in the most extreme circumstances. Professors may shirk their duties in a variety of ways. This "slacking off" is highly detrimental both to law schools as institutions and to the students whose education suffers as a result. Consider the following cases:

THE CHECKED OUT CLASSROOM TEACHER

Professor A has had tenure at her law school for more than thirty years. Originally, she was a fair classroom teacher, teaching a wide variety of core and specialized courses. Her teaching, though never spectacular, was good enough to garner her tenure. Over the years, the quality of her teaching has declined. She has not kept up in some of her subject areas, either through laziness or indifference. She feels aggrieved that she has not been promoted into administration, with its higher compensation, additional prestige, and greater control over law school affairs, and she takes out this feeling of grievance by putting less and less into her course preparation and classroom performance. In addition, her performance in core courses has become so deficient that the students are complaining loudly to the administration, so much so that she has been moved into small "boutique" courses with low enrollments. Of course, such specialized courses can be a useful part of a law school curriculum and enrich the students' education. But a law school facing financial and personnel cutbacks, as many are, cannot afford to have professors teaching only such courses. Furthermore, her chances of moving to another law school where she might be happier are slim.

So what can the law school do about Professor A? The school officials believe that they are not getting the proper return on their investment, especially in light of her high salary. Termination or suspension is not available under the school's current stringent rules for discipline of tenured faculty. The dean can try to prod her to improve her classroom performance by giving her no or low raises. But the range of possible raises is often very narrow in universities, and at her level of seniority Professor A already earns a healthy salary. Some commentators have suggested that increased mentoring may assist an underperforming classroom teacher in improving teaching skills. Professor A, however,

³ See Katerina P. Lewinbuk, *Hard to Build, But Easy to Destroy?: Will Chaos in Legal Education Lead to the Restructuring of Law Schools and Elimination of Faculty Tenure?*, 39 J. LEGAL PROF. 1, 10–12 (2014).

has no interest in such mentoring and believes that the students should be grateful for her knowledge and experience. Thus Professor A remains in her sinecure, and the students and the institution suffer as a result.

THE INDIFFERENT LAW SCHOOL CITIZEN

Professor B is a fine classroom teacher, offering both core and specialized courses. Like Professor A, he has had tenure and the status of full professor for many years. He maintains a vital scholarly agenda in at least two different fields of law, regularly publishes articles in top journals, and has produced two books published by esteemed academic presses. But Professor B has no interest in service at the law school or university level. He declines to chair committees, volunteer for university committees, or take on tenure and promotion review of junior colleagues. He rarely attends student functions, admissions events, and even faculty meetings. In the private sector, his boss would ream him and tell him to drop his attitude. But within the academy, he remains untouched by discipline of any kind. Once again, the dean has few tools with which to address Professor B's lackluster service record. The dean could appoint Professor B to several heavy-work committees, but there is no guarantee that Professor B would shoulder his fair share of the burden on those committees.

Arguably, Professor B fulfills his obligations to the law school through teaching and scholarship. But faculty governance and service are part of his job and were considered by the faculty and the university when he was granted tenure many years ago. Again the law school suffers from his indifferent attitude toward service; colleagues have to pick up the slack for him; and the students are indirectly harmed by his absence at school functions.

THE NON-PUBLISHER

Professor C does a decent job as a classroom teacher, and often teaches several sections of required or bar courses. She performs her committee work with alacrity and regularly attends faculty meetings, student events, and recruitment receptions. But she has not published any scholarly articles or even practitioner-oriented pieces in the twenty years since she received tenure. Despite the dean's continued encouragement, Professor C has not found a way to get past her writer's block or lack of interest in scholarship. Although the value of some legal scholarship has been seriously questioned, scholarly production remains a component of the law professor's job.⁴ Once again under the current

⁴ See, e.g., A Conversation with Chief Justice Roberts, C-SPAN (June 25, 2011), <https://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts> [<https://perma.cc/DWF6-KMJF>] ("People ask me what the last law review article I read was, and I have to think very hard before coming up with one."). Federal Court of Appeals Judge Harry T. Edwards wrote several articles questioning the

system, there is little, if anything, that can be done to boost Professor C's scholarly productivity.

FAMILIAR FACES

My law faculty colleagues across the country will undoubtedly recognize Professors A, B, and C as characters in their own academic lives. I suspect that such individuals are, fortunately, a distinct minority of law professors nationwide. Most law faculty members, I believe, are conscientious professionals who seek to fulfill all aspects of their jobs: to teach students effectively; to publish meaningful scholarship; and to share the burden of law school governance. In an ideal world, moreover, the pre-tenure review process would winnow out those candidates who are unlikely to be productive over the long haul.

But, for a variety of reasons, pre-tenure review does not always identify those untenured colleagues who will not sustain a high level of performance over time. First, untenured professors will put maximum effort in meeting the requirements for excellent teaching, scholarship, and service. The school's standards for tenure are no doubt spelled out in university and law school documents, and with proper mentorship most candidates should be able to meet them. There is no guarantee, of course, that the successful candidates will continue to put forth that kind of effort. Law faculty colleagues, like any human beings, are subject to inertia, ennui, and alienation, and, as in my examples above, may let their professional performance slide. Although the past is usually the best predictor of the future, that is not always the case.

Second, tenure is now viewed as a right rather than a privilege. Untenured faculty members expect that if they meet the minimum tenure standards, they will be granted that status. Tenured professors are extremely reluctant to deny tenure to a colleague whom they like as a person even though that colleague may be teetering on the edge of non-compliance with tenure standards. That colleague, in turn, will present evidence of his ambitious scholarly agenda for the next several years and will claim to be vigorously addressing any shortfall in teaching or service.

Third, denial of tenure will almost certainly lead to a lawsuit, and tenured faculty members may anticipate being drawn into a lengthy litigation process.⁵ Understandably, they dread the prospect of being prepared as a witness, deposed, and called to testify at a trial. If a candidate marginally complies with tenure standards, it is almost easier to pass that person through rather than face

worth of legal scholarship. *See generally* Ronald K.L. Collins, *On Legal Scholarship: Questions for Judge Harry T. Edwards*, 65 J. LEGAL EDUC. 637 (2016).

⁵ *See, e.g.*, *Rowley v. Brigham Young Univ.*, 372 F. Supp. 3d 1322 (D. Utah 2019); *Lopez v. Bd. of Trs. of Univ. of Ill. at Chi.*, 344 F. Supp. 2d 611 (N.D. Ill. 2004); *Berkowitz v. President & Fellows of Harvard Coll.*, 789 N.E. 2d 575 (Mass. App. Ct. 2003).

the dismal prospect of litigation. Senior faculty members, near retirement age, may decide that they might as well approve tenure for a marginal candidate because they do not anticipate remaining at the institution much longer. They would rather do that than being drawn into litigation, post-retirement.

THE DAMAGE DONE

Continuing tenure of colleagues who are not meeting the professional standards of their employment as law professors does harm in a multitude of ways. It shortchanges the students who experience lower quality teaching and faculty involvement in their academic and co-curricular lives. It increases the burden on faculty members who are forced to fill in the gaps created by their colleagues' inadequate performance. It damages the reputation of the law school employing the underperformers. It closes off teaching slots to minorities and women. Many of the senior faculty members at American law schools continue to be white men. Insofar as teaching positions are unavailable because underperforming senior professors occupy them, fewer minorities and women will be hired as law teachers.⁶ Thus, law faculty diversity suffers.

ACADEMIC FREEDOM

Of course, one must balance the detriment of long-time, underperforming faculty members against the benefits of academic freedom. Despite other justifications for tenure, its core remains the protection of free expression by professors, particularly through their scholarship. Professors who express unpopular views, it is thought, may be terminated without the protections of tenure. This is a genuine fear. Recently, the faculty council at my university voted to condemn "in the strongest possible terms both the tone and content" of an online essay by a DePaul philosophy professor who took an adamantly pro-Israel, anti-Palestinian position.⁷ If this professor did not have tenure, his job might have been in jeopardy.

But even within the realm of academic freedom, one can make distinctions. Compare the scholarly article that advances a controversial view on a

⁶ For a thought-provoking article on different varieties of diversity (e.g., religious, political, etc.) among law faculty members, see James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, 39 HARV. J.L. & PUB. POL'Y 89 (2016). For statistics on the racial and gender composition of law faculty, see *Standard 509 Disclosure*, ABA SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, <http://abarequireddisclosures.org/Disclosure509.aspx> [<https://perma.cc/7UBL-58SN>].

⁷ Valerie Richardson, *DePaul Professor Ignites Free-Speech Uproar with Unabashed Pro-Israel Views*, WASH. TIMES (May 7, 2019), <https://www.washingtontimes.com/news/2019/may/7/jason-hill-israel-support-ignites-depaul-free-speech/> [<https://perma.cc/KR2V-SJX7>]. For the original, controversial essay, see Jason Hill, *The Moral Case for Israel Annexing the West Bank—and Beyond*, THE FEDERALIST (Apr. 16, 2019), <https://thefederalist.com/2019/04/16/moral-case-israel-annexing-west-bank-beyond/> [<https://perma.cc/E6S2-7NUL>].

subject (e.g., abortion, gay marriage, immigration) with one that contains fanciful, unsupported assertions (e.g., aliens from another planet have taken over our government). The first article is the very point of academic freedom—to stimulate dialogue, challenge the established wisdom, and advocate change. The second is just poor scholarship. Faculty members and university administrators, it is hoped, can understand the difference.

THE SOLUTION?

Given some of the identified problems with tenure in the legal academy, one might ask whether it is time to eliminate it altogether. Virtually no worker is guaranteed lifetime employment (save federal judges), and perhaps law professors and law schools should reconsider whether tenure should be abolished. What I propose is a modification of the current system, which addresses the issue of the underperforming colleague while preserving many of the job guarantees of tenure.

1. Post-Tenure Review

After a professor receives tenure, he or she should be subject to post-tenure review every five to ten years. Many law schools already have such a system in place. A mix of junior and senior colleagues would be assigned to examine a professor's productivity in the three traditional areas of teaching, scholarship, and service. The entire faculty would then review the report produced and indicate its approval or disapproval. If the reviewers and the faculty conclude that the faculty member's performance is substandard, they would so inform him or her and indicate that a reassessment will occur in two years. At the end of the two-year period, the reviewers would conduct another assessment. If that assessment continues to be significantly negative, the professor would be placed on a short-term contract.

2. Short-Term Contracts

A professor who has not sufficiently improved performance within a two-year period would have tenure lifted and be entitled to a short-term contract of an additional two years. During the period the professor would be mentored and given every opportunity to address the deficiencies in his or her teaching, scholarship, and/or service. At the conclusion of that second two-year period, if the professor's performance remains deficient, that person would be terminated. If the performance has improved and now meets required standards, tenure would be reinstated upon faculty approval.

3. Adjustments of Salary

Although tenure has been assumed to carry with it the promise of undiminished salary, there is no reason that this should necessarily be the case. Some senior faculty members may have achieved high salaries at an earlier time when their productivity was impressive. But that time may be far in the past, and with the annual percentage raises offered to most law faculty members, an underperforming colleague may now be at the head of the pack, despite the lack of recent productivity. Law schools should consider the possibility that the dean could lower a faculty member's salary in light of poor performance, perhaps with the input of a faculty advisory committee to ensure fairness.

4. Point Evaluation Systems

Service can be a particularly knotty problem for law schools because service activities are often pursued in an irregular and unaccountable way. Professor D may attend a student reception, act as an informal judge for students preparing for moot court competitions, serve in several committees, organize a conference or a speaker series, and participate in commencement. Professor E, on the other hand, may do none of those things, except possibly attend committee meetings. The dean and the other law faculty members may not be fully aware that Professor D's service far exceeds Professor E's.

Service accountability might be addressed through some sort of point system, whereby faculty members are required to accumulate a certain number of points by fulfilling service activities. For example, attending graduation could count for 5 points, coaching moot court students 10 points, organizing a conference 15 points, and so forth. Each faculty member would be expected to garner a prescribed number of points each academic year—say, 50 points in my hypothetical system. If professors do not achieve the required number of points, they could be subject to a fine or a warning. Or they could be required to pick up an extra class without additional pay.

NOT THROWING THE BABY OUT WITH THE BATH WATER

Unquestionably, law teaching is one of the greatest jobs ever created. It allows professors to teach bright, enthusiastic young people, it provides flexible hours necessary for creating first-rate scholarship or engaging in advocacy for important causes, and, with tenure, it almost always offers guaranteed lifetime employment. Along with tenure comes the freedom to express whatever views one has in articles, essays, speeches, and op-eds. Liberals, conservatives, Republicans, Libertarians, Democrats, Socialists all get to say what they think, without fear of termination or discipline. One can advocate that by law the rich

should pay no taxes or that the poor should have a guaranteed income. It does not matter.

Arguably, tenure is the only real safeguard for academic freedom. But, as I have discussed above, it is also subject to abuse. My goal is to preserve that safeguard while addressing some of the inefficiencies created by it. Ultimately, no proposal can purport to protect tenure completely while subjecting tenured faculty to meaningful post-tenure review. But I have argued that some restrictions on tenure will boost faculty performance and still protect free discourse. In examining a colleague's record, in no case would the faculty be allowed to consider their colleagues' point of view in their scholarship. However objectionable some faculty members might find that point of view, the scholarship should be evaluated as the basis of the customary criteria devoid of partisanship.

Preferred Citation: Margit Livingston, *Tenure Revisited*, 61 B.C.L. REV. E. SUPP. I-12 (2020), <https://lawdigitalcommons.bc.edu/bclr/vol61/iss9/2>.

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