

CONTINUING PROFESSIONAL DEVELOPMENT IN LAW SCHOOLS

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I. INTRODUCTION

THERE is nothing more controversial in higher education than post-tenure review. It is, of course, widely unpopular with many faculty members. At one extreme, some faculty fear it is a rather poorly disguised assault on tenure; not to mention that it is too burdensome to create an extensive peer review system comparable to the system that awards tenure. On the other hand, post-tenure review is widely popular with many law school constituencies such as alumni, central administrations, and boards of trustees. These groups want accountability and, at their extreme, see opposition to post-tenure review as an unprincipled defense of job security.¹ This extreme takes the position that one prong of a two prong rationale for post-tenure review is essentially to try to correct the perceived central problem with tenure—deadwood.²

Given the overwhelming emphasis in the post-tenure review debate on its relationship to tenure, it is not surprising that two of the most quoted statements concerning tenure review reflect these two sides of the issue. Kingman Brewster, former president of Yale University, famously stated that “[t]he practical fact in most places, and the unexceptional rule at Yale, is that tenure is, for all normal purposes, a guarantee of appointment until retirement age.”³ William and Mary professor William W. Van Alstyne (then at Duke), stated:

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1. See, e.g., Mark C. Taylor, *End the University as We Know It*, N.Y. TIMES, Apr. 26, 2009, at A23, available at http://www.nytimes.com/2009/04/27/opinion/27taylor.html?pagewanted=1&_r=1&emc=eta1 (“To complicate matters further, once a faculty member has been granted tenure he is functionally autonomous. Many academics who cry out for the regulation of financial markets vehemently oppose it in their own departments.”).

2. There are, of course, those who strongly believe this is not a problem. “[T]he label ‘deadwood’ would apply only to under 2 percent of a major university faculty” Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 LAW & CONTEMP. PROBS., Summer 1990, at 325, 332 (quoting HENRY ROZOVSKY: THE UNIVERSITY: AN OWNER’S MANUAL 210-11 (W.W. Norton 1990)). “Might we guess 5 percent?” See *id.* See also Dr. Robert B. Conrad & Dr. Louis A. Trosch, *Renewable Tenure*, 27 J.L. & EDUC. 551, 562 (1998) (“[A]t most, only 10 percent of the faculty are marginally unproductive.”) (citing MATTHEW W. FINKIN, THE CASE FOR TENURE 172 (1996); ALBERT REES & SHARON SMITH, FACULTY RETIREMENT IN THE ARTS AND SCIENCES 61 (1991)).

3. Brown & Kurland, *supra* note 2, at 325 (quoting Kingman Brewster, Jr., *On Tenure*, 58 AAUP BULL. 381, 381 (1972) (excerpted from his 1971-72 Report as President of Yale University)).

Tenure, accurately and unequivocally defined, lays no claim whatever to a guarantee of lifetime employment. Rather, tenure provides only that no person continuously retained as a full-time faculty member beyond a specified lengthy period of probationary service may thereafter be dismissed *without adequate cause*.⁴

Referring to these quotations, Professors Ralph S. Brown and Jordan E. Kurland stated: "Both definitions are close to the truth: President Brewster's as a realistic observation, Professor Van Alstyne's as a cautious scholar's synthesis."⁵ The fact is these statements are not just close to the truth. Except for the fact that there is no longer a retirement age in higher education,⁶ they are the truth. Professor Van Alstyne stated the rule. President Brewster stated the application of the rule. It is the apparent disconnect between the rule and its application that is the largest motivating force behind a call for the end of tenure and the rise of post-tenure review.

Not surprisingly, given that the post-tenure debate deals with the terms of their own employment, there is a wealth of written opinion by scholars on the topic from the perspective of seeing it as an attack on tenure.⁷ While it is an interesting debate, this is not an article about tenure as such. This article assumes tenure as we know it will survive. More specifically, this is an article about how to reconcile two very different views concerning the value of attempts to increase accountability while promoting the continuing professional development.

The basic premise of the article is that we are caught in an unproductive debate about post-tenure review, when what we should be focused on is a more productive discussion about how to encourage professional development beyond tenure. Opponents have a legitimate interest in ensuring a system that does not fundamentally change tenure. On the other hand, proponents have a legitimate interest in accountability. Institutions have an obligation to various constituencies

4. Brown & Kurland, *supra* note 2, at 325 (citing William W. Van Alstyne, *Tenure: A Summary, Explanation, and "Defense,"* 57 AAUP BULL. 328 (1971)).

5. Brown & Kurland, *supra* note 2, at 325.

6. Since January 1, 1994, the Age Discrimination in Employment Act Amendments of 1986, 29 U.S.C. § 631, has prohibited mandatory retirement based on age. For a discussion of the impact the law has on the character of the faculty, see generally Marianne C. DelPo, *Too Old to Die Young, Too Young to Die Now: Are Early Retirement Incentives in Higher Education Necessary, Legal, and Ethical?*, 30 SETON HALL L. REV. 827 (2000).

7. See, e.g., Doug Rendleman, *Academic Freedom in Urofsky's Wake: Post September 11 Remarks on "Who Owns Academic Freedom?"* 59 WASH. & LEE L. REV. 361, 361 (2002) (commenting on Stacy E. Smith, Note, *Who Owns Academic Freedom: The Standard for Academic Free Speech in Public Universities*, 59 WASH. & LEE L. REV. 299 (2002)). See also generally David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom under the First Amendment*, 53 LAW & CONTEMP. PROBS., Summer 1990, at 227; William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Review*, 53 LAW & CONTEMP. PROBS., Summer 1990, at 79; J. Peter Byrne, *Academic Freedom: "Special Concern of the First Amendment,"* 99 YALE L.J. 251 (1989); Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265 (1988); Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817 (1983); William W. Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberties*, ANNALS AM. ACAD. POL. & SOC. SCI., Nov. 1972, at 140.

to ensure that faculty members remain productive teachers and scholars. Perhaps as importantly in a system of life tenure, faculty and institutions both have an obligation to have a system of professional development that ensures that faculty evolve as the institution evolves. Having said that, however, it is instructive to at least know the justification for and the criticisms of tenure since it underlies the entire debate.

II. WHY TENURE?

To create a successful, that is, effective and politically acceptable professional development policy, the rationale behind tenure must be taken into account. The purposes tenure is designed to serve can be stated quite simply. Certainly the most widely accepted justification for tenure is academic freedom—in both what a faculty member teaches and what type of research and scholarship he or she wishes to pursue. As part of that academic freedom, it has been argued as justification that the faculty member requires the economic stability tenure provides.⁸ The rationale goes that financial security ensures that faculty members will be judged by their peers rather than “lay employers,”⁹ and that faculty can engage in important long term projects.¹⁰ The economic stability rationale has also often been seen in more stark economic terms. The economic stability entices talented people to join the academy,¹¹ while allowing the university to pay below market wages.¹²

In less stark economic terms, tenure has been justified on the basis that it creates a “social contract” that benefits the university. In exchange for academic freedom and economic stability for its faculty, the university receives the benefit of faculty stability with minimal expenditure of time and money in monitoring and evaluating performance.¹³ Finally, in what is a particularly non-egalitarian justification, tenure “justifies participation in university governance.”¹⁴ Those of

8. Ira P. Robbins, *Exploring the Concept of Post-Tenure Review in Law Schools*, 9 STAN. L. & POL’Y REV. 387, 389 (1998) (“Tenure has always represented a sacrosanct safeguard of academic freedom, largely because of the fear that McCarthy-esque harassment of academicians could occur subtly under the guise of one evaluation scheme or another.”).

9. James J. Fishman, *Tenure: Endangered or Evolutionary Species*, 38 AKRON L. REV. 771, 772 (2005).

10. Brown & Kurland, *supra* note 2, at 333-34. See also Robbins, *supra* note 8, at 389.

11. See 1940 Statement of Principles on Academic Freedom and Tenure, <http://www.aaup.org/NR/rdonlyres/EBB1B330-33D3-4A51-B534-CEE0C7A90DAB/0/1940StatementofPrinciplesonAcademicFreedomandTenure.pdf> (last visited Nov. 19, 2009).

Tenure is a means to certain ends; specifically: ... (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.

Id.

12. Brown & Kurland, *supra* note 2, at 333 (“Without tenure, the uncertainty of employment would require higher salaries.”).

13. Robbins, *supra* note 8, at 389.

14. Fishman, *supra* note 9, at 772.

us who suffered through the clinical wars—not the attacks on clinic academic freedom,¹⁵ but the fights over the status of clinicians—know all too well that this is the underlying battleground.¹⁶ Indeed, in large measure it is also the battleground over gender-based attacks on tenure.¹⁷

If this is the substance of tenure, what is the procedure? Obviously, the faculty member serves a probationary period of sufficient length that his or her peers are theoretically in a position to assess not only his or her current ability to meet the requirements of teaching scholarship and service, but that there is a reasonable expectation that *at a minimum* such level of performance will continue throughout the faculty member's career. Most proponents, of course, argue that from a process standpoint tenure merely shifts the burden of production and persuasion regarding competence and productivity away from the faculty member where it was before tenure. Accountability remains. It is accepted as a simple truism that regardless of these shifts in the burdens of proof, the body to whom the now tenured faculty member is accountable remains the tenured faculty. Any policy must ensure that the tenured faculty remains the body to which the individual faculty member remains responsible.

III. THE PURPOSE OF REVIEW POLICIES

As is clear from its label, the primary purpose of any policy should be to foster professional development. This type of review is often referred to as formative. A formative review is designed to identify strengths and weakness and then develop a plan that addresses the weaknesses and rewards the strengths. Much of the controversy that surrounds post-tenure review results from proposals that do not clearly articulate this goal or from critics who simply do not believe the proponents of the proposal actually are concerned with professional development.

A professional development policy can also foster accountability. This type of review is often referred to as summative. It is a summative review that is designed to ensure that the faculty member remains accountable to the institution. A summative review is obviously the more controversial of the two purposes. It is typically the purpose on which critics of post-tenure review focus, arguing that it will lead to the destruction of tenure and inappropriate behavior by the administration.¹⁸

15. See generally Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 FORDHAM L. REV. 1971 (2003).

16. See Thomas F. Guernsey, *Beware of Navel Oranges*, 34 U. TOL. L. REV. 81, 86 (2002). See also generally Jan M. Levine, *Legal Research and Writing: What Schools are Doing, and Who is Doing the Teaching*, 7 SCRIBES J. LEGAL WRITING 51 (2000).

17. See generally Marina Angel, *The Modern University and Its Law School: Hierarchical, Bureaucratic Structures Replace Coarchical, Collegial Ones; Women Disappear from Tenure Track and Reemerge as Caregivers: Tenure Disappears or Becomes Unrecognizable*, 38 AKRON L. REV. 789 (2005); Levine, *supra* note 16.

18. Donna R. Euben & Barbara A. Lee, *Managing Faculty Productivity after Tenure*, AAUP.ORG, Oct. 24, 2005, <http://www.aaup.org/AAUP/protect/legal/topics/productivity.htm>.

IV. TYPES OF POST-TENURE REVIEW

To develop an appropriate policy, it is useful to look at existing post-tenure review policies. At a minimum they provide a warning as to the pitfalls in developing a professional development policy. As important, they provide guidance on what one would hope should be acceptable.

Essentially there are five types of post-tenure review in use:¹⁹

1. Annual merit evaluations conducted by the dean;
2. Promotion to full professor review, where the tenure decision is separate from the full professor decision;
3. “[C]yclical reviews” in which faculty are reviewed every two to seven years;²⁰
4. “[T]riggered reviews” requiring some event to institute review—this can be either administrative or involve a faculty committee;²¹
5. Tenure revocation proceedings instituted for cause under the current policy.

Within these five categories, there is room for considerable variation.²² Some deans use individual conferences with a faculty member as part of the annual review. Others rely on a letter summarizing conclusions. Some post-tenure reviews are limited to formative evaluations; those designed to encourage faculty development.²³ Others include summative evaluations; evaluations designed to hold the faculty members accountable.²⁴ Outcomes from the reviews can vary widely, ranging from none to tenure revocation. For our purposes, the question is: which of these are appropriate in light of the underlying goals we are trying to achieve?

V. ARGUMENTS AGAINST POST-TENURE REVIEW

A. *Accountability v. Professional Development*

As the debate over post-tenure review began, the Association of American University Professors (AAUP) took the position that post-tenure review should

19. One study indicates that 88 of 192 (46%) of the institutions that have some form of review have post-tenure review. Cheryl Sternman Rule, *After the Big Decision: Post-Tenure Review Analyzed*, in *POLICIES ON FACULTY APPOINTMENT: STANDARD PRACTICES AND UNUSUAL ARRANGEMENTS* 18 (Cathy A. Trower ed., 2000), available at <http://www.acenet.edu/resources/chairs/docs/Rule.pdf>. Another study indicates that 61% of 680 schools studied had post-tenure review. Euben & Lee, *supra* note 18.

20. Rule, *supra* note 19, at 1. Of the 88 with post-tenure review, 89% conduct cyclical reviews. *Id.*

21. *Id.* at 1 (“37 (42%) conduct ‘triggered reviews.’”).

22. *Id.* (“27 (31%) conduct both cyclical and triggered reviews.”).

23. *Id.* (“22 (25%) have purely developmental (formative) post-tenure reviews.”).

24. *Id.* (“61 (69%) have post-tenure reviews that may result in administrative action (summative)”).

never be implemented.²⁵ The AAUP subsequently developed a policy a bit more accepting of the concept. But, its position is that the only legitimate purpose of post-tenure review is for professional development.²⁶

Post-tenure review is believed by some as merely an attempt by the administration to save money, squeezing more out of faculty. It is merely an attempt to increase faculty workload,²⁷ and even worse, post-tenure review is a “thinly disguised attempt to discharge tenured faculty members”²⁸

Actually, this is not “thinly disguised” if it means that the administration would like to have a system in which faculty members are accountable to someone during the bulk of their work life. The issue is developing a system that has the likely outcome of actually fostering professional development, but in the worst case has the procedural protections to insure that a faculty member is not harshly disciplined without peer review and for adequate cause.

The procedure, obviously, must provide appropriate due process. Faculty members who are lawyers have a view of due process beyond all reasonable expectations. Howard R. Bowen and Jack H. Schuster, referring to all of higher education, not just law schools, pointed out that current revocation of tenure

25. “The Association believes that periodic formal institutional evaluation of each postprobationary faculty member would bring scant benefit, would incur unacceptable costs, not only in money and time but also in dampening of creativity and of collegial relationships, and would threaten academic freedom.” Post-Tenure Review: An AAUP Response 60 (1999), <http://www.aaup.org/AAUP/pubsres/policydocs/contents/PTR.htm>.

26. *Id.*

Post-tenure review should not be undertaken for the purpose of dismissal. Other formal disciplinary procedures exist for that purpose. If they do not, they should be developed separately, following generally accepted procedures.

....

We recognize that some tenured faculty members may, nonetheless, fail to fulfill their professional obligations because of incompetence, malfeasance, or simple nonperformance of their duties. Where such a problem appears to exist, “targeted” review and evaluation should certainly be considered, in order to provide the developmental guidance and support that can assist the faculty member to overcome those difficulties.

Id. at 61, 62.

27. *Id.*

Those who have followed recent attacks on faculty workloads know that the issue rapidly shifted from the allegation that faculty did not work enough (which, it turned out, they plainly did) to the allegation that faculty did not do the right sort of work. Some proponents of post-tenure review will thus not be content with the identification of the few “slackers” already known to their colleagues by other means, nor even with the imposition of a requirement of faculty cooperation and institutional loyalty. They also want faculty members to give back some portion of their ability to define their own work and standards of performance. For example, increased emphasis on students’ evaluations of teaching may lead to the avoidance of curricular experimentation or discourage the use of more demanding course materials and more rigorous standards. Periodic review that is intended not only to ensure a level of faculty performance (defined by others than faculty) but also to shape that performance accordingly, and regardless of tenure, is a most serious threat to academic freedom.

Id. at 63.

28. Euben & Lee, *supra* note 18.

procedures requires an amount of effort required in a murder trial.²⁹ Perhaps along the way we could come to an understanding that this is not just about, or even mostly, about tenure revocation. There are professional development options, short of the career death penalty. There should be acceptable prosecutorial discretion. There are code violations and misdemeanors, not just felonies.

A potential flaw in any type of post-tenure review is that the baseline is thought by many to be static. If a faculty member was hired at a time when scholarship was not expected, or perhaps not even valued, is it fair to expect the faculty member to become a scholar? Can you become a nonproductive faculty member because the world around you has changed? I think the answer has to be yes.³⁰

Law schools and their faculty cannot ignore basic external pressures. For example, between 1989-1991, due in large part to *U.S. News and World Report*, what was once a regional business for all but a few of the then 160 law schools turned into a national business.³¹ I like to say to a group of Albany Alumni who graduated before 1989 that I bet they applied to two law schools—Albany and Cornell. Until the late 1980s, if you were in upstate New York and wanted to go to law school, Albany was the obvious choice. Today, if you live in upstate New York and want to go to law school, you take the LSAT, buy a copy of *U.S. News & World Report* and say, “let me see all the places I can go.”³²

Every ABA accredited law school is a national law school, not by choice, but by reality. If we still want that applicant from upstate New York, we better have a program that compares to every other program in the country or we will lose that local applicant. A school with a faculty predominately hired that is

29. HOWARD R. BOWEN & JACK H. SCHUSTER, *AMERICAN PROFESSORS: A NATIONAL RESOURCE IMPERILED* 243-44 (Oxford Univ. Press 1986).

30. Indeed, there is some empirical evidence that what is commonly thought of as deadwood is an inaccurate characterization. While there may be a slight decline in productivity following the award of tenure, most faculty are essentially as productive over the course of their careers as they were when they received tenure. See generally Si Li & Hui Ou-Yang, *Incentives, Performance, and Academic Tenure* (Jan. 22, 2003), available at <http://ssrn.com/abstract=399240> or DOI: 10.2139/ssrn.399240. But see Jeffrey L. Harrison, *Post-Tenure Scholarship and Its Implications*, 17 U. FLA. J.L. & PUB. POL’Y 139, 151 (2006), available at <http://ssrn.com/abstract=931185> (“I found some of these statistics surprising. The most surprising was the decrease in scholarly output between pre- and post-tenure.”).

31. See Jan Klabbers, *The Internationalization of Law and Legal Education*, in 2 IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE 7-8 (2008). There are, of course, other structural changes that have transformed legal education in our lifetime. I, for example, began law school in 1973 during the transformative period where large numbers of women began attending law school. Gender equity required adaptation of the law school culture.

32. As a faculty member, I found graduation speakers quoting Dr. Seuss annoying. Little did I know the good doctor would be even more annoying when, as a dean, I was competing for students who were thinking of all the places they could go. See THEODORE SEUSS GEISEL, OH, THE PLACES YOU’LL GO! (1993) (“Oh, the places you’ll go! There is fun to be done! There are points to be scored. There are games to be won.”).

teaching and conducting scholarship as though this change never occurred cannot compete in this new market.³³

Institutional pressures are also at work. Most recently the Carnegie Foundation for the Advancement of Teaching published "Educating Lawyers: Preparation for the Profession,"³⁴ a pretty unflattering review of legal education. It is a strong call for change. The Clinical Legal Education Association has published "Best Practices for Legal Education: A Vision and a Road Map."³⁵ If the views contained in these two books gain acceptance in the profession, it is going to require a major change in the way faculty will need to perform their jobs.

The existence of these pressures is going to force even currently productive faculty members to reassess what it means to meet the expectations of the institution. It is precisely the type of professional development challenge that needs to be accounted for in post-tenure review.³⁶

B. *Broken Social Contract*

Attacks on proposals for post-tenure review justifiably start with questioning the fundamental assumption of accountability. Before tenure, the faculty member was accountable to the tenured faculty and the dean. Short of tenure revocation, after the grant of tenure, accountability is merely to the dean.³⁷ One study indicated that only fifty-five percent of faculty members believe they have responsibility for the conduct of their colleagues. Even more revealing, however, only thirteen percent believe their colleagues "exercise a great deal of shared responsibility," and thirty percent believe there is "very little or no" such exercise of responsibility.³⁸

33. See Larry Catá Backer, *Defining, Measuring, and Judging Scholarly Productivity: Working Toward a Rigorous and Flexible Approach*, 52 J. LEGAL EDUC. 317, 318 (2002) ("Those elements of the popular press that evaluate law schools tend to rely heavily on measures of scholarly reputation."). See also Neil W. Hamilton, *The Ethics of Peer Review in the Academic and Legal Professions*, 42 S. TEX. L. REV. 227, 264 (2001) ("Rankings attract students, and rankings are based in significant measure on disciplinary recognition, especially for scholarship.").

34. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION (2007).

35. ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007).

36. See Euben & Lee, *supra* note 18. The same could be said about other market forces, such as globalization. It is unlikely a business organization professor teaching and conducting scholarship as she did in the 1980s is relevant today.

37. See Fishman, *supra* note 9, at 780 ("Unfortunately, most faculty treat non-performing faculty as the dean's responsibility."). See also Neil W. Hamilton, *Academic Tradition and the Principles of Professional Conduct*, 27 J.C. & U.L. 609, 622 (2001) ("The public challenge today is directed at the failure of peer review adequately [sic] to enforce the correlative duties of professional competence and ethical conduct following the grant of tenure.").

38. Hamilton, *supra* note 37, at 623 (citing Judith Swazey et al., *Ethical Problems in Academic Research: A Survey of Doctoral Candidates and Faculty Raises Important Questions About the Ethical Environment of Graduate Education and Research*, 81 AM. SCIENTIST 542, 550 (1993), available at <http://www.americanscientist.org/issues/id.934,y.0,no.,content.true,page.1,css.print/issue.aspx>).

There is more than a bit of irony in the fact that the faculty fight so hard to maintain its prerogatives in deciding whether a tenure-track faculty member is competent and productive enough (and sometimes even collegial enough) to join the faculty. But having made the tenure decision after six years, the tenured faculty is more than happy to abandon its responsibility for colleague performance in favor of the dean for the next forty years. Any realistic policy, therefore, has to shift accountability back to the faculty. Further, to the extent sanctions are part of post-tenure review, the sanctions must be clear so that post-tenure review becomes a statement of support for the use of resources to correct and, if necessary, sanction continued, unproductive behavior.

Legally, a dean can do quite a bit to attempt to influence unproductive behavior. The problem is that it very rarely works. I have been a dean for twelve years. In that time I have worked with approximately seventy-five tenured faculty members. I can think of two instances where any of these rewards or punishments at least arguably changed a tenured faculty member's behavior. Even then, both were already moderately productive faculty members—who moved to becoming outstanding faculty members. Money does not correct bad behavior—whether you give it to them or take it away. What I have seen work, however, is peer pressure. My asking the senior faculty member to speak to a tenured faculty member engaged in inappropriate behavior works. Raising misbehavior or lack of productivity in a faculty meeting (anonymously) and having the faculty show outrage works, too.

There are, of course, limitations to relying on faculty peer pressure. There are even occasional candid statements such as, “[W]e have regular post-tenure review, but the firmly established norm is that the review is totally complimentary, even when a person's teaching or scholarship could use a great deal of improvement. I've been at vicious schools and, on balance, I'll take collegiality and 'lower standards' any day.”³⁹

Any realistic policy, therefore, has to shift accountability back to the faculty and deal with this herding instinct. Of course, this is not easy in an environment where the faculty has little incentive for change. As stated eloquently by Nancy B. Rapoport, it is tough to change the *status quo* in this environment:

There's no question that life for a tenured professor at a research university has to be one of the all-time best deals in the world: as long as the university can afford to keep running ... the freedom that the professor has is unparalleled. No boss can dictate to the professor what her field of research should be; most of the time, the professor teaches in areas that complement her research interests; and the service components of the job are often interesting⁴⁰

39. Michael L. Seigel & Kathi Miner-Rubino, *Some Preliminary Statistical, Qualitative, and Anecdotal Findings of an Empirical Study of Collegiality Among Law Professors*, 13 WIDENER L. REV. 1, 15-16 (2006).

40. Nancy B. Rapoport, *Eating Our Cake and Having It, Too: Why Real Change Is So Difficult in Law Schools*, 81 IND. L.J. 359, 363 (2006).

C. Cost

It has also been argued that post-tenure review is more expensive than it is worth. There is no doubt that it is an expensive proposition.⁴¹ Regarding post-tenure review Dr. Robert B. Conrad and Dr. Louis A. Trosch state:

Faculty and administrators would have to spend countless hours in the personnel process just to identify the non productive faculty members. There would be additional hidden costs associated with the mandatory due process hearings to terminate the incompetent faculty member's tenured position.⁴²

Certainly the expenditure of faculty time is an issue. Conrad and Trosch estimate that "the university would lose \$380,000 per year just to go through the review process to identify twenty non-productive faculty members."⁴³

Conrad and Trosch estimate that "[a]ltogether, for preparation, review, and reporting ... 316 hours would be accumulated in the review, preparation of documentation, and presentation of conclusions for one faculty member seeking promotion or tenure."⁴⁴ As they point out, full post-tenure review is likely to consume the same amount of time.

It is this analysis that led Conrad and Trosch to their estimate of \$380,000 in cost each year. Using the same analysis, an average law school with fifty faculty members, and assuming a five-year cycle, would eventually see five faculty being reviewed each year. That's 1,580 hours each year. If the average tenured law professor makes say \$125,000 and, assuming a 2,000 hour working year, he or she makes about \$62.50 per hour. The cost of review is \$98,750.

Actually, \$380,000 for the whole university or \$98,750 for just the law school would be a bargain. Assume a law school with a \$25 million total budget, a faculty of fifty, and a faculty budget line of \$7 million. Ten percent of the faculty means five faculty members are non-productive. Assuming the non-productive faculty are evenly spread over the salary scale, as opposed to being concentrated among the higher paid senior faculty, the school is paying these five faculty members \$700,000 a year, or 2.8 percent of its budget.

Certainly Conrad and Trosch do not think 2.8 percent is a big deal. Although talking about eliminating tenure, they state:

Financial experts generally agree that Pareto's Law requires concentrating on areas of greatest inefficiency if advancement or improvement is to be accomplished. Eliminating tenure to get at less than 2.7% of one's expenditures appears to be *an exercise in futility and only serves to give an appearance of tackling a problem*.⁴⁵

41. Fishman, *supra* note 9, at 778 ("If post-tenure review is undertaken, it requires an enormous use of faculty resources to do properly. Because of this, it is time-consuming for faculty. It necessarily will take them away from other responsibilities and can lead to conflict.").

42. Conrad & Trosch, *supra* note 2, at 570.

43. *Id.* at 567.

44. *Id.* at 566.

45. *Id.* at 563.

Conrad and Trosch underestimate the real cost. Saying you have a \$25 million, or even a \$300 million budget does not fully convey the reality. In an academic institution, the amount of truly discretionary money is small. The budget is consumed with fixed costs. The real financial impact is that you are wasting ten percent of your faculty lines, and there is no money to compensate for the loss of productivity. It would seem well worth at least some cost to move this ten percent from being less productive to being more productive. Wasting 2.8 percent of your widgets may not kill a company, but spending 2.8 percent of your budget on defective parts that then go into your widgets or continuing to employ ten percent of your work force who contribute to a defective product and, as a result cause consumer complaints, can seriously harm your business.

Cost, of course, must also be viewed in terms of the time it takes to actually conduct post-tenure review. Even faculty members who take his or her post-tenure responsibility seriously have a legitimate concern about the cost to them and the institution. They were, after all, hired primarily to teach constitutional law. The cost is considerable, both in terms of the faculty members who are reviewed and the faculty members doing the review. They are evaluating or being evaluated, not teaching or conducting research.

The fact is, whether you think the cost in real dollars is great, the cost in social and psychological terms is high, and any post-tenure review system has to minimize those costs. This is also one of the reasons I reject the idea of cyclical reviews. I do think, however, the overall value of the process is worth some expenditure of time and money.

D. Does Not Work

Perhaps the biggest challenge to post-tenure review is the assertion that there is no point in doing it because it just does not work.⁴⁶ The one bit of evidence most often used to show it does not work is the small number of faculty whose tenure is terminated following post-tenure review. Of course, that same statistic can be used to show that post-tenure review is working so well that corrective intervention has saved the day. It is interesting that claims that post-tenure review does not work are often made in the same article that extols how well the existing tenure process works in identifying candidates. If pre-tenure review works, why should we assume that post-tenure review will not?

Defining success for post-tenure review as limited to showing that there has been specific, identifiable change in an underperforming faculty member or termination of that faculty member is much too narrow a view. The primary function of post-tenure review clearly is to affect the behavior of particular faculty members.

The accountability function, however, is not merely to the institution. The individual faculty member is accountable to other faculty members, students, perhaps even taxpayers. A highly productive faculty member, for example, has an interest in the fairness of a system; to ensure that he or she is not carrying

46. Gail E.R. Johnson, *Post Tenure Review: Practical Considerations*, 8 J. HIGHER EDUC. MGMT., Winter/Spring 1993, at 23 n.2.

more than his or her full-load because of under-performing faculty members. In an environment where annual reviews and salary raises are confidential, the productive faculty member has a legitimate interest in knowing, at least, that there are structures in place that try to create fairness.

Students also have a right to know that the institution as a whole takes their concerns over the quality of teaching seriously. Again, in an environment of confidentiality regarding not just faculty evaluations, but the consequences of those evaluations, students deserve more than an assurance from the dean that, yes indeed, I do read the evaluations, and they are taken into consideration during the annual review. I should think they deserve to know that not just the dean, but the entire faculty, who purport to run the place, take these concerns seriously and have procedures to deal with them.

A policy that actively engages the faculty, therefore, is an important statement to the law school's constituencies who, despite pronouncements that there is really nothing wrong, believe they see a different picture. They see neither the professional development nor the accountability that comes from having at most annual merit review because this is all done in private. All too often, they do not believe there is either accountability or development because they do not see any behavioral change by the under-performing faculty member, and they do not see the concern of the dean because it is a private, personnel matter. They do not see the concern of the faculty, because most are not concerned and those who are express that concern in private. The challenge is to develop a process that retains confidentiality but also communicates to the other constituencies that we take their concerns seriously. We may not be able to tell you what we are doing, but we can show you we are doing something.

VI. A CHANGED PREMISE

As a starting point, the professional development policy should be guided by the four principles advocated by the AAUP. In the 1999 report, *Post-Tenure Review: An AAUP Response*, it states:

The principles guiding this document are these: Post-tenure review ought to be aimed not at accountability, but at faculty development. Post-tenure review must be developed and carried out by faculty. Post-tenure review must not be a reevaluation of tenure, nor may it be used to shift the burden of proof from an institution's administration (to show cause for dismissal) to the individual faculty member (to show cause why he or she should be retained). Post-tenure review must be conducted according to standards that protect academic freedom and the quality of education.⁴⁷

Given the depth of disagreement, however, these general principles should lead to more specific premises as well.

47. See *Post-Tenure Review*, *supra* note 25.

A. The Premises

There should be an acceptable alternative if we can take the debate over post-tenure review and incorporate the AAUP four general principles while perhaps reformulating the premises that lead to a specific policy. The conclusions I draw from the debate are that to be effective in a law school setting, any policy should be based on a number of premises:

1. The policy should be viewed as an overall approach to continuing professional development. It should be made clear that this is not post-tenure review, it is about professional development. As such, for example, it should not be only about scholarship. It must focus on teaching and service, as well.
2. To the extent possible, existing policies should be incorporated into the process, including tenure standards, separation of tenure and promotion, and the annual dean's review.
3. It should require the minimum faculty expenditure of time, for example, not everyone needs to be reviewed every given number of years. Faculty involvement needs to be targeted to a specific problem. Faculty need to spend their resources where the system is broken and only when there is a specific, identifiable problem. Therefore, it should be a triggered review, not a cyclical review. The most common triggered review appears to be tied to a dean's annual evaluation. The fact is, if the dean is happy, why bother the faculty?
4. If we have existing structures that work, they should be incorporated into the system.
5. It should be both formative and summative, that is, it must be focused on professional development and accountability.
6. Given its dual role, any policy should be based on the presumption that non-productivity can be corrected.
7. Law schools need not reinvent the wheel. There are many excellent examples of policies readily available on the Internet.⁴⁸
8. Revocation of tenure should not be a part of the policy. Indeed, the policy should not state specific sanctions of any type. There is no need for it to be in a policy that purports to be primarily concerned with formative considerations. Termination is always a last resort, but is extremely rare,⁴⁹ and is usually covered in other law school

48. This proposal, for example, draws heavily from the policies of the University of Colorado, the University of Montana, and Winthrop University. See University of Colorado, Administrative Policy Statement: Policy Title: Post-Tenure Review, https://www.cu.edu/policies/policies/HR_Post-Tenure-Review.html (last visited Oct. 11, 2009); The University of Montana-Western Education Department Unit Standards for Tenure and Promotion 183-88, http://www.montana.edu/accreditation/documents/st4_report.pdf (last visited Oct. 11, 2009); Winthrop University: Post-Tenure Review, http://www2.winthrop.edu/acad_aff/Policies/post.html (last visited Oct. 11, 2009).

49. The fact is, absent a specific policy or law to the contrary, the school retains a wide array of possible negative actions. Most commonly, we can refuse to give a salary increase. We can reassign teaching responsibility. We can deny summer research grants and sabbaticals. We could,

policies. In fact, because of its formative purpose, continuing professional development should not reduce the protections currently provided regarding tenure revocation. It should be designed to minimize the likelihood that the tenure revocation proceedings are ever implemented.

9. The policy needs to be simple to implement and easy to understand. Given the earlier premise that if the dean is happy, why involve faculty, there seems little point in extensive faculty involvement that simply adds time and cost without any clear advantage.⁵⁰

Using these premises, the policy should consist of a statement of purpose, as well as an articulation of what the law school affirmatively provides to foster excellence in teaching, scholarship, and service.⁵¹ It is more than symbolic to include in a policy the affirmative steps the school will take to ensure the opportunity for the faculty to develop and articulate as well as possible what specific rewards are available for professional advancement.

Following the articulation of the positive support provided for professional development, the policy sets out a four-tiered process of evaluation: (1) a mandatory annual evaluation by the dean, preferably using the system currently in place, with the added summary evaluation of the faculty member as either exceeding, meeting, or falling below expectations; (2) an extensive review in application for promotion from associate professor to full professor; (3) a Dean Consultation resulting from a below expectations annual evaluation; and (4) a Faculty Consultation resulting from either two below expectation ratings within five years or resulting when a faculty member who has undertaken a Performance Improvement Agreement did not achieve an evaluation of meeting expectations or better by the end of the agreement. The annual merit evaluation remains the basic annual instrument of faculty evaluation.

B. Annual Dean's Evaluation and the Performance Ratings for Faculty

To the extent possible, the annual review by the dean should follow the format the faculty has grown accustomed to and hopefully trusts. The specifics of the annual evaluation need not, and probably should not, be part of the overall policy. Deans come and go and value different strengths. Indeed, individual deans may put different emphasis on faculty accomplishments over the years as

I suppose, reduce a faculty member's salary. See, e.g., Donna R. Euben & Barbara A. Lee, *Faculty Discipline: Legal and Policy Issues in Dealing with Faculty Misconduct*, 32 J.C. & U.L. 241, 276 n.252 (2006) ("Courts generally rule that faculty members do not have a property interest in a specific salary.") (citing *Swartz v. Scruton*, 964 F.2d 607, 610 (7th Cir. 1992)).

50. If you disagree with this premise, see an excellent treatment in Jayne W. Barnard, *Post-Tenure Review as if it Mattered*, 17 J. CONTEMP. LEGAL ISSUES 297 (2008).

51. Albany Law School provides a range of benefits to encourage professional development such as reduced teaching loads for new hires, release time pre-tenure, reduced teaching loads for unusually productive scholars, summer curriculum grants, summer research grants, annual scholarship, teaching and service awards, generous travel and research budgets, and sabbaticals (up to a year in certain circumstances).

institutional needs change. What should be part of the recommended policy, regardless of how a particular dean conducts the annual evaluation, is a summary conclusion related to exceeding expectations, meeting expectations, or falling below expectations.

Personally, I start my annual evaluation process with an Annual Achievement and Goals Report ("Report") completed by each faculty member. A version of this report has been used at the law school for years. It is a short answer report covering activities for the prior year in the areas of teaching, scholarship, and service. It also, as the name implies, asks for the goals of the faculty member plus anything else the faculty member wishes to report.

Using the Report and other information, such as student evaluations, I fill out a Performance Rating Sheet ("Rating Sheet"). The Rating Sheet assigns points to particular achievements in teaching, scholarship, and service. The point allocation for a particular achievement, for example, writing a law review article or changing a teaching assignment, attempts to reflect importance of the accomplishment in light of the long-range plan of the school.

Both the Report and the Rating Sheet may change over time as the needs of the institution change (or I am convinced that the Rating Sheet does not accurately reflect what the school is trying to achieve). My hope is that a consensus builds around the Performance Rating, despite the fact that everyone probably has some problem with part of it.⁵²

As seen from the point allocations described below, the dean does retain discretion, by setting a range of points, when it comes to the relative quality or importance of a particular work. The faculty has a role in the development of these forms. I draft the documents in light of the strategic plan and then circulate the documents to the faculty for comments and suggestions.

The immediate consequence of the Performance Rating Sheet is to: (1) structure my annual conversation with each faculty member; (2) send a clear message as to what I think is important for the faculty to be engaged in; and (3) determine merit salary increases.

Beyond structuring the annual phase of professional development, this point system has several advantages for further reviews. First, it clearly articulates what the dean values, that is, the activities in which a productive member of the faculty should be engaged. A faculty member knows that to get more money he or she merely needs to do more of these things. Second, it creates a summary paper trail for later stages in the review process. It commits the dean to an evaluation with which a later faculty committee can either agree with or disagree. Third, it provides a summary evaluation (outstanding, exceeding expectations, meeting expectations, below expectations) that may trigger a Faculty Consultation.

52. Individuals have agreed to disagree with me on particular point allocations, but by and large the response has been that they appreciate the candor of the system. You do need to be prepared for the productive scholars to chuckle about the "silliness" of trying to quantify the quality of their work. They will quickly see, however, that it is to their advantage.

1. *Teaching*

By far the biggest complaint about the Performance Rating Sheet in the past has been the teaching portion. The attached version takes into account some of those complaints. The point allocation reflects what I feel are the current institutional needs. There is a critical need for faculty to participate in institution-building and changes related to our academic program. For example, if we are going to have a smaller entering class with smaller sections in the first year, faculty will need to change what they teach. They should be rewarded for such changes. Certain faculty members carry dramatically different teaching loads than other faculty, and the institution could not fulfill its primary function if that did not happen. These faculty members should be recognized.

Ultimately, I have come to the conclusion that notwithstanding all of their problems, student evaluations of faculty come close to the mark.⁵³ There are a small number of truly stellar classroom teachers and a few truly dreary teachers. The rest are in the middle.

If the faculty believes that the current teaching evaluation form does not adequately measure teaching effectiveness, I would encourage the appropriate committee to revise it. Short of using the form, the only alternative is peer evaluation.

I know I do not have the time to watch individual faculty members teach and having faculty committees do it seriously undermines the goal to minimize the time and monetary costs from this phase of review.

The teaching points are allocated as follows:

- Permanent shift in teaching assignment at administration's request (3 points)
- One time shift for sabbatical coverage (2 points)
- Teaching more than four classes and more than thirteen credit hours (2 points)
- Extraordinary student load (2 points)
- Published teaching materials (e.g., casebook) (2 points)
- Student evaluations average at or above 75th percentile (2 points)⁵⁴
- Addition of significant writing component to traditional class (2 points)

2. *Scholarship*

To determine what constitutes scholarship can obviously be a thorny issue, since faculty can differ markedly in terms of what they consider to be

53. The scholarship on student evaluation of faculty has been more extensive than the scholarship on the role of tenure. *See generally, e.g.*, William Arthur Wines & Terence J. Lau, *Observations on the Folly of Using Student Evaluations of College Teaching for Faculty Evaluation, Pay, and Retention Decisions and Its Implications for Academic Freedom*, 13 WM. & MARY J. WOMEN & L. 167 (2006).

54. Based on evaluations from all courses, full load, and with 90% of students responding.

scholarship.⁵⁵ Consistent with the idea that any review should build on existing structures, the rating system relies on the definition of scholarship adopted by the faculty in its promotion and tenure standards. Reliance on a previously agreed to definition makes life easier for everyone.

A common question from faculty is: why the emphasis on scholarship and a perceived bias against state-based scholarship? I do value state-based scholarship a great deal. I believe that for Albany Law School to be successful, we need to maintain our reputation as the law school serving the legal profession in New York.

The reality is, however, that law schools also need to produce scholarship that will increase our reputation nationally. Faculty must do so over the course of their careers. There is empirical data that suggests scholarly productivity declines post-tenure. The decline does not appear related to the rank of school at which the tenured faculty member teaches.⁵⁶

What about longer term projects that take more than one year to complete? Are faculty members harmed by this system since a publication only counts when I have it physically in hand? Clearly different types of projects take different amounts of time to complete, and I do not want to discourage ambitious projects. As have most deans, however, I have been burned on promises of books and articles that “will be out soon.” I deal with this issue by the track record allocation, potentially allowing a productive scholar to be rewarded if something does not come out in a particular year.

There are also questions about how to count writings like second editions, supplements, and statutory commentaries. New additions, supplements, and the like vary so greatly that it is hard to assign a fixed value. Decisions on value are not made in a vacuum, and the sheet provides for faculty members to educate me on the relative merit of such scholarship.

The scholarship points are allocated as follows:⁵⁷

- Article: Non-ALS—national or international scope (5 points)
- Article: ALS Journal—national or international scope (3 points)
- Article: Non-ALS—state scope (3 points)

55. There are a fascinating number of articles on what scholarship is and how you evaluate it. Professor Larry Catá Backer’s article, *Defining, Measuring, and Judging Scholarly Productivity: Working Toward a Rigorous and Flexible Approach*, 52 J. LEGAL EDUC. 317 (2002), provides a particularly helpful (at least to a dean) analysis of the issues. See also Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153, 154 (2002); Richard A. Posner, *Legal Scholarship Today*, 45 STAN. L. REV. 1647, 1647 (1993); Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 889 (1992); Philip C. Kissam, *The Evaluation of Legal Scholarship*, 63 WASH. L. REV. 221, 222 (1988).

56. Jeffrey L. Harrison, *Post-Tenure Scholarship and Its Implications*, 17 U. FLA. J.L. & PUB. POL’Y 139, 151 (2006). See also Michael I. Swygert & Nathaniel E. Gozansky, *The Desirability of Post-Tenure Performance Reviews of Law Professors*, 15 STETSON L. REV. 355, 359 (1986) (stating that “little if any motivation exists for tenured faculty to publish at perhaps even a majority of America’s law schools”).

57. Publications must meet the definition contained in the Albany Law School Faculty Handbook. Publications not meeting this definition may count as teaching or service. Co-authored articles are reduced by one-half. New chapters in books count as articles.

- Article: ALS Journal–state scope (2 points)
- Book/Treatise: Original work–national or international scope (5 or 6 points)
- Book/Treatise: Editor (3 or 4 points)
- Book/Treatise: Original work–state scope (3 or 4 points)
- New edition book (2 points)
- Chapters revised in existing book (not per chapter) (1 or 2 points)
- Statutory Commentary (1-3 points)
- Extraordinary quality judgment (2 points)
- Extraordinary publication track record during previous three years (2 points)
- Supplement (0-2 points)
- Publication in Top 25 Journal (in addition to above allocation) (2 points)
- Comparable publication not otherwise included (1-4 points)

2. *Service*

Service has been the least controversial of the points, and points are allocated as follows:

- Extraordinary School of Law service (1 point)
- Above average attendance at School of Law events (1 point)
- National or State Bar Leadership (1 point)
- Extraordinary other law related service (1 point)
- Moot Court Coach (non-paid) (1 point)
- Blog editor (1 point)
- Bar Journal Article (.5 point)
- Op Ed Article (.5 point)

3. *Point Reductions*

The theory behind the evaluations is to make them formative. I want to identify problem areas and try to work to correct those problems. For most of the years I have used this type of form, a faculty member could only earn points, not lose them. I have recently changed my mind. It is in large measure a reaction to what you might call pet peeves. In my view, these should not be controversial. The point reductions are as follows:

- Miss two or more regularly scheduled faculty meetings (-1 point per meeting)⁵⁸
- Miss two or more hiring faculty meetings (-2 point per meeting)
- Late grades (-2 points)
- Late Annual Achievement and Goals Report (-2 points)
- Student evaluations for one or more courses average below 3.0 (-2 points)
- Failure to attend graduation (-2)

58. The first two missed meetings count in reduction. Religious holidays and school/scholarly business trips are excluded.

4. *Summary Evaluation*

The final feature of the annual form is a summary evaluation of outstanding, exceeding expectations, meeting expectations, or below expectations. This summary is designed both to communicate an annual overview evaluation, but also to trigger any further review.⁵⁹ There are no set minimum points necessary to receive a below expectations review. Simply not receiving points should not lead to a below expectations evaluation. I should think, however, that no scholarship points, for example, over an extended period of time (three years perhaps) may lead to a presumption.

5. *Salary Determinations*

The immediate consequence of the Performance Ranking Sheet is determining merit salary increases. In general, the process I use is quite simple. A certain percentage of a salary pool is given to everyone who is doing a good job in the areas of teaching and service. For example, if there is a two percent salary pool to be distributed by merit, one percent might be given to everyone who is performing the basic teaching and service functions. If a faculty member does not receive this portion of the increase, it would indicate a concern that minimum standards were not being met in those two areas, and the likely result will be a below expectations summary rating.

The remainder of the merit pool is distributed using the Performance Sheet. Based on the Annual Achievement and Goals Report, points are assigned in each of the three categories on the Performance Sheet. When all the points are awarded to each faculty member, the points are totaled. The point total is divided into the money remaining in the raise pool, resulting in a dollar value per point. Faculty members then receive the additional salary increase based on their point total.

In addition to everything else, I think this system addresses a common concern among younger faculty; namely, the use of a percentage increase over time results in the gap between junior and senior faculty is ever widening. A system that uses percentages, such as everyone exceeding expectations gets a three percent salary increase, means that a senior faculty member can get thousands more dollars than a junior faculty member for doing the same amount of work. Over the course of a productive career, the (relatively new) junior faculty member is at a great disadvantage. Under this system, a junior member of the faculty who writes a law review article gets the same reward as a senior faculty member writing a comparable article.

While this point system has been accepted by the two law school faculties for whom I have served as dean, there are critics of such systems. The criticisms

59. Also note that this evaluation is based on a calendar year, not an academic year. It is impossible to do a comprehensive annual evaluation and meet individually with each faculty member between the end of the academic year and July 1. I also use different criteria for Clinical and Lawyering Faculty, and I ask those faculty members to make any suggestions for those modifications.

apply regardless of whether we are talking about teaching, research and scholarship, or service. But, in the context of research and scholarship, one such criticism boils down to “[i]n a discipline like ours, [comparative literature,] there are as many imponderables in assigning points as there are in assigning salaries.”⁶⁰ More specifically, how can you possibly make judgments concerning the wide variety of forms scholarship takes?

Does a 10-page article count as much as one that is twice as long? Does an article in a top-tier journal count the same as one in a lesser-ranked publication? How should I assess a public lecture, a conference paper, a keynote address? Does a translation or a scholarly edition of a Korean text equal a book? Does a volume you have edited count as a book?⁶¹

These are precisely the kind of questions that an administrator is either paid to answer or paid to get his or her faculty to answer. A school or department has a mission. Which of these publications further that mission? When push-comes-to-shove, how do you want your faculty to spend their time? Which publication will best meet the needs of the institution? If you cannot answer those questions, you need another line of work.⁶²

A second criticism directed at a point system is that it leads to unfairness in two areas. First, it is argued that it leads to salary compression. “With seven years of annual raises, a productive associate professor ends up earning little more than an untried assistant professor hired last year.”⁶³ Salary compression is not the result of a point system. Salary compression is the result of market forces outside the university. People in the market and in demand get higher salaries than people who are either not in the market or who are not in demand. Quite the contrary, a point system ensures that an assistant professor who is as productive as a full professor, for example, both publish an article in the primary journal of a top-tier law school, each receive the same reward for the accomplishment. Further, as pointed out before, in the absence of a point system, the commonly used percentage increase actually increases compression as the gap between the assistant professor and the full professor continues to widen year after year.

A third criticism of a point system is that quantity of publications does not equate to productivity. I agree that there are fields in which faculty produce “excellent research for which a publisher cannot be found”⁶⁴ I think we have a research and *scholarship* responsibility. If research does not get circulated, it is the same as not existing. Also, let us keep in mind that in legal education there

60. James H.S. McGregor, *Divvying Up the Raise Pool*, CHRON. HIGHER EDUC., Apr. 11, 2008, <http://chronicle.com/article/Divvying-Up-the-Raise-Pool/45750/>.

61. *Id.*

62. One suggested alternative is to rate faculty as below average, average or exceptional when it comes to scholarly productivity. *Id.* If you can do this, you can assign a number. I would suggest 1, 2, and 3. I would also suggest that average and below average only have meaning if average productivity is the same as meeting expectations. You obviously can have average productivity that is nothing.

63. *Id.*

64. *Id.*

are over 900 journals; over 600 of which are edited by students.⁶⁵ Does anyone really contend that you cannot get something published?

C. Dean Consultation Resulting from a Below Expectations Annual Evaluation

Under the proposal, a Dean Consultation takes place when a faculty member receives an annual summary evaluation from the dean of “below expectations.” This Dean Consultation communicates to the faculty member that the dean does not believe the faculty member is meeting his or her professional obligations and responsibilities, that is, underperforming. The result of the review is the creation and monitoring of a Performance Improvement Agreement:

The Performance Improvement Agreement

1. Faculty who receive a “below expectations” summary rating as the result of their annual performance evaluation shall participate in developing and implementing a Performance Improvement Agreement (PIA) designed to improve their performance.
2. The faculty member develops a PIA that includes specific goals, timelines, and benchmarks that will be used to measure progress at periodic intervals. Usually, PIAs will be established for one year. But, if research deficiencies warrant longer, the PIA may be set up for two years. The Dean shall designate an advisor to provide advice to the faculty member on best practices and models for PIAs and appropriate benchmarks. The next annual merit evaluation following the term of the PIA shall address whether the goals of the PIA have been met.

If the goals of the PIA have been met, thus resulting in an annual dean’s summary evaluation of at least “meeting expectations,” the review process is complete.

The obvious goal in the Dean Consultation is to deal with a problem in a low key manner, minimizing the work of the unaffected faculty and focusing on the professional development prong of review. It is really a small step beyond what the annual review itself would accomplish. It does ensure, however, that both the dean and faculty member explicitly address the problem and proposed solution. The policy also explicitly recognizes in the sanctions provisions that at the dean’s discretion, the faculty member may not receive a salary increase for the next contract year.

D. Faculty Consultation

A faculty member who receives two “below expectations” ratings within the previous five years (this would, of course, include those whose PIA did not result in an evaluation of “meeting expectations” or better) move on to the next level of

65. For an index of scholarly legal publications, see Univ. of Wash. School of Law: Marial Gould Gallagher Law Library—Periodicals Information, <http://lib.law.washington.edu/cilp/period.html>.

review. At this point, there has been a minimum of two years during which the dean believes the faculty member is not meeting expectations. At this point it is clear to the dean that the relative informality of the PIA is not working, and it seems reasonable that after two years, the faculty should become involved.

For a Faculty Consultation, the Committee will evaluate whether the faculty member is meeting expectations regarding teaching, scholarship and service as well as his or her overall productivity and contributions to the Law School. The Committee will examine the candidate's record of teaching, scholarship and service as defined in the Albany Law School Promotion and Tenure Standards. In conducting this review, the Committee may consider any relevant information, including any material the faculty member or the dean wishes to submit.

It is entirely possible that the faculty committee could disagree with the dean at this point and find that the faculty member is meeting expectations. If the faculty committee makes a finding that the faculty member is meeting expectations, the review is complete. If, however, the committee believes that the faculty member is not meeting expectations, the next step is to again focus on professional development. The committee will recommend actions that should be included in the faculty member's "Development Plan," including realistic goals and expectations for performance; activities to improve performance; a timeline for completing goals; suggested resources to support the plan; and methods for assessing achievement of the goals and expectations, including peer and student evaluation of performance.

Similar to a Performance Improvement Plan, a Development Plan focuses on professional development. This time, however, progress will be monitored by the committee as well as the dean. The Development Plan can cover a two-year time period. Assuming the Development Plan is successfully completed, the review process is over.

If the Development Plan is not successfully completed, the dean returns to the process. Note that we are now four years into the review process. The dean and faculty have both worked closely with the faculty member and revocation of tenure resulting from review has not once been on the table. Even then, however, in the worst case scenario, a revocation of tenure recommendation must go through the standard procedures for revocation of tenure contained in the relevant law school policy. At this point, however, there will be a well documented series of actions that can be the basis for decision making.

E. Procedural Protections

The primary procedural protection afforded the faculty member under this proposal is the same set of protections that currently exist—tenure cannot be revoked without following the current revocation standards. There is, however, a good deal more notice in this policy than normally exists without a formal statement. Clearly the Performance Ratings requires the dean to articulate what it is he or she is expecting. The policy ensures the faculty members participation in development of both the PIA and the Development Plan as well as selecting members of the review committee.

VI. CONCLUSION

Continuing professional development is as critical in legal education as any other profession. The law school administration and the faculty have a joint interest in providing a fair and effective mechanism to make this happen. This proposal merely attempts to present a pragmatic, workable method to accomplish the goal.