

A Consideration of Tenure and Its Effect on Women Faculty Members: A Proposal for Increasing Parity Between Men and Women on College Campuses

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Abstract

At four-year colleges and universities, particularly those at which either master's degrees or doctoral degrees are the highest degrees conferred, women continue to be underrepresented in the ranks of tenured faculty. At one time, the disparity could be explained by the paucity of women who had earned doctoral degrees and were otherwise qualified to teach at the university level. However, for almost twenty years, women have earned at least 40% of the doctoral degrees conferred, and currently that percentage is approaching 50%. Nonetheless the disparity at four year colleges between tenured male versus female faculty continues.

This article questions why the disparity continues to exist and offers a proposal for how parity between female and male faculty might be attained. It concludes that although there are sufficient numbers of women qualified to hold entry-level positions, the structure of the traditional tenure system appears to be a cause for the disparity among tenured faculty. It further considers the anti-discrimination statutes and concludes that they do not serve as an effective remedy when bias occurs in evaluating women for tenure, which may explain the gender disparity among tenured faculty. This article proposes, as an alternative to the traditional tenure structure, consideration of a framework wherein either tenure no longer existed or was modified to result in periodically reviewable contracts. Finally, it analyzes how a different framework may impact parity between male and female faculty members.

Introduction

The 1960s are memorable for many reasons, including the emergence of the women's rights movement, which gained full momentum during that era.¹ Notwithstanding the years since then, and notwithstanding the Civil Rights Act of 1964, which prohibited employment discrimination based on sex, there still exists a gender gap in higher education. It has been well-documented that women are underrepresented in the ranks of university faculty, and even more underrepresented in the class of tenured professors.² In this stratified professional community, tenured faculty as a group are accorded the most prestige and their status results in a level of job security that is almost the equivalent of a life appointment. As such, there are qualitative

¹This is not to ignore the women's movement that started with the women suffragists, or for that matter, the entreaty by Abigail Adams to her husband John Adams to "remember the ladies, and be more favorable to them than your ancestors." David McCullough, *John Adams* 104 (Simon and Schuster 2001).

²According to the American Association of University Professors (AAUP), women hold only 24% of full professor positions in the United States, below what one would expect given that women are earning doctoral degrees at record rates. During academic year 1995-96, women earned 40% of the doctorate degrees conferred. Martha S. West & John W. Curtis, *AAUP Faculty Gender Equity Indicators 2006* [hereinafter AAUP Gender Equity], <http://www.aaup.org/NR/rdonlyres/63396944-44BE-4ABA-9815-5792D93856F1/0/AAUPGenderEquityIndicators2006.pdf>, p. 8 (last visited July 20, 2008). However, during the 2005-06 academic year, only 26% of tenured positions at universities that award doctorate degrees were held by women. *Id.* at p. 21. At schools that award master's degrees as the highest degree, women held 35% of the tenured positions. *Id.*

differences between one's status as a tenured professor as compared to one who holds only a tenure-track position or one whose status is that of a lecturer or contract instructor.

This paper asks a basic question and offers a proposal. The question posed is what, if anything, might be done to increase the parity between female and male faculty members.³ The proposal for consideration is that we seek a structure different than that which currently exists, a structure that serves to preserve the benefits of tenure without also having the potential collateral effect of disadvantaging women.

This paper will start by reviewing the nature of tenure and the tenure process. It will then describe and evaluate other means by which women might gain parity, particularly focusing on the current status of the anti-discrimination statutes as they apply to the tenure decision and concluding that the laws inadequately protect women, and for that matter, minorities in general. Finally, it will envision how the environment might change for women if a different structure for university faculty existed. This article asks the question might tenure, or more accurately the tenure process, disadvantage women in higher education such that women would fare better in an environment in which a different process were utilized.

The Nature of Tenure and the Tenure Process

Academic tenure sets college and university professors apart in significant ways from professionals in other fields. Tenure is described as a formal assurance that no professor retained beyond a specific probationary period who meets the criteria set out by her college or university can be dismissed without adequate cause.⁴ While technically a tenured instructor does not have a

³The author assumes that increasing parity is a valid goal because there are benefits to the institute and its individual constituents.

⁴AAUP, *1940 Statement of Principles on Academic Freedom and Tenure* [hereinafter 1940 Statement of Principles, <http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm> (last visited on July 21, 2008)]. The AAUP policy is widely accepted and cited as the most influential expression of tenure principles. Lawrence White, *Academic Tenure: Its Historical and Legal Meanings in the United States and Its Relationship to the Compensation of Medical School Faculty Members*, 44 ST. LOUIS U. L. J. 51, 64 (2000).

guarantee of lifetime employment,⁵ that tends to be the practical result for the vast majority of tenured professors.⁶

Contrast the status of a tenured professor with that of virtually any other professional. Barring an enforceable contract, that employee is an employee at-will. Stated in its most simple iteration, employment at-will means that unless an employer and employee are bound by a contract, either is free to terminate the employment for any reason or no reason at all. From the employer's perspective, it is not required to have cause to terminate an employee. There have been many encroachments on the concept,⁷ but essentially, the employee has little job security.

When viewed in this light, academic tenure, while long-recognized and accepted, is actually a fairly radical idea: it results in a status that is not available to the vast majority of other American workers.⁸ Even those who are parties to employment contracts generally have contracts of a defined duration, as opposed to the open-ended duration of a tenured position.

Nonetheless, tenure is widely considered necessary given the unique mission of colleges and universities, namely to educate and to discover new knowledge. The idea is that tenure protects the academic freedom necessary to engage in the search for knowledge, unfettered by concerns of termination or discipline for unpopular research or ideas. Tenure facilitates the pursuit of disinterested scholarship and teaching, which is reviewed by one's peers, free of threat to the individual.⁹ According to the American Association of University Professors (AAUP), tenure is, 1) a means to certain ends, specifically freedom of teaching and research and of

⁵Three grounds exist for terminating tenured faculty: 1) cause; 2) program discontinuance; and 3) financial exigency, according to the AAUP. 1940 Statement of Principles. Financial exigency does occasionally result in tenured professors being terminated. Most recently, Tulane University eliminated the positions of 65 tenured professors as a means to address a budgetary shortfall following Hurricane Katrina in 2005. David Epstein, *A Smaller Tulane*, INSIDE HIGHER ED., Dec. 9, 2005, <http://www.insidehighered.com/news/2005/12/09/tulane>, last visited July 21, 2008).

⁶Each year, 50 to 75 tenured professors are terminated for cause. Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U. L. REV. 67, 80-81 (2006). According to Adams, Harvard University has not terminated for cause a single tenured professor in some 300 years—not even the one that was convicted and hanged for murdering a colleague. *Id.*

⁷Anti-discrimination statutes, such as Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, as well as the whistle-blower laws, the protections provided pursuant to the National Labor Relations Act, and the anti-retaliation provisions found in many statutes are just a few.

⁸Perhaps the only employment relationships that approach that of tenured professors are the civil service system, in which civil servants enjoy a measure of job security, and the life tenure of federal judges.

⁹Adams, *supra* note 6, at 80-81.

extramural activities, and 2) a means to provide a sufficient degree of economic security to make the profession attractive to individuals with ability.¹⁰

There are in fact many apologists for the concept of tenure. Proponents for maintaining tenure rely heavily on the idea of academic freedom, arguing that without tenure, professors are at the mercy of students, administration, and trustees whose political views may differ.¹¹ Indeed, the existence of tenure is credited for protecting university instructors who may have held unpopular ideas during the McCarthyism era the 1950s.¹² This freedom to pursue knowledge inures not only to the benefit of the university and its students, but to society as well.¹³ Beyond the academic freedom argument, support for the concept of tenure assures that judgment of professional performance will be made on professional grounds, without the influence of concerns about competitive personal advantage.¹⁴

On the other hand, tenure has its detractors as well. They argue that academic freedom is not dependent on tenure as its exclusive foundation, noting that even untenured instructors enjoy academic freedom. Rather, academic freedom can be accomplished by way of due process protections.¹⁵ They further raise other disadvantages to tenure, including that tenure fosters mediocrity and protects the nonproductive, the so-called “deadwood.”¹⁶ Given the due process protections for tenured faculty, it is excessively difficult for the institution to rid itself of incompetent or irresponsible professors. Furthermore, the review that occurs in granting tenure is not always successful in weeding out those who cannot be trusted to be productive once tenure

¹⁰1940 Statement of Principles, *supra* note 4.

¹¹Adams, *supra* note 6, at 79. Academic freedom can be seen as consisting of three components: 1) freedom of inquiry; 2) freedom of teaching; and 3) freedom of external action and utterance. *Id.*

¹²Robert B. Conrad & Louis A. Trosch, *Renewable Tenure*, 27 J. LAW AND EDUC. 551, 555 (1998).

¹³Adams, *supra* note 6, at 80-81; Ernest Van Den Haag, *Academic Freedom and Tenure*, 15 PACE L. REV. 5, 8 (1994).

¹⁴*Report of the AALS Special Committee on Tenure and the Tenuring Process* [hereinafter AALS Report], 42 J. LEGAL EDUC. 477, 481 (1992).

¹⁵The European colleges and universities give some proof that academic freedom can exist without the concept of tenure. In the 1980s, tenure was restructured in England without any dire consequences for academic freedom. Van Den Haag, *supra* note 13, at 7; Adams, *supra* note 6, at 71. Tenure has ceased to be offered in many other European countries as well. *Id.* Even without tenure, according to Van Den Haag, English universities are unlikely to terminate a professor even if he or she has developed unpopular views. Van Den Haag, *supra* note 13, at 7. He does, however, note that the traditions that culminated in tenure are not as old or robust in the United States as in England, and thus tenure is needed to protect faculty from attack from those overtly devoted to different political ideologies. *Id.* Moreover, the employment laws in many European countries provide more protection, with most employees enjoying some form of protection from arbitrary dismissal. Contrast that with the employment at-will doctrine, which is the overwhelmingly dominant concept in the United States.

¹⁶AALS Report, *supra* note 14, at 480.

is granted.¹⁷ The difficulty of ridding an institution of a tenured professor is such that it is reasonable to question how many universities are willing to undertake the process to terminate those unproductive professors.

With tenure, there is also the risk that a tenured professor can misuse that status to pursue self-serving interests or as a platform for partisan advocacy.¹⁸ Perhaps one of the worst risks is that tenure can be used to exclude new ideas.¹⁹ From the perspective of a young faculty member, tenure arguably creates an artificial, unhealthy atmosphere where young scholars are researching based on the quest for tenure rather than researching for the sake of research itself.²⁰ Given that so much weight is given to publication at many schools, teaching effectiveness may be of only secondary concern.

There are a variety of other arguments raised in support of modifying the system as it currently exists, but of particular importance to this article is the criticism that tenure concentrates power in the hands of tenured faculty members, excluding from participation young faculty.²¹ The tenured professors become the judges of who will be granted tenure as well as who may be subject to termination as a tenured professor. A cynic might note that tenure creates what is essentially a private community. Those who have achieved membership in that community are authorized to sit in judgment of those who wish to join, applying criteria to which those tenured faculty are not currently subject as a practical matter. Indeed, tenure applicants may be subject to criteria that are substantially more rigorous than those applied to professors who are already tenured—criteria that those same professors might not have been able to meet when they applied and might not be able to meet currently.

A number of articles have already been written that more fully develop the relative advantages of the system that currently exists at most American universities.²² Rather than

¹⁷Kenneth G. Dau-Schmidt, Book Review, 1 EMP. RTS. & EMP. POL'Y J. 293, 302 (1997) (reviewing Matthew W. Finkin, *THE CASE FOR TENURE* (1997)).

¹⁸Van Den Haag, *supra* note 13, at 8.

¹⁹*Id.*

²⁰This author distinctly recalls the advice she was given at a seminar for new law school professors. She was advised to write esoteric papers on narrow topics, with the expectation that few would read them, to ensure a successful tenure application. Thereafter, she was advised, she would be free to write about whatever she found interesting.

²¹AALS Report, *supra* note 14, at 481.

²²*See, e.g.,* Conrad & Trosch, *supra* note 12; James J. Fishman, *Tenure: Endangered or Evolutionary Species*, 38 AKRON L. REV. 771(2005); Robert K. Leik, *There's Far More than Tenure on the Butcher Block: A Larger Context*

rehashing those arguments in all but the most summary form, the focus here is on how that process affects women.

Overview of the Tenure Process

The process for tenure varies from school to school as much as the colleges themselves vary. Nonetheless, to be successful in gaining tenure, the typical tenure candidate must establish excellence in at least two of three areas: 1) teaching effectiveness; 2) research and publication; and 3) university service.²³ The university president, provost, or perhaps even the Board of Trustees will make the ultimate decision regarding tenure, but only after the application has gone through several layers of independent review that may involve any of the following committees: 1) tenured members of the applicant's department or school; 2) the candidate's dean; and 3) a committee consisting of tenured instructors from across the university.²⁴ Increasingly, universities often rely on individuals outside the institution to review and comment on the scholarship of the applicant.²⁵ Each of these different groups will recommend whether tenure is appropriate, based on their independent evaluations of the candidate. The ultimate decision-maker is generally not bound by the recommendations of the prior evaluators, but a negative recommendation anywhere along the way is likely to sink the applicant's prospects if it does not end consideration of the application outright.²⁶

The tenure policy may provide a deadline by which an instructor is considered for tenure.²⁷ Moreover, it appears that many institutions have either formal or informal evaluations

for the Recent Crisis at the University of Minnesota, 41 SOC. PERSP. 747 (1998); Dau-Schmidt, *supra* note 17; Van Den Haag, *supra* note 13.

²³Shelley M. Park, *Research, Teaching, and Service: Why Shouldn't Women's Work Count?*, 67 J. HIGHER EDUC. 46, 51 (1996). In addition, some universities may also consider collegiality as a separate criterion, although the AAUP cautions against this. AAUP, *On Collegiality as a Criterion for Faculty Evaluation*, <http://www.aaup.org/AAUP/pubsres/policydocs/contents/collegiality.htm> (last visited August 29, 2008).

²⁴For example, at the time the plaintiff in *Weinstock v. Columbia Univ.*, 224 F.3d 33 (2d Cir. 2000), applied for tenure, the tenure process involved consideration by, two different departments; two different committees, including the Appointments, Tenure and Promotions; the president of Barnard College (Barnard and Columbia are affiliated institutions); the Provost; the President of Columbia University; and the Board of Trustees. *See also, Adelman-Reyes v. Saint Xavier Univ.*, 500 F.3d 662 (7th Cir. 2000)(following several layers of review, the university president makes the final decision).

²⁵*See, e.g., Weinstock*, 224 F.3d at 38.

²⁶*See, e.g., Harel v. Rutgers, the State Univ.*, 5 F. Supp.2d 246 (D.N.J. 1998); *Broussard-Norcross v. Augustana Coll. Ass'n.*, 935 F.2d 974, 977 (8th Cir. 1991)(the evidence showed that the college had never granted tenure to anyone who had received a negative recommendation from a department chair).

²⁷*See, e.g., John Marshall Law School Tenure Standards*, www.jmls.edu/intranet/fhb-app2.shtml; *University of Missouri Regulations Governing Applications of Tenure*, www.umsystem.edu/ums/departments/gc/rules/bylaws/310/020.shtml.

in the years leading up to the tenure decision.²⁸ These pre-tenure reviews are intended to identify any areas of weakness in the untenured instructor's record in sufficient time that the instructor has a chance to address the deficiencies prior to his formal tenure application.

The application procedure is often laid out well, with clearly defined steps in the process that leave little room for misunderstanding.²⁹ There is room for criticism, however, in the manner in which the decision is made. The tenure decision by its very nature is subjective. While some schools attempt to provide more objective guidelines for making the tenure decision, such as requiring that an applicant publish some set number of articles,³⁰ more often, the criteria are vague and open to interpretation by each individual reviewer. For example, the tenure policy may state such guidelines as, "The candidate should have achieved full teaching effectiveness in a wide range of courses."³¹ As Professor West has noted, the criteria for tenure are unclear, unrealistic, or inappropriate, and there is the additional concern that some faculty perceive the undue influence of personality traits.³²

The vague guidelines applicable to the tenure process invite a subjective determination by the various reviewers and weighing of the different factors as each sees fit. The court in *Banerjee v. Board of Trustees of Smith College*³³ acknowledged as much, noting that different people could and did focus on different things in evaluating the plaintiff in that case. Those who supported the plaintiff's tenure application focused on the value he brought to his particular department. Those who disfavored tenure focused on his scholarship.³⁴ Or consider *Lawrence v.*

²⁸*Id.*

²⁹There are cases where the college has failed to follow its own procedure (*see, e.g., Weinstock*, 224 F.3d at 453-54; *Stern v. Trs. of Columbia Univ.*, 131 F.3d 305, 313 (2d Cir. 1997)). Procedural irregularities may aid the plaintiff in making his or her case by indicating a lack of good faith on the part of the university. *See Kunda v. Muhlenberg Coll.*, 621 F.2d 532, 536-38 (3d Cir. 1980).

³⁰*See e.g., McFadden v. State Univ. of New York*, 195 F.Supp.2d 436, 450 (W.D.N.Y. 2002).

³¹*Craine v. Trinity Col.*, 791 A.2d 518, 528 (Conn. 2002). The tenure policy of one law school stated, "[T]eaching effectiveness, scholarship, professional activity, and effective collegial involvement in faculty governance, committee work, and support of meaningful student activities are all part of the obligations and responsibilities of full-time faculty members and will be important considerations in the tenure decision." AALS Report, *supra* note 14, at 487. Perhaps the policy of the school from which this excerpt comes has changed since AALS published its report in 1992, but the language provides an example of the kind of vague language that is meant to guide the tenure decision.

³²Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 67, 140-41 (1994).

³³495 F.Supp. 1148 (D. Mass. 1980).

³⁴*Id.* at 1160.

*Curators of the University of Missouri*³⁵ where the same evaluator characterized the same journal differently in reviewing different candidates. Commenting on one candidate's scholarship, the evaluator characterized one of the journals in which the candidate had published an article as a "top-tier" journal. Two years later, the same individual commented on another tenure applicant, the plaintiff in the case, that "she has not yet published in a top-tier journal," notwithstanding that the second candidate had published an article in the same journal.³⁶

Various commentators have noted the subjectivity of the tenure process and identified it as a weakness in the process.³⁷ Yet, those guidelines are the yardsticks by which a tenure candidate's future will be measured, meaning the difference between obtaining the favored status associated with tenure³⁸ or receiving a terminal contract, with limited prospects for securing future employment in higher education.

The Challenge to Increasing Female Parity

The Pool of Qualified Applicants

No doubt there are a number of factors at play that affect university women as well as women in other professions.³⁹ In past years, the lack of qualified women explained the paucity of women among the ranks of tenured faculty. However, the gender gap, while not completely closed, has diminished in recent years. For the academic year 2002-03, women earned 47% of the doctorate degrees conferred.⁴⁰ Between academic years 1979-80 and 2004-05, the percentage of women earning doctorate degrees increased from 30% to 49%.⁴¹ Areas where women have traditionally been underrepresented have also seen increases in the number of terminal degrees

³⁵204 F.3d 807 (8th Cir. 2000).

³⁶*Id.* at 810. The evaluator also rated the first candidate higher, notwithstanding that the candidate had only co-authored an article, as compared to the plaintiff, who had sole-authored her article. *See also, Weinstock v. Columbia Univ.*, 224 F.3d 33 (2d Cir. 2000). Two of the tenure reviewers were critical of the plaintiff's scholarship, testifying that it "lacked originality" and that the journals in which she published were not first-class "top-tier scientific journals." *Id.* at 39.

³⁷Eileen N. Wagner, *Tenure Committees, Take Heed: University of Pennsylvania v. EEOC Should Change the Way You Proceed*, 64 EDUC. LAW REP. 979 (1991); West, *supra* note 32, at 96-97.

³⁸Professor Adams describes the satirical board game, *Survival of the Witless*, which defines tenure as the "key to fame, wealth, happiness and most importantly, to never having to put in a single day's work again." Adams, *supra* note 6, at 68. Conrad and Trosch estimate that no more than 10% fall into the category of marginally unproductive. Conrad & Trosch, *supra* note 12, at 570.

⁴⁰U.S. Department of Education, National Center for Education Statistics Postsecondary Institutions in the United States Fall 2003 and Other Awards Conferred 2002-03 (NCES 2005-154). During the same academic year, women earned 58% of the bachelor's degrees and 57.5% of the master's degrees. *Id.*

conferred. Women earned 41% of all doctorate degrees in science and engineering during the time period 1995-99.⁴² Contrast that with the 1920s when women earned only 15% or even the 1975-79 period when women earned approximately 25% of the doctorates conferred in science and engineering.⁴³

Arguably, the increase in the number of women qualified to hold university teaching positions has occurred. There are significant numbers of women earning degrees, such that the lack of qualified females cannot fully explain why women remain underrepresented among tenured faculty. Women may indeed opt out of the pool of candidates for tenure-track positions for reasons personal to themselves. However, the fact that women do make up a more proportionate percentage of instructors teaching in non-tenure-track positions, and are sometimes overrepresented, would lead one to question how much of the disparity is attributable to lifestyle choices, family responsibilities, or other factors that may influence women's choices.⁴⁴

The Anti-Discrimination Statutes

One must acknowledge that sex discrimination may be a factor that has impeded women in earning tenure, and one must further query whether the anti-discrimination statutes adequately protect women in cases of suspected discrimination. The short answer is that there probably is discrimination in some cases, and that notwithstanding evidence of discrimination, the law probably does not provide an adequate remedy. As Professor West concluded some 14 years earlier, the vague criteria and subjective standards make it particularly difficult for disappointed professors to challenge a denial of tenure even when there is evidence to raise a suspicion that sex discrimination or some other impermissible factor may have influenced a denial of tenure.⁴⁵ There has been no substantial improvement in the years since Professor West reached her conclusions.

Since 1972, colleges and universities have been subject to the anti-discrimination provisions set out in Title VII,⁴⁶ which prohibit employment discrimination on the basis of race,

⁴¹ U.S. Department of Education, National Center for Education Statistics The Condition of Education 2007 (NCES 2007-074), Indicator 28. During that same period, the percentage of women earning bachelor's degrees rose from 49% to 57%; the percentage of women earning master's degrees increased from 49% to 59%. *Id.*

⁴² National Science Foundation, U.S. Doctorates in the 20th Century, fig. 3-3.

⁴³ *Id.*

⁴⁴ See AAUP Gender Equity, *supra* note 2, at 6-7.

⁴⁵ West, *supra* note 32, at 143.

⁴⁶ 42 U.S.C.A. §§2000e - 2000e-17 (West 2003).

color, religion, national origin, and sex.⁴⁷ Title VII provides a number of different theories on which liability may be based. An instructor denied tenure faces daunting obstacles in finding success on any of these theories.

The vast majority of employment discrimination cases are based on the theory of disparate treatment, which requires that the plaintiff prove that he or she was treated differently by the employer because of his or her race, color, religion, national origin or sex. Disparate treatment cases are often referred to as intentional discrimination cases because the plaintiff will have to prove that the employer was motivated by an improper factor, as opposed to the disparate impact theory in which the *effect* of a practice or policy is the focus rather than an employer's motivation.

Stated most simply, a successful plaintiff must identify someone or something about the process from which a court can conclude that the tenure denial decision was caused by an improper factor. One way by which a plaintiff can prove disparate treatment is with direct evidence of discriminatory animus. In this context, direct evidence is that which demonstrates a specific link between the discriminatory animus and the employment action, sufficient to support a finding that an illegitimate criterion actually motivated the employer's decision, without inference, presumption, or resort to other evidence.⁴⁸ The kind of direct evidence that will prove discrimination includes actions or comments by those with decision-making authority⁴⁹ or policies that are based on improper factors.⁵⁰ The plaintiff will further have to establish a causal link between the discriminatory animus and the employment decision.

The plaintiff can also establish the *prima facie* case with circumstantial or indirect evidence, using the model and the burden-shifting scheme first set out in *McDonnell Douglas Corp. v. Green*,⁵¹ and later clarified in *Texas Dept. of Community Affairs v. Burdine*.⁵² If the

⁴⁷42 U.S.C.A. §2000e-2 (West 2003). Title VII is the main anti-discrimination statute. In addition, the Age Discrimination in Employment Act (ADEA), 29 U.S.C.A. §§621–633a. (West 1999), addresses, as the name suggests, age discrimination. The Americans with Disabilities Act (ADA), 42 U.S.C.A. §12101–12182 (West 2003), prohibits disability discrimination. There are other anti-discrimination statutes, e.g. the Rehabilitation Act of 1973 (29 U.S.C.A §§701–718 (West 1999)), but Title VII, the ADEA, and the ADA are the main sources for the law in this area. Cases decided under these various acts are generally applicable to the other acts in most situations.

⁴⁸*EEOC v. Wiltel, Inc.*, 81 F.3d 1508, 1514 (10th Cir. 1996).

⁴⁹*See, e.g. Weiss v. Parker Hannifan Corp.*, 747 F.Supp. 1118, 1122 (D.N.J., 1990), where there was evidence that a manager had stated, “As long as I’m the warehouse manager, no Jew will run the warehouse for me.”

⁵⁰*See, e.g., Tomsic v. State Farm Mutual Ins. Co.*, 85 F.3d 1472, 1477 (10th Cir. 1996).

⁵¹411 U.S. 792 (1973).

plaintiff successfully establishes his or her *prima facie* case of discrimination, the employer will have the burden of production to establish a legitimate, non-discriminatory reason for its decision. Because the defendant has only the burden of production—indeed the burden of persuasion always remains with the plaintiff—the defendant’s burden is simply to articulate a legitimate, non-discriminatory reason supported by legally admissible evidence.⁵³ The employer, by its articulation of a legitimate non-discriminatory reason seeks to negate the inference of discrimination created by the plaintiff’s *prima facie* case. The employer’s articulated reason, however, should be reasonably specific to provide the plaintiff a full and fair opportunity to challenge that reason.⁵⁴

Assuming that the employer satisfies its burden, the burden of production shifts back to the plaintiff and merges with the plaintiff’s ultimate burden of persuasion to prove that the defendant’s articulated reason is actually a pretext and that the real reason for the decision is illegal discrimination. In the alternative, the plaintiff can attempt to prove that even if the articulated reason was not a pretext, the employer additionally considered an improper factor, i.e. a mixed-motive case. In a mixed motive case, the defendant has the burden of persuasion to prove that notwithstanding its improper motivation, it would have reached the same decision.⁵⁵ If it succeeds in doing so, the defendant employer limits the remedy that is available to the employee: the employee is not entitled to receive damages, back pay, or any of the other make-whole remedies, such as reinstatement or promotion. Rather, the plaintiff, who did in fact prove illegal discrimination, receives only his attorney’s fees.⁵⁶

⁵²450 U.S. 248 (1981). The basic elements of the plaintiff’s *prima facie* case are: 1) that the plaintiff was in a protected class; 2) that the plaintiff was qualified; 3) the plaintiff suffered some adverse employment action; and 4) others not in the plaintiff’s protected class were treated better. *McDonnell Douglas*, 411 U.S. at 802. *McDonnell Douglas* was a refusal to hire case. As such, the fourth element in the case was that the position remained open. However *McDonnell Douglas* scheme is flexible. The question is whether there is evidence from which to draw an inference of discrimination. The elements of the *prima facie* case are adapted with that focus in mind. *Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133, 147 (2000); *Burdine*, 458 U.S. at 259.

⁵³According to *Burdine*, the defendant need only articulate lawful reasons for the decision and produce admissible evidence that would allow the trier of fact to conclude that there was no discriminatory animus. 450 U.S. at 254-55.
⁵⁴*Id.* at 258.

⁵⁵42 U.S.C.A. §2000e-5(g)(2)(B) (West 2003); *Desert Palace v. Costa*, 539 U.S. 90, 94-95 (2003).

⁵⁶42 U.S.C.A. §2000e-5(g)(2)(B) (West 2003).

Discrimination cases are hard cases for plaintiffs to win as a general rule.⁵⁷ The law has developed in such a way as to stack the deck against employees, making success elusive even in cases where the facts suggest illegal discrimination. Particularly in the context of a tenure decision, the law can be as much of a hindrance as it is a means to protecting untenured professors. Reviewing the cases discloses a number of problems faced by university professors, some of which are unique in this context. Specifically, academic deference and the requirement to establish causation are particularly problematic for the plaintiffs.

The concept of academic deference is found almost exclusively in the realm of higher education, and it gives university employers a particularly significant advantage over their employees. Deference to tenure decisions tends to pervade the analysis at every step, and when a court raises the specter of academic deference, that is a pretty good indicator that the university will likely win the lawsuit.

In tenure cases, the courts appear particularly concerned about preserving the university's academic freedom. The university's academic freedom, as compared to that of its instructors, consists of, 1) the freedom to determine *who* may teach; 2) the freedom to determine *what* may be taught; 3) the freedom to determine *how* it shall be taught; and 4) the freedom to determine *to whom* it shall be taught.⁵⁸ Consequently, the courts broadly defer to universities on the grounds that a school should be able to choose its own faculty with limited interference from the court. They justify this deference on the professed incompetence of judges to evaluate academic criteria and their concern about courts becoming too entangled in university affairs.⁵⁹ Given this view of faculty selection, according to one court, academic freedom is most in jeopardy when the court is faced with two individuals with similar credentials and the court considers which is more qualified.⁶⁰ The same court noted that principles of academic freedom do not cloak colleges with immunity from claims of discrimination, but it does require courts to keep sharply focused on

⁵⁷Plaintiffs in employment discrimination suits tend to enjoy success at lower rates, as compared to other civil plaintiffs. Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 558 (2001).

⁵⁸Comment, *Gender Discrimination, Higher Education, and the Seventh Circuit: Balancing Academic Freedom with Protections Under Title VII*, 22 WIS. WOMEN'S L.J. 153, 159 (2007).

⁵⁹Eileen Wagner, *supra* note 37, at 984 n.23; Note, *Namenwirth v. Board of Regents of the Wisconsin System: Proving Pretext in a Title VII Tenure Denial Case*, 1987 WIS. L. REV. 1041, 1050 (1987).

⁶⁰*Craine v. Trinity Coll.*, 791 A.2d 518, 537 (2002). Of course, in a discrimination case, the court's job is never to choose which among a group of candidates is the most qualified. Rather, the first inquiry is whether the evidence suggests that an employment decision may have been motivated by some factor made unlawful by Title VII.

whether the denial of tenure was actually motivated by discrimination and not by one of the many other possible reasons that a candidate was unsuccessful.⁶¹

On the other hand, another court recognized that colleges do in fact enjoy a status that tends to shield them from liability for discrimination.

“This anti-interventionist policy has rendered colleges and universities virtually immune to charges of employment bias, at least when that bias is not expressed overtly. We fear, however, that the common-sense position we took in [an earlier case], namely that courts must be ever-mindful of relative institutional competences, has been pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of the Civil Rights Act of 1964.”⁶²

The commitment to deference is so great that one court stated that unless the disparities in a *curriculum vitae* are so apparent as to virtually “jump off the page and slap us in the face,” judges should be reluctant to substitute their views for those of individuals charged with the evaluation duty by their own years of experience and expertise in the field of question.”⁶³

It is the very nature of tenure that seems to motivate courts to take the kind of hands-off approach that it has not been willing to do in any other context, including employment decisions regarding accounting professionals, administrative law judges, law enforcement officials, to list a few.⁶⁴ “[T]enure decisions in an academic setting involve a combination of factors which tend to set them apart from employment decisions generally,” as the court stated in *Zahorik v. Cornell University*.⁶⁵ The significance of tenure, coupled with the nature of faculty relationships, changes the way the court views the case and the way Title VII should be applied in this context. In *Lieberman v. Gant*, the court specifically referred to the lifelong commitment, adopting the

⁶¹*Id.* at 648.

⁶²*Kunda v. Muhlenberg College*, 621 F.2d 532, 551 (3d Cir. 1980).

⁶³*Shakir v. Prairie View University*, 178 F.App’x 361, 364 (5th Cir. 2006). The Supreme Court has since criticized this “slap-in-the-face” standard, stating, “The visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications.” *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457 (2006).

⁶⁴*See*, Scott A. Marsh, *Against “Academic Deference”: How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 6 (2006), for a list of cases in different contexts where the courts have not been as deferential.

⁶⁵*Zahorik v. Cornell Univ.*, 729 F.2d 85, 92 (2d Cir. 1984).

argument of the University of Connecticut that because of the significance of tenure, any error should occur on the side of caution.⁶⁶

Courts are willing to bestow on colleges and university personnel a level of trust not accorded to the decision makers in other contexts.⁶⁷ It is fairly common for tenure cases to contain statements such as, “[W]e do not sit “as a super tenure review board.... It is not for us to weigh the evidence and determine whether we agree with the University's assessment.”⁶⁸ The resulting effect is that the courts tend to refuse to draw any inferences from the facts presented, notwithstanding that the evidence seems to suggest otherwise.

The courts’ treatment of these cases seems in direct conflict with the law as stated by the Supreme Court in *Reeves v. Sanderson*,⁶⁹ in which the court instructed that on a motion for summary judgment, the court must draw all reasonable inferences in favor of the non-moving party, disregarding evidence favorable to the movant. That would suggest that at the summary judgment stage, a court should be reluctant to rely on the evidence of the university, given that typically the university is the party that moves for summary judgment.

*Weinstock v. Columbia University*⁷⁰ illustrates one court’s unwillingness to draw reasonable inferences from the evidence, opting rather to defer to the University’s decision. The plaintiff, educated at Harvard University and The Massachusetts Institute of Technology, was hired to teach at Barnard College.⁷¹ During her time at Barnard, Dr. Weinstock had obtained grants from the National Institutes of Health (NIH), apparently quite a coup, inasmuch as the

⁶⁶*Lieberman v. Gant*, 630 F.2d 60, 64 (2d Cir. 1980). Indeed, the appellate court gently criticized the district court for its reliance on a standard that was appropriate for a contract non-renewal case, rather than a standard that was more appropriate for cases involving tenure. *Id.*

⁶⁷There is an astonishing lack of critical consideration of whether universities and colleges are so different as to justify the broad deference the courts accord them. One of their main functions is education. The same can be said, however, of primary and secondary schools, where there has been far less deference. Institutes of higher education are also responsible for creating new knowledge, but they do not have a monopoly on research or intellectual pursuits.

⁶⁸*EEOC v. Muhlenberg*, 131 F.App’x 807, 811 (3d Cir. 2005). *See also, Weinstock v. Columbia University*, 224 F.3d 33 (2d Cir. 2000); *Villanueva v. Wellesley Coll.*, 930 F.2d 124 (1st Cir. 1991).

⁶⁹*Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133, 147 (2000).

⁷⁰*Weinstock*, 224 F.3d 33 (2000).

⁷¹Barnard College and Columbia University are affiliated institutions, and because of that affiliation, members of the Columbia faculty and administrative officials of Columbia were also involved in the tenure decision. There was some question as to whether Barnard faculty was to be judged by the criteria applied to Columbia faculty or by a lesser standard given that Barnard did not enjoy the same resources as Columbia necessary to engage in research of the same caliber. *Id.* at 51 (Cardamone, J., dissenting).

NIH funds fewer than 10% of all applications.⁷² She enjoyed unanimous support from her colleagues in the Barnard College chemistry department.⁷³ Nonetheless, one Columbia reviewer suggested that Dr. Weinstock could not even qualify for tenure at a city college.⁷⁴ In addition, the evidence showed that only two female chemistry professors in the past 40 years had received tenure at Columbia.⁷⁵ There was significant evidence that some of the reviewers focused on her gender and her female-based characteristics, such as that she was nurturing, a push-over, and nice.⁷⁶ Evidence that a decision-maker held stereotypical views of an individual can also serve to establish intentional discrimination, as the Supreme Court held in *Hopkins v. Price Waterhouse*.⁷⁷ The *Weinstock* majority, however, discounted this evidence that suggested stereotyping, reasoning that men would also want to be considered to have such characteristics. Of course, the court's reasoning ignores that the focus is whether tenure candidates are evaluated under different standards based on their gender. Nonetheless, the *Weinstock* facts were never considered by a jury; the trial court's summary judgment for the University was affirmed by the appellate court.⁷⁸ Rather than drawing reasonable inferences against the University (the moving party), the court essentially ignored evidence that raised a fact issue that should have been resolved by the jury, as the dissenting judge in *Weinstock* concluded.⁷⁹

Establishing a causal link between the discriminatory motive and the ultimate tenure decision also tends to prove difficult for university instructors. The numerous layers of review often serve to break the causal connection between an individual that does harbor a bias and the ultimate tenure decision, as the court in *Adelman-Reyes v. St. Xavier University*⁸⁰ recognized.

⁷²*Id.* at 52 (Cardamone, J., dissenting).

⁷³*Id.*

⁷⁴*Id.*

⁷⁵*Id.*

⁷⁶*Id.* at 57 (Cardamone, J., dissenting).

⁷⁷490 U.S. 228, 250 (1989).

⁷⁸*Weinstock v. Cornell Univ.*, 224 F.3d 33, 50 (2d Cir. 2000).

⁷⁹*Craine v. Trinity College* presents another example of the court's refusal to draw reasonable inferences of discrimination from the facts. In that case, the court overrode the jury's verdict for the plaintiff on her Title VII claim, entering a judgment notwithstanding the verdict. The evidence was not the strongest, but there was evidence of procedural irregularities and stereotypical statements sufficient to support the jury's findings. The court, however, concluded that the evidence was insufficient to support the jury's verdict of discrimination by the University. *Craine*, 791 A.2d at 540. The plaintiff did, however, prevail on her breach of contract and negligent misrepresentation claims. *Id.* at 543-44.

⁸⁰500 F.3d 662 (7th Cir. 2007).

Under the circumstances, the causal link is weak or non-existent at best.⁸¹ Particularly when the bad actor participates earlier in the process, perhaps as part of the departmental review of a tenure candidate's application, as compared to the review by the provost or president or someone whose consideration occurs towards the end of the process, there is less of a nexus between that bad actor and the final decision.⁸²

Indeed, the facts in *Adelman-Reyes* were that the Dean of the School of Education of Xavier was overheard making statements to the effect that the plaintiff was a "liberal, union-oriented Jew"

and that she had missed university events because of the Jewish holidays.⁸³ The Dean recommended against tenure for the plaintiff. Following review by the Dean of Academic Affairs and the President, the plaintiff was denied tenure.⁸⁴ This evidence was, however, insufficient for the plaintiff to survive summary judgment. In affirming the trial court's grant of summary judgment for the University, the appellate court discounted the Dean's first statement on the grounds that there was no evidence that linked it to the employment decision. While acknowledging that the second statement was related to the Dean's recommendation, it was nonetheless insufficient to prove discrimination, in light of the tenure process. True to form, the court made reference to its reluctance to second-guess the "expert" decisions of the faculty committees. It then noted the difficulty of making the causal connection where there are multiple layers of review.⁸⁵

If a plaintiff can establish the existence of statements that suggest discriminatory motive by a decision-maker earlier in the tenure application, it is possible that this will suffice to get the

⁸¹*Id.* at 667.

⁸²*Banerjee v. Bd. of Trs. of Smith Coll.*, 495 F.Supp. 1148, 1151 (D. Mass. 1980). The courts seem to ignore the practical realities that negative recommendations tend to taint the process in a way that may be difficult for a candidate to overcome.

⁸³*Adelman-Reyes v. Saint Xavier Univ.*, 500 F.3d 662, 666 (7th Cir. 2000).

⁸⁴*Id.* at 665.

⁸⁵*Id.* at 666. *See also, Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 451 (2d Cir. 1999); *Sun v. Board of Trs. of the Univ. of Illinois*, 473 F.3d at 813. In *Sun*, one of the tenured faculty members appointed to serve on the plaintiff's departmental review committee made what he described as a "throw-away remark" to the effect that he would not accept any more Chinese graduate students. The plaintiff, a native of China, was subsequently denied tenure. Arguably the comment, referring to students, proved little about the committee member's views about Chinese colleagues. The court, however, stated that had that speaker been a member of the committee that made the ultimate decision, that would have created a genuine issue of fact such that summary judgment was not appropriate. However, because the decision was made by another, independent group, the causal link was broken. *Id.* at 813.

plaintiff past a motion for summary judgment. The plaintiff will need to show, however, that the bad actor exercised some degree of influence on the decision to strengthen the causal link.⁸⁶

The courts' treatment of cases such as *Adelman-Reyes*⁸⁷ ignores the reality of the situation. One would expect a dean's recommendation to carry significant weight, and if that recommendation were motivated by discriminatory animus, it would seem to raise a fact issue as to whether the ultimate decision was tainted by that discriminatory animus. Perhaps a fact-finder would have concluded that the Dean held no discriminatory animus. Or perhaps the fact-finder would have found that the President was entirely uninfluenced by the Dean's recommendation. Either way, essentially the plaintiff was put to prove her case entirely at the summary judgment stage, at the risk of losing before the case was heard by a jury.⁸⁸

The attendant result of these various rules is that few cases in which tenure is challenged survive a motion for summary judgment. In other contexts, the defendant must articulate reasonably specific facts that explain how it reached its decision, even when subjective criteria are applied, in order to satisfy the requirements of *Burdine*. However, virtually any explanation, coupled with the court's reticence about reviewing the decision, out of deference to the university, generally results in a court holding that the defendant has met its burden of production to articulate a legitimate, non-discriminatory reason.

Plaintiffs do succeed occasionally in establishing discrimination. In *Kunda v. Muhlenberg College*,⁸⁹ the plaintiff was able to raise an inference of discrimination based on procedural irregularities that occurred during the university's consideration of her tenure application. These procedural defects were sufficient to raise an inference that the reason stated by the defendant for its decision to deny the plaintiff tenure was a pretext. More typical, however, are the cases where the plaintiff's case is never tried to a jury or the bench because the court has determined there is no issue of fact to be tried.

⁸⁶*Sun v. Board of Trustees of the University of Illinois*, 473 F.3d 799, 813 (7th Cir. 2007). According to the *Sun* court, the plaintiff must show that the individual with the illicit motive exercised a "significant degree of influence." *Id.* There is a split of authority, however, on what is the appropriate standard in this situation. The fourth circuit requires that the decision-maker be so completely beholden to the subordinate that the subordinate is the actual decision-maker. *Hill v. Lockheed Martin Logistical Mgmt., Inc.*, 354 F.3d 277, 290 (4th Cir. 2004).

⁸⁷*Adelman-Reyes v. Saint Xavier Univ.*, 500 F.3d 662 (7th Cir. 2000).

⁸⁸West, *supra* note 32, at 115-20, where the commentator argues that the appellate courts tend to apply a different standard to plaintiffs versus defendants in Title VII cases.

⁸⁹621 F.2d 532 (3^d Cir. 1980).

The theory of disparate impact offers an alternative means by which a plaintiff can prove discrimination. Once again, however, this is not likely to result in proving discrimination.

Disparate impact theory focuses on the *effects* of what are facially neutral policies, but which policies nonetheless result in disproportionately affecting a group protected by Title VII. In a disparate impact case, the plaintiff must produce evidence that a neutral policy results in a statistically significant difference in the effect on the members in the protected group versus those outside the protected group. If the plaintiff succeeds in establishing a disparate impact, the defendant can prevail nonetheless if it can prove that its policy or practice is justified by business necessity, that is, the policy or practice is in some way related to the job or had a statistically significant predictive value about which individuals could successfully do the job.⁹⁰

Assuming that a plaintiff can identify the neutral policy or practice that causes a disproportionate effect, as required by the statute,⁹¹ the university will likely succeed in justifying that policy by business necessity. In the university setting, the court has already signaled that it is likely to recognize the business necessity of the criteria used for the tenure determination.⁹² Thus the university will likely avoid liability even in light of evidence that, for example, the collegiality criterion disproportionately affects women and minorities, notwithstanding that the subjective evaluations of an individual's collegiality may be colored by discrimination.

Finally, there is a major shortcoming in the law in that there is no legal means for addressing the subconscious biases that may impact a tenure decision. There is ongoing research about the subconscious biases that all individuals hold that affect the way they perceive people based on various characteristics, including race and gender.⁹³ That these subconscious biases may impact the decision is a reasonable conclusion but a problem for which there is no remedy.

⁹⁰Theoretically, the plaintiff could still prevail by establishing that there was another means for selecting or excluding candidates that worked at least as well as the employer's requirement but did not disparately affect a protected group. 42 U.S.C.A. §2000e-2(k)(1)(A)(ii) (West 2003). Aside from the fact that there is some ambiguity in the statute about the practical application of the relevant provision, this author is unaware of any case in which a plaintiff attempted to win on this grounds. The expense and logistical challenges of developing and validating an alternate practice make it improbable that many plaintiffs will ever attempt to do so.

⁹¹See 42 U.S.C.A. §2000e-2(k)(B)(I) (West 2003). If the elements of the decision-making process are inseparable, the process may be analyzed as one employment practice. *Id.*

⁹²*Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 1007 (1988).

⁹³Project Implicit is a collaborative effort between researchers at Harvard University, the University of Virginia, and the University of Washington. They have concluded that implicit biases are pervasive, that many people are unaware of their biases, and that those biases are predictive of behavior. Those who are higher in implicit bias have been shown to display greater discrimination. For more information about Project Implicit, see <http://www.projectimplicit.net/generalinfo.php> (last visited August 1, 2008).

In short, Title VII, as it is currently structured, is a flawed framework for addressing challenges to a denial of tenure. As applied, it provides no means by which the evidence can be fully and fairly considered, and as such, does not offer sufficient protection to women and other minorities who seek to join the ranks of the tenured professors. At least one court has reached the same conclusion. According to the judge in *Zahorik*, Title VII is rarely a benefit to those alleging gender-based discrimination regarding tenure given that all candidates have some blemish on their records.⁹⁴ This seems to be a tacit admission that the institution can exploit that blemish to defend against a discrimination claim, knowing that as long as the record contains some evidence to support the decision to deny tenure, no matter how weak the evidence is, a court is unlikely to question the university further.

A New Structure

The law, or how it is applied to tenure cases, is not likely to change. Perhaps, therefore, thought should be given to modifying the system that appears to perpetuate the gender disparity. The reasons to abolish tenure generally have been addressed by other commentators. Rather, the issue here is whether an alternative system might have significant advantages to increasing parity as compared to the current system.⁹⁵

A number of different variations exist to replace the system that currently exists at most schools, but the focus here is on two basic models that have been proposed. In the first model, professors are hired with the expectation that termination will occur only for cause. This is essentially the system employed by many European colleges. Such a structure would, however, essentially result in making available at the outset of the faculty appointment one of the benefits that is currently available under a traditional tenure system only after an extended probationary period, namely, the limitation on the university's termination rights.⁹⁶

In addition, for an interesting proposal about how the law might deal with subconscious biases, *see*, Charles R. Lawrence, *The Id, Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

⁹⁴*Zahorik v. Cornell Univ.*, 729 F.2d 85, 93 (2d Cir. 1984).

⁹⁵Many colleges and universities actively seek to have a diverse faculty, having recognized the benefit that inures to their students and society, as well as to the university. Consequently, one finds colleges engaging a number of strategies that are aimed at attracting and retaining qualified candidates, including appointing task forces to address the issue and employing administrative staff who are responsible for assisting the university in improving its diversity.

⁹⁶It has its weaknesses, the main one being that if cause is defined as it currently is for tenured professors, few faculty members would ever be at risk of losing their jobs. That clearly would not be good for universities inasmuch

In the second model, sometimes referred to as term tenure or renewable tenure, all instructors are parties to separate contracts of a specified duration. At the end of the contract, each party—the university and the professor—would choose to renew or terminate the contract. Such an arrangement would require the university, for its part, to determine what standards will be applied in making the determination as well as the process by which such a decision would be made. Given that teaching effectiveness, scholarly production, service, and perhaps collegiality are important factors for so many colleges, a college might determine it appropriate to consider those criteria, or some combination thereof, in what would essentially be a question of retention. Furthermore, it might be appropriate for the consideration to occur in a process much like that which currently exists for the tenure decision, at least with respect to an initial consideration at the departmental or college level, but that would be determined by each institution.

The Effect on the Law

The immediate consequence of either model is evident. Both arrangements would shift the focus of the university's decision making from the tenure decision to the hiring decision. Under the current system, institutions have more flexibility to take a chance on a candidate, given that the probationary period allows that candidate to prove herself and allows the university to refuse to renew the contract of a faculty member who does not measure up. Under the first model, however, there is no probationary period. Moreover, although the second model arguably provides a series of probationary periods, the effect of either model may be to increase the university's scrutiny of all candidates at the hiring stage.

Therein lies the risk for women. The same gender issues that may influence the tenure decision may exist when a university is determining whom to hire. The litigation that would ensue following a denial of tenure may give way to increased litigation wherein the hiring decision becomes the issue.

On the surface, a new model would seem to offer little advantage to women. However, one would expect a court the nature of the evidence and the court's view to differ in these refusal-to-hire cases as compared to those involving a denial of tenure. These differences may prove advantageous to women. As was discussed above, a plaintiff that raises gender or any other type of discrimination in connection with a tenure decision has little chance of success

as there would be little incentive to strive for excellence in teaching or to seek new knowledge. Unless cause were

unless there are procedural defects or her credentials are so unequivocally superior that the university's claims regarding her scholarship, teaching, service, or collegiality cannot credibly be raised in defense to a discrimination suit. As *Zahorik* accurately predicted, the blemishes that exist on every candidate's record make success unlikely.⁹⁷

A hiring decision is different, however, in ways that may affect the court's analysis in these cases. First, the lack of evidence that tends to weaken a tenure denial case is less likely to be a problem in refusal-to-hire cases. The court in *Craine* noted that evidence that is highly probative is often not available because tenure decisions are often made on a rolling basis and do not involve a search to fill a particular position. As the court observed, there can be years between tenure candidacies in some departments, and comparisons between departments are often not appropriate because of the specific requirements of different departments.⁹⁸

It is surely the rare situation where a university hires a new faculty member, particularly at the entry level, without subjecting prospective hires to a competitive hiring process. Consequently, it is more likely that there will be available the kind of evidence that tends to raise suspicion about discrimination and perhaps to prove it. Statistical evidence that includes the race and gender of those who respond to any posting about an open position is likely to be available, as well as data about the gender and race of those who are selected for an initial interview and those who are asked to return for subsequent interviews. Evidence often exists currently to track where prospective faculty appointees drop out of contention, providing valuable information for universities, even outside of litigation, to consider if there is a problem and where the problem might exist.⁹⁹

Under a renewable tenure system, in addition to the hiring decision, the decision not to renew a professor's contract has the potential to instigate litigation. As such, the question is whether the courts would view that decision any differently than the tenure-denial decision. If, as the time for contract renewal approaches, an instructor has the burden to prove that he or she has earned renewal, there would be little difference between this burden and the tenure applicant's

more broadly defined, such a system would seem to breed mediocrity.

⁹⁷*Zahorik*, 729 F.2d at 92.

⁹⁸*Craine v. Trinity Coll.*, 791 A.2d 518, 532 (Conn. 2002).

⁹⁹For example, members schools of the Association of American Law Schools annually submit data to the Association that includes statistics organized by race and gender of those candidates who were contacted for

burden to establish her entitlement to tenure. However, the difference would be, as is the case when hiring decisions are challenged, in the availability of evidence which may indeed disclose patterns that cannot be explained other than by discrimination. While retention would not entail the competitive process that occurs in hiring new faculty, that all faculty would be subject to the same retention process would again provide the data to determine whether different standards were adopted or applied based on the race or gender of the candidate. Thus, it would seem harder for a university to apply different standards based on the gender of the faculty member, such as criticizing the publication by one instructor in a particular journal while praising the publication of another in that same journal. Of course, university personnel decisions are rarely that simple. Rather, most involve a balancing of the different criteria, such that an instructor might compensate for his weakness on the teaching front with outstanding research and publication. Nonetheless, with more faculty subject to review, discriminatory application of the standards may be easier to detect.

The bigger impact, however, could be how the courts review faculty personnel decisions, particularly where a renewable tenure system existed. The courts appear to be overly fixated on the long-term commitment that tenure engenders and the implications for the university. The very nature of tenure serves to justify the broad deference afforded to universities. Particularly in a renewable tenure system, the relationship between the university and its faculty starts to resemble the situation that exists in other employment contexts where there is a contract that modifies the employment at-will concept. A system where there was less of a guarantee of lifetime employment would subtract one of the justifications for the deference that universities have traditionally enjoyed regarding their decisions.

On the other hand, a system that resulted in essentially a grant of tenure at the outset would continue to justify the courts' continued reticence about closely reviewing a university's personnel decisions. The difficulty of terminating a faculty member, particularly if the only grounds was cause, would likely result in the court according the same sort of deference to the hiring decision under a modified system as is currently seen regarding the tenure decision in a traditional system.

interviews; those who participated in an initial interview; those who were invited for on-campus interviews; those who were offered an appointment; and those who accepted an appointment.

Moreover, courts may remain unwilling to second-guess university decisions inasmuch as the university's long-term commitment to tenured faculty is not the only justification for deference.¹⁰⁰ Nonetheless, it should weaken the deferential approach, at least if the case involves a renewable tenure system, given that the stakes are not as high if an individual is subject to reconsideration periodically.

Declassification/Weakening the Class System

Typically, only those that have achieved tenure have a voice in the tenure decision.¹⁰¹ Inasmuch as anything short of an overwhelming positive vote will likely result in an ultimate denial of tenure, it takes but one or two negative votes to negatively impact a candidate.

Women tenure candidates are most at risk when they teach in departments where women are underrepresented among the tenured faculty and neither the university nor the department is sensitive to the possibility that some may harbor subconscious or even intentional biases. In such instances, there may be few or no women to challenge comments, questions, or evaluations that raise suspicions about the fairness of the decision to be made, particularly when the candidate is a woman or a racial or ethnic minority.

As structured, arguably the current system permits, perhaps even promotes, the concentration of power among those who have achieved tenure. Tenure arose at a time in history when, but for the rare woman or minority, the faculty was male and white.¹⁰² That the power to

¹⁰⁰The court's professed lack of experience in judging candidates is also often cited to justify the hands-off approach practiced by most courts in these cases. *See, e.g., Harel v. Rutgers the State Univ.*, 5 F.Supp.2d 246, 266 (D.N.J. 1988).

¹⁰¹*See, e.g.,* Senate Resolution on the Promotions and Tenure Committee, Rice University available at <http://www.professor.rice.edu/images/professor/facultysenate/PTProposalApproved.pdf> (last visited July 17, 2008); The Faculty Code of University Government §4-5.1, The University of North Carolina at Chapel Hill, <http://www.unc.edu/faculty/faccoun/code/code2007.shtml#apt> (last visited July 17, 2008).

The voices of others, including non-tenured faculty and perhaps students, may be heard, but it may occur through the filter of tenured faculty or not be accorded much weight. Involved in making a recommendation. Tenured faculty may solicit input from their non-tenured colleagues which they may consider in making their recommendation on tenure. Student evaluations may also be part of the process but are rarely accorded much weight.

¹⁰²The origins of tenure can be traced to the 19th century and the influence of German universities. American professors, exposed to German academic governance, discovered the idea that academic freedom protected faculty members from university administrators and trustees. The increase in the number of colleges and universities as a result of land grants, coupled with the ideological confrontations occurring within the economics profession during the early 20th century, further spurred development of the modern concept of tenure. In 1913, the AAUP was formed, with one of its principal tasks being the "gradual formulation of general principles respecting the tenure of the professional office and the legitimate ground for dismissal of professors." White, *supra* note 4, at 57-64.

Until relatively recently, the tenured professoriate remained mostly male. For example, during the 1950s, among law faculty, only 11 women were tenured or held tenure-track positions. Marina Angel, *The Modern*

grant tenure was concentrated among the ranks of white males, who were passing judgment on other white males, may have raised other sorts of concerns, but none with respect to gender or race.

On the other hand, universities have changed in significant ways. They have responded to the cultural shifts that have occurred in the past fifty years, seeking to enroll students and appoint faculty members that more closely mirror society in general.¹⁰³ Yet the tenure application process, including who will participate in the tenure decision, does not appear to have changed in any significant way. The rank of tenured faculty is still mostly male, particularly in non-traditional fields of study, and for that matter, still predominantly white.¹⁰⁴ A system that allows a group, deemed to be elite, to determine who shall be admitted into their ranks is one that risks perpetuating itself as it is, selecting as new members those who most closely resemble themselves.

Consider the risk related to evaluation of a candidate's scholarship, one of the key factors for the tenure decision. Although the evidence was insufficient to prove discrimination, that one reviewer likened a female chemistry professor's publications to a recipe book makes one wonder what unstated biases may have affected his evaluation of her work.¹⁰⁵ As Professor Carter suggests, it is difficult for people from one background to value the scholarship of others from different backgrounds.¹⁰⁶ Indeed, Trinity College, the defendant in the *Craine* case, recognized

University and its Law School: Hierarchical, Bureaucratic Structures Replace Coarchival, Collegial Ones; Women Disappear from Tenure Track and Reemerge as Caregivers: Tenure Disappears or Becomes Unrecognizable, 38 AKRON L. REV. 789 (2005).

¹⁰³That many schools have adopted affirmative action plans, aimed at increasing diversity in the student body as well as in the faculty ranks, is some evidence of the change in culture. There has been some success inasmuch as in 2005-06, 41% of tenure track positions at schools that award doctorate degrees are held by women; at schools where the master's degree is the highest degree awarded, 47.3% of those positions are held by women. AAUP Gender Equity, *supra* note 2, at 8. There is still a disparity given that women are approaching the 50% mark for earning doctoral degrees. *Id.*

¹⁰⁴During the 2005-06 year, among the schools that offer doctoral degrees, only 31% of the tenured faculty are female. AAUP Gender Equity, *supra* note 2, at 9-10. At schools with a strong reputation in science or other non-traditional fields for women, the disparity is more striking. For example, at the Massachusetts Institute of Technology, only 16.1% of the tenured faculty were women during that same time period. In 2007, only one of the 25 candidates granted tenure at the Massachusetts Institute of Technology was a woman. Linda K. Wertheimer, *The Boston Globe*, Dec. 6, 2007, available at http://www.boston.com/news/education/higher/articles/2007/12/06/tenure_at_mit_still_largely_a_male_domain/ (last visited July 17, 2008).

¹⁰⁵See *Craine v. Trinity Coll.*, 791 A.2d 518 (Conn. 2002).

¹⁰⁶Stephen L. Carter, *Tenure and "White Male" Standards: Some Lessons from the Patent Law*, 100 YALE L. J. 1065, 2075 (1991); See also, AALS Report, *supra* note 14, at 482, where the report identifies as a tension point that affects the tenure decision the diversity of subject matter and technique, complicating the task of reaching consensus. Included as examples are the different views of critical legal theorists, feminists, and the law and economics school.

the risk as evidenced by its affirmative action policy that required that candidates' files receive a fair and unbiased review, "particularly if his or her research and activities are in a new or non-traditional area."¹⁰⁷

Would not a system whereby all faculty participated in the retention decision for other colleagues not address some of the risk that exists simply because women and minorities are underrepresented in the tenured professoriate?¹⁰⁸

Admittedly, whether women ultimately benefit is dependent on the assumption that women continue to be hired in approximately the same or better proportions as they are currently. It also assumes that they experience no disparity in the proportion that were retained as compared to men. If indeed that were the experience, that would surely create the critical mass of women and minorities to serve as a check on questionable evaluations or decisions that tend to hinder them in achieving tenure.

Either way, it would deconcentrate the power. That is consistent with another concept that is valued in the university context, namely shared governance. Universities often pride themselves on their democratic nature. Indeed, the commitment to shared governance, between faculty and administration, as well as within departments and schools, is surely one of the differences that sets universities apart from typical commercial endeavors. Shared governance involves sharing the responsibility for making decisions that are important to the constituents of the university.¹⁰⁹ It does not extend to every decision on policy, personnel, or budgetary decision that must be made. Nonetheless, when done correctly, shared governance benefits the university and its constituents in significant ways. Reaching consensus strengthens the university as well as the individual units within the institution. This in turn enhances the unity of the decision-making units and the university as a whole.

The Effect on Flexibility

The current system of tenure requires that applicants excel in all areas: teaching, scholarship, and service, at the risk of being denied tenure. There are many good reasons why an

¹⁰⁷*Craine*, 791 A.2d at 543.

¹⁰⁸As an alternative, to ensure that the decision is made by those qualified to do so, those eligible to participate in the review process could be limited to instructors who had survived their first retention review.

¹⁰⁹Often, shared governance on a university campus arises in the context of the faculty senate or some other representative body. However, only the most narrow concept of shared governance would fail to recognize the myriad ways in which decision-making is shared and the benefit that results therefrom.

instructor who is capable of excellence in all areas might nonetheless prefer to excel at a subset of those areas, not the least of which includes for lifestyle reasons. The effort to achieve tenure often comes at great personal sacrifice to family, community service, and other non-academic endeavors. For such an instructor who may be capable of excellence in all areas but prefers not to, there are few options. Such an individual could choose to teach in a non-tenure track position, in which he or she may be freed from the research and publication responsibilities, with responsibilities for teaching and service only. The flexibility of a non-tenure track position, however, comes at significant cost under our current system. To quote the AAUP, these positions are “the least secure, the least remunerative, and the least prestigious jobs among the full-time faculty.”¹¹⁰ Moreover, such positions do not tend to serve as stepping stones into tenure track positions. Those who begin in non-tenure track positions are unlikely to gain appointment to a tenure track position on that same campus.¹¹¹ This led the AAUP to conclude that the expansion of the number of non-tenure track positions has created gender equity issues.¹¹² One could conclude that by virtue of the increasing prevalence of these non-tenure track positions, universities have created a *de facto* “mommy track” or female ghetto.

It would seem that our current system demands a level of commitment, at least while one is on the quest for tenure, that is not clearly necessary for the quality of education. While there has been a significant expansion in the number of non-tenure track positions, there has been scant concern that the quality of education or the quality of research have suffered as a consequence thereof. Rather, the concerns that have arisen pertain to the lack of job security and worries about academic freedom.¹¹³

If indeed the trend towards more non-tenure track positions continues, then, as other commentators have suggested, it is an attack on tenure as we know it, but with poor consequences for women. It would seem to solidify the stratification that currently exists because of the tenure system, maintaining a third underclass of non-tenured instructors who are disproportionately female and significantly underpaid.

¹¹⁰AAUP Gender Equity, *supra* note 2, at 9.

¹¹¹*Id.*

¹¹²*Id.*

¹¹³*See, e.g.,* Marina Angel, *Women Lawyers of All Colors Steered to Contingent Positions in Law Schools and Law Firms*, 26 CHICANA/O-LATINA/O L. REV. 169, 173 (2006).

Rather than drifting towards such an arrangement, it would behoove all concerned to consider whether there exists a structure that allows the flexibility that non-tenure track positions offer without creating a subclass of positions for which there is no job security and for which there is no escape. Maybe a system such as offered by either of the two models is such a structure; maybe it is not. It is worth considering, however, how such a system might provide more flexibility that ultimately benefits all who aspire to teach at a university.

Other Considerations

There are likely to be disadvantages to colleges and universities, as well as to women and other minorities, in a system where tenure ceased to exist. The administrative costs of periodic reviews could be significant. Particularly if all faculty were subject to a retention review, whether the review is cursory or more extensive, the institution will incur costs, both tangible or intangible. An extensive review, of course, would incur costs in terms of the time spent by faculty and administration to faithfully follow whatever procedures were established. Additionally, each faculty member would be put to spend time and effort to establish his worthiness to retain his position as his contract renewal approached.¹¹⁴ Time spent on the renewal process is time unavailable for teaching, researching, and publishing. Moreover, a decision not to renew the contract would incur additional costs inasmuch as the instructor would likely pursue all administrative appeals provided by the institution, followed up by litigation, thus increasing the costs to the university.

On the other hand, if a university employed a more cursory review, there would exist the risk that the quality of the education and research at that institution could suffer. If indeed all or most instructors are perfunctorily renewed or instructors are rarely terminated for cause, there is less incentive to excel in any of the areas of importance to a university.¹¹⁵ In other words, the same mediocrity that critics of the current tenure system raise would be a risk if only a cursory system of review were adopted.

Moreover, the effect on collegiality could be significant. If each instructor were up for contract renewal on a periodic basis, would that engender the formation of camps or coalitions

¹¹⁴One commentator concluded that the average tenure applicant spends 250 hours preparing his application materials. Conrad & Trosch, *supra* note 12, at 566. One can imagine the cost to the university if every professor were put to such effort periodically.

¹¹⁵One would expect that most instructors are driven by personal pride and ambition such that a change in the system would no more incentivize them to do less than does the current tenure system.

that form to provide protection to the individual members? Would those camps form along gender or race lines? If that were the case, then women may be in no better situation than under the current system.

There is also the possibility that a contract renewal system could alter the sense of duty and loyalty the university has the right to expect from its faculty as faculty members, faced with a periodic review, elevate self-interest over the interests of the institution. Ideally, tenured faculty, called on to judge a tenure applicant's worthiness for tenure, will candidly evaluate the candidate on those criteria set forth by the university. Their place in the university being secured by tenure, their own individual interests are arguably aligned with those of the university: selecting those candidates that are in the best interest of the university, based on the candidates' qualifications. If, however, instructors are called to evaluate their colleagues for contract renewal purposes, their need to protect their own self-interests may take precedence over what is in the best interest of the institution. In other words, a professor might temper his or her evaluation of a colleague out of the express or implied expectation that others will repay the favor.¹¹⁶

From the standpoint of an individual faculty member, a change in the faculty/university relationship to one of contract renewal may provide multiple opportunities for discrimination to occur. At each contract renewal, the individual would be at risk of a decision motivated by illegal factors. Perhaps the risk would be mitigated by the participation of all faculty and a theoretically more diverse faculty, but there would be, nonetheless, the risk each time.

Associated with the determination to decline contract renewal or the decision to terminate a professor for cause, as would be the case under the first model, is the concern about the potential implications for the affected instructor. That the university's decision may require justification for its refusal to renew might mean that the university would create the kind of record that could follow a professor and hinder his chances to gain a similar job. Rather than the vague explanations that have been accepted related to tenure decisions, the university may be put to justify its action, thus damaging soon-to-be released faculty members in unforeseen ways.

Perhaps of greatest concern is that any system in which all faculty members were subject to periodic review would potentially result in discrimination of a different type, namely on the

¹¹⁶Admittedly, this is a cynical suggestion. One would expect professionals to engage in professional assessments, although, of course, there is no guarantee that such will occur. That is at the heart of the problem of the paucity of women holding tenured positions in certain disciplines.

basis of age. There is the reality that universities would be in a position to act opportunistically in determining whose contract should be renewed and whose will not. Thus more senior faculty, who would have enjoyed the job security provided by tenure, would be vulnerable to an opportunistic department or administration looking to take the department in a new direction or to cut costs. The same concern that the scholarship of women is not as highly valued as that of men would exist in that the scholarship of more senior faculty may not be as highly valued as that of whatever is currently in vogue. A system that imposed a greater risk of discrimination on another protected group would not be particularly appealing.¹¹⁷

Conclusion

Whether women, as well as minorities, would fare better under a system that differs from what is in place at most universities presents an intriguing question. Suffice it to say that there are many unknowns and the chance for many unforeseen consequences. That includes the possibility that there may be more impetus for faculty to unionize to gain through collective bargaining that which may have been lost by virtue. Nonetheless, it would be worth a consideration of what alternatives there might be that serve to protect the legitimate interests of university faculty without disadvantaging women.

¹¹⁷The Age Discrimination in Employment Act, 29 U.S.C.A. §§621-633a (West 1999), protects those who are 40 years or older. It is reasonable to speculate that most faculty members anticipate, even hope, to live to the age of 40, and as such, will enjoy protection under the ADEA. No one would benefit from an increased risk of discrimination on the basis of age.

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