Is Tenure Necessary to Protect Academic Freedom?

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I. Introduction: The Role of Tenure in Protecting Academic Freedom

The institution of tenure is under serious attack. New schools, like the soon to open Florida Gulf Coast University, are being created without the possibility of tenure for faculty members.[1] Some universities, like Vermont's Bennington College, have abolished tenure.[2] In fact, it is estimated that nationally about 20 percent of all independent four-year colleges no longer offer their faculty tenure.[3]

Additionally, there are efforts in many places to significantly weaken the traditional protections accorded to tenured faculty members. A national debate over tenure was triggered by a proposal by the Regents of the University of Minnesota to allow the University to fire tenured

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[1]Dennis Kelly, New University Becomes Setting for Tenure Debate, USA Today, July 17. 1996.

[2]David Fischer, Taking on Tenure: A Job For Life? More Schools Are Just Saying No, U.S. News & World Report, March 3, 1997, 60.

[3]Id. at 62.

faculty members whose departments are eliminated and to permit the University to cut the salaries of tenured faculty members for reasons other than a financial emergency.[4] At the University of Southern California, tenured faculty members in the Basic Sciences Department of the Medical School sued when the university decreased their salaries by 25 percent.[5]

Apart from all of these individual events, criticism of tenure is increasingly common by political officials and in the popular press. Attacks on tenure are prompted by a desire to increase the accountability of faculty members and to enhance the quality of their performance. Tenure is challenged as protecting the lazy faculty member who no longer engages in scholarship or effective teaching. The perception is that safeguarded by a job for life, faculty members are insulated from scrutiny and pressure for enhanced performance.

Moreover, tenure is an anomaly; other than federal judges who have their positions for life unless they are impeached, tenure is virtually unheard of in the American workplace. It is not surprising that politicians and the public question why academics should have a form of job security that is available to almost no one else.

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[4]Jon Sanders, Debate Over College Tenure Dividing America, the Public, and the Professorate, Greensboro News & Record, February 8, 1997, F-6.

[5]The suit is pending in Los Angeles County Superior Court as of May 1997.

Perhaps most importantly, the attack on tenure is a reflection of the lack of a recent systematic threat to academic freedom. During and soon after the McCarthy era, it was easy to explain the need for tenure to safeguard the ability of professors to speak and write in politically unpopular ways. Likewise, during the Vietnam War, tenure was understood as necessary to protect faculty members from reprisals for their political activities. But now those threats seem remote and the need for tenure appears more abstract. A reflection of this is that a recent survey by the Higher Education Research Institute at UCLA found that 43 percent of all faculty members under age 45 believe that tenure is an outmoded concept, compared with about 30 percent of faculty members over age 55.[6]

All of these attacks on tenure raise a basic question: is tenure necessary to protect academic freedom? Few would deny that it is imperative that faculty members be protected from adverse employment actions because of the content of their teaching, their writing, or their political activities. Protecting faculty members freedom in these areas is both instrumentally and intrinsically desirable.

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[6]Fischer, supra note 2, at 62.

From an instrumental perspective, academic freedom ideally leads to better and more creative teaching and scholarship. Without the assurance of academic freedom, many faculty members might be chilled from taking novel or unpopular positions. Potentially important ideas might not be advanced and intellectual debate and advancement would suffer. The late Chief Justice Earl Warren wrote: "The essentiality of freedom in the community of American universities is almost self-evident. . . . To impose any straitjacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[7]

[7]Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion).

From an intrinsic perspective, tenure safeguards the freedom of faculty members to speak, write, and associate however they choose. Justice Thurgood Marshall observed that "[t]he First Amendment serves not only the needs of the polity but also those of the human spirit -- a spirit that demands self-expression."[8] Freedom of speech is regarded in our society as an essential liberty, basic to autonomy. Professor Baker said that "[t]o engage voluntarily in speech is to engage in self-definition or expression. A Vietnam war protestor may explain that when she chants 'Stop This War Now' at a demonstration, she does so without any expectation that her speech will affect continuance of the war . . .; rather, she participates and chants in order to define herself publicly in opposition to the war. The war protestor provides a dramatic illustration of the importance of this self-expressive use of speech, independent of any effective communication to others, for self-fulfillment or self-realization."[9]

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[8]Procunier v. Martinez, 416 U.S. 396, 427 (1974).

[9]Edwin C. Baker, Scope of the First Amendment Freedom of Speech, 25 U.C.L.A. L. Rev. 964, 994 (1978).

Thus, academic freedom is highly valued.[10] It is not surprising that the Supreme Court has declared that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."[11]

[10]For an excellent exploration of the meaning of academic freedom, see J. Peter Byrne, Academic Freedom: A 'Special Concern of the First Amendment, 99 Yale L.J. 251 (1989).

[11]Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

Tenure is a key mechanism for protecting academic freedom. Once a faculty member receives tenure, he or she cannot be subjected to adverse employment action, such as firing, without proof of cause.[12] The American Association of University Professors, in a famous 1940 Statement of Principles on Academic Freedom and Tenure, declared: "Tenure is a means to certain ends, specifically: (1) Freedom of teaching and research and of extramural activities and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society."[13]

Tenure has an obvious role in protecting academic freedom.[14] By limiting the ability of the university to fire or otherwise take adverse actions against faculty members, tenure provides protection for faculty members to teach and write as they choose. As Professors Brown and Kurland explained, "a system that makes it difficult to penalize a speaker does indeed underwrite

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[12]An important question is what types of adverse employment actions, short of dismissal, constitute a violation of tenure. For example, cutting a person's salary by 90 percent surely has the same effect as firing the individual. Protecting the existence of a person's job means little if the person could be effectively fired by eliminating his or her salary. The difficult question, and one beyond the scope of this paper, is the point at which an adverse employment action is inconsistent with tenure. In evaluating the importance of tenure for academic freedom, this paper focuses primarily on dismissals from employment. Obviously, if alternatives to tenure are adequate in providing protection from termination, they are likely to be sufficient as to less extreme adverse employment actions.

[13]Reprinted in Freedom and Tenure in the Academy: The Fiftieth Anniversary of the 1940 Statement of Principles, 53 L. & Cont. Prob. 407, appendix B (1990); see also Walter P. Metzger, The 1940 Statement of Principles on Academic Freedom and Tenure, 53 L. & Cont. Prob. 3 (1990).

[14]For an excellent discussion of the relationship of tenure to academic freedom, see Ralph S. Brown & Jordan E. Kurland, Academic Tenure and Academic Freedom, 53 L. & Cont. Prob. 325 (1990).

the speaker's freedom."[15] A tenured faculty member can take a position, in the classroom or in scholarship or in the public arena, knowing that it is unpopular without worrying that it will lead to reprisals.

Often overlooked is that tenure offers both procedural and substantive protections. Procedurally, tenure means that a faculty member has continuing employment unless the university initiates an action against the faculty member and succeeds in proving "cause" for termination. It is the university that must begin the proceedings to terminate a tenured faculty member and that must bear the significant burden of proving the justification for its proposed action.

Substantively, tenure means that the only specific, narrowly defined circumstances will constitute "cause" sufficient for termination or other adverse employment actions. Although the definition of "cause" varies by university, in general, there must be serious violations of the law or of principles of academic honesty to meet the standard.

The focus of this paper is on whether alternatives to tenure can succeed in protecting academic freedom. My conclusion is that no alternative yet described is likely to succeed in providing both the procedural and the substantive protections accorded by tenure. In general, the inadequacy of alternatives is evidenced by their motivation. Those who seek alternatives to tenure do so because of a desire to weaken the current protections accorded to faculty members.

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[15] Id. at 329.

Although the motivation behind these reforms is the laudable desire to increase accountability for faculty members, by definition this entails a lessening of the safeguards embodied in the concept of tenure. Thus any alternative to tenure is likely to mean a substantial decrease in the protection afforded faculty members and consequently of academic freedom. The better approach is to devise ways to improve performance and accountability within the tenure system.

However, those who challenge tenure argue that alternatives might succeed in adequately protecting academic freedom, even if less so than the institution of tenure. Two primary alternatives have been advanced. One possibility is to protect faculty members from adverse actions that are in retaliation for the content of their teaching, writing, or political activity. The Supreme Court, in a series of cases, has provided protection for the First Amendment rights of government employees and limited the power to punish them for their speech activities.[16] Some argue that academic freedom can be adequately safeguarded by applying these principles to faculty members.

Another alternative is to provide faculty members with long-term contracts, such as for five or seven years, and to create a grievance procedure that would need to be followed before a faculty member could be terminated. This approach would seek to provide job security in the form of contractual protections and procedural safeguards in the nature of grievance hearings and decisions by faculty panels.[17]

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[16]These are summarized in Richard H. Hiers, New Restrictions on Academic Free Speech: Jeffries v. Haleston, 22 J. College & Univ. L. 217, 227-249 (1995); see also text accompanying notes 18-26, infra.

[17]This approach is described in J. Peter Byrne, Academic Freedom Without Tenure?, American Association for Higher Education, Working Paper Series, Inquiry #5 (1997).

I believe that neither of these alternatives is likely to succeed in protecting academic freedom. Neither provides the substantive protections that tenure accords in that neither limits the situations in which adverse actions can be taken to those that constitute "cause." Additionally, neither provides the procedural protection of tenure which requires that the university initiate proceedings and prove cause. Section II of the paper discusses the former proposal of applying First Amendment protections accorded government employees to faculty members and section III analyzes the latter suggestion for replacing tenure with long-term contracts and grievance hearings.

II. Would First Amendment Protections Be an Adequate Substitute for Tenure?

Those who seek to weaken tenure generally do not argue against the concept of academic freedom or advocate the elimination of all protections for faculty members' speech. Rather, the argument is often made that academic freedom can be adequately protected by applying First Amendment principles. The claim is simple: tenure is valued because it protects the academic freedom of faculty members to speak and write without fear of reprisal. Therefore, tenure can be replaced by protections that limit the ability of a university to act against a faculty member because of his or her speech.

An analogy is often drawn to a series of decisions in which the Supreme Court has protected the free speech rights of government employees. Stated generally, the Court has held that the First Amendment prevents the government from acting against its employees because of their speech. The argument is that the application of these precedents to faculty members would suffice to safeguard academic freedom. In evaluating the desirability of this alternative, I first

review the law concerning the First Amendment protections for government employees and then explain why this standard is insufficient to protect academic freedom.

A. The Law Concerning First Amendment Protections for Government Employees

The Supreme Court has held that the government may not punish the speech of public employees if it concerns matters of public concern unless the state can prove that the needs of the government outweigh the speech rights of the employee. In other words, speech by public employees is clearly less protected than other speech; First Amendment protection does not exist unless the expression is about public concern and even then the employee can be disciplined or fired if the government can show, on balance, that the efficient operation of the office justified the action. It should be noted that these protections apply only for government employees, not for employees in the private sector. The Constitution applies only to government conduct, not to private action.

Pickering v. Board of Education is an important case in holding that speech by government employees is protected by the First Amendment.[18] A teacher was fired for sending a letter to a local newspaper that was critical of the way school officials had raised money for the schools. The Supreme Court held that the firing violated the First Amendment. Justice Marshall, writing for the Court, said that its task was to balance the free speech rights of government employees with the government's need for efficient operation. Justice Marshall wrote: "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.

[18]391 U.S. 563 (1968). See also Perry v. Sinderman, 408 U.S. 593, 597 (1973) (holding that the First Amendment limits the ability of the government to fire or discipline employees

The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer in promoting the efficiency of the public services it performs through its employees."[19]

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because of their speech activities).

[19]Id. at 568.

The Court emphasized that there was no indication that Pickering's statements in any way interfered with the teacher's ability to perform or the operation of the school district. The Court also stressed that the speech concerned a matter of public concern: the operation of the school district. Indeed, the Court said that a teacher is likely to have unique and important insights as to the adequacy of educational funding. Although there were some factual inaccuracies in the statement, the Court held that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish a basis for his dismissal from public employment."[20]

In Mt. Healthy City School District Board of Education v. Doyle,[21] the Court articulated a test to be used in applying Pickering. An untenured teacher was not rehired after several speech-related incidents, including an argument with another teacher, making an obscene gesture to students, and informing a local radio station about the principal's memorandum on teacher dress and appearance. The Court reiterated that speech by public employees is protected by the First Amendment. The Court said, however, that a public employee who otherwise would have been fired does not deserve special protection because of the speech.

Thus, the Court said that a public employee challenging an adverse employment action must initially meet the burden of showing that "his conduct was constitutionally protected, and

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[20]Id. at 574.

[21]429 U.S. 274 (1977).

that this conduct was a 'substantial factor' -- or, to put it other words, that it was a 'motivating factor'" for the government's action.[22] If this is done, the burden shifts to the government to

[22]Id. at 287.

show by a "preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct."[23]

In Connick v. Meyers,[24] the Court added an additional requirement to the Pickering/Mt. Healthy approach. An assistant district attorney, angry over a transfer to a different section in the office, circulated a memorandum soliciting the views of other attorneys in the office concerning the transfer policy, the level of morale, and the need for establishment of a grievance committee. The attorney was fired and sued alleging a violation of the First Amendment.

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[23]Id. This is the same approach the Court uses with regard to proof of discriminatory intent under the Fourteenth Amendment. See Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).

[24]461 U.S. 138 (1983).

The Supreme Court ruled against the attorney emphasizing that the speech was not protected by the First Amendment because it did not involve comment upon matters of public concern. The Court, in an opinion by Justice White, said: "The repeated emphasis in Pickering on the right of a public employee 'as a citizen, in commenting upon matters of public concern, was not accidental. . . . [When] employee expression cannot fairly be considered as relating to any matter of political, social, or other concern to the community, officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[25] The Court said that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement."[26] Although Meyer's statements related to the performance of supervisors and policy in a public office, the Court said that it did not concern matters of public concern, especially because she was not seeking to inform the public.

However, the Court also has expressly ruled that private statements that are not made publicly are protected by the First Amendment so long as they involve matters of public concern. In Givhan v. Western Line Consolidated School District, the Court unanimously held that it violated the First Amendment to fire a teacher because of her speech that privately communicated

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[25]Id. at 143.

[26]Id. at 147-148.

grievances about racially discriminatory policies.[27] The Court said that no First Amendment freedom "is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."[28]

[27]439 U.S. 410 (1979).

[28]Id. at 415.

In Rankin v. McPherson, the Court applied Connick and found that a public employee's statement was protected by the First Amendment when she declared, after hearing of an assassination attempt directed at President Ronald Reagan, "If they go for him again, I hope they get him."[29] The Court held that the firing of the employee because of the statement violated the First Amendment because it concerned a matter of public concern. The Court, in an opinion by Justice Marshall, said that "[t]he statement was made in the course of a conversation addressing the policies of the President's administration. It came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President. The inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern."[30]

The Court said that if a statement is of public concern, then a court must balance the employee's First Amendment rights with the state's interest in the "effective functioning of the public employer's enterprise."[31] The Court found that the speech was protected by the First Amendment because there was no evidence that it interfered with the efficient functioning of the office.

The specific content of the employee's speech is obviously crucial in applying this test. Often, of course, there will be a dispute between employer and employee over exactly what was said. How is this dispute to be resolved? The Court addressed this issue in Waters v. Churchill.[32]

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[29]483 U.S. 378 (1987).

[30]Id. at 386-87.

[31]Id. at 388.

[32]114 S.Ct. 1878 (1994).

A nurse was disciplined and ultimately fired from a public hospital for her speech, but there was a dispute between her and the employer over what she actually said.

Justice O'Connor, writing for a plurality of four, said that the trier of fact should accept the employer's account of what was said so long as it is reasonable to do so. Justice O'Connor said that there is no violation of the First Amendment when a government employer reasonably believes that speech does not involve matters of public concern. The plurality said that a court should side with the employer so long as the employer acted reasonably in obtaining information about what was said and so long as the employer's belief is reasonable.

Justice Scalia wrote an opinion concurring in the judgment, joined by two other Justices, and said that the employee was protected by the First Amendment only if she could prove that the firing was in retaliation for constitutionally protected speech.[33] Scalia objected to the plurality's requirement that employers use reasonable procedures to ascertain what was said.

Justice Stevens dissented, in an opinion joined by Justice Blackmun, and argued that the content of the speech was a question of fact that should be tried like any other factual issue.[34] Justice Stevens said that the issue is not whether the employer followed reasonable procedures or even whether the employer had a reasonable belief. The question is whether the speech is

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[33]Id. at 1893 (Scalia, J., concurring in the judgment).

[34]Id. at 1898 (Stevens, J., dissenting).

protected by the First Amendment and that can be ascertained only by first deciding what was said.

Thus, a three-step analysis can be derived from the cases: 1) the employee must prove that an adverse employment action was motivated by the employee's speech; if the employee does this, the burden shifts to the employer to prove by a preponderance of the evidence that the same action would have been taken anyway; 2) the speech must be deemed to be a matter of public concern; 3) the Court must balance the employee's speech rights against the employer's interest in the efficient functioning of the office. Phrased another way, the employee can prevail only if he or she convinces the Court that speech was the basis for the adverse employment action, and if the Court concludes that the speech concerned matters of public concern, and if the Court decides that on balance the speech interests outweigh the government's interests in regulating the expression for the sake of the efficiency of the office.

B. The First Amendment Is Not an Adequate Substitute for Tenure

For many reasons, it would be undesirable to replace tenure with the protections that are accorded government employees. At the outset it should be noted that faculty members employed by public colleges and universities already have the First Amendment safeguards described above. A faculty member at a government institution now has both the protections of tenure and those of the Constitution. Abolishing tenure would not substitute new protections for these individuals but only decrease the current safeguards of academic freedom.

Procedurally, a First Amendment approach would be far inferior from a faculty member's perspective when compared with tenure. Under the First Amendment approach, the burden would be on the faculty member to initiate an action claiming that the University acted improperly

in retaliation for speech activity. In contrast, under the tenure system, the university has the burden of starting the proceedings to terminate a tenured faculty member. At the very least, the need to bring formal proceedings is a disincentive for the university to act. The easier it is for the university to terminate a faculty member, the more likely it is to act in retaliation for unpopular teaching or writing.

More importantly, a First Amendment approach puts the burden on the faculty member to show that the university's motive was a reprisal for speech activities. In many cases, this can be an insurmountable obstacle for the faculty member. Proving motive is often elusive and many faculty members may be discouraged from even initiating proceedings because of doubts about meeting this burden. When the faculty member protests the university's action, showing an improper motive for the adverse employment action may not be possible, even in some cases when the university's action actually was in retaliation for speech. In contrast, under the tenure system, the university must prove cause for termination. There is no burden on the faculty member to demonstrate improper purposes on the part of the university; the only issue is whether the university can prove just cause for termination.

From a substantive perspective, a First Amendment approach provides much less protection than the current tenure system. Now a tenured faculty member can be terminated only if there is proof of a limited number of circumstances that constitute cause. But under a First Amendment approach, the University is not restricted to just these narrow situations for taking an adverse action. Under the First Amendment approach the university can act for <u>any</u> reason so long as it is not in retaliation for speech. This distinction is crucial: tenure means that a very narrow set of circumstances will be sufficient for terminating a faculty member; a First

Amendment approach means that a virtually limitless set of circumstances will be sufficient for terminating a faculty member, so long as the action is not a reprisal for the content of teaching or writing. For example, under the First Amendment approach, a university might try to fire a tenured faculty member for insubordination if he or she disobeys an order from a senior administrator. Under the tenure system, only in the most extreme cases could this be cause for termination.

Moreover, the First Amendment approach used to protect government employees would not even provide adequate safeguards for faculty members against reprisals for speech activities. If the government employee precedents were applied to faculty members, then only speech about matters of public concern would be protected.[35] Currently, all speech by tenured faculty members -- whether or not of public concern -- is protected from being the basis for reprisals unless it meets the narrow standard for cause. Moreover, the requirement that the speech be of public concern can be questioned because the First Amendment generally has no such limitation. In Connick, for example, the Court found that the employee's speech was not of public concern even though it pertained to the functioning of an important public office.

Even more importantly, under current law, the government may act against an employee because of his or her speech if it demonstrates that, on balance, the expression interfered with the efficient functioning of the office. Under this approach, a faculty member could be terminated if the university demonstrated that the speech was disruptive and that, on balance, the university's interests outweighed the faculty member's interests in academic freedom. This is far less

[35]See, e.g., Connick v. Meyers, 461 U.S. 138 (1983), discussed above at text accompanying notes 24-26.

protection than faculty members have under the tenure system. Now a faculty member can be terminated only under the restrictive standards found in the definition of "cause." But under the First Amendment approach, the university would just have to demonstrate that, on balance, its action was justified.

This simple balancing test -- weighing speech interests against the government's interest in administrative efficiency -- can be questioned as failing to place sufficient weights on the free speech side of the scale. The balance would seem to be specific to each case as to whether the university's interest in that instance outweighed the faculty member's speech interests. But the proper balance should be more general, weighing the overall effect on academic freedom of allowing the termination for the speech against the university's interests.

At the very least, a balancing test as used in Pickering and its progeny would leave faculty members uncertain as to when their speech would be protected and when it could be the basis for adverse employment actions. The high degree of protection embodied in tenure would be lost. Many faculty members might be chilled by this uncertainty and academic freedom would be seriously compromised.

Thus, protecting faculty member's speech through a First Amendment approach would provide neither the procedural nor the substantive safeguards accorded by tenure. The First Amendment approach seems far inferior as a way of ensuring academic freedom.

III. Can Academic Freedom Be Adequately Protected Through Long-Term Contracts and Grievance Procedures?

An alternative possibility for safeguarding academic freedom would be to provide faculty members with long-term contracts, such as for five or seven years, and require that the university succeed in grievance proceedings in order to terminate a faculty member. In a recent article, Professor J. Peter Byrne has advocated this approach.[36] In fairness to Professor Byrne, he does not propose that this replace the institution of tenure. Rather, he argues for this as an alternative in those universities which do not have a tenure system. However,

[36]J. Peter Byrne, Academic Freedom Without Tenure?, American Association for Higher Education, Working Paper Series (1997).

Professor Byrne concludes that these "measures would fully protect the familiar terrain of academic freedom."[37]

It is this conclusion that I wish to challenge. I focus on Professor Byrne's proposal, in part, because it is representative of this approach, and, in part, because it is a particularly well conceived version of this approach.

A. The alternative described

Professor Byrne's proposal seeks to protect academic freedom through the combination of a number of devices. He suggests that faculty contracts should make explicit the protection of academic freedom. He says that "an institution that wants to respect academic freedom should bind itself to do so through an explicit promise that it will not violate the academic freedom of the faculty."[38] In fact, Professor Byrne offers a model definition for faculty contracts. He offers the following proposed language:

> "Academic freedom includes the following rights and duties:
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> 1) Faculty members have the right to pursue chosen research topics and to present their professional views without the imposition or threat of institutional penalty for the political, religious, or ideological tendencies of their scholarship, but subject

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[37] Id. at 13.

[38] Id. at 4.

to fair professional evaluation by peers and appropriate institutional officers.

2) Faculty members have the right to teach without the imposition or threat of institutional penalty for the political, religious, or ideological tendencies or their work, subject to their duties to satisfy reasonable educational objectives and to respect the dignity of their students.

3) Faculty members may exercise the rights of citizens to speak on matters of public concern and to organize with others for political ends without the imposition or threat of institutional penalty, subject to their academic duty to clarify the distinction between advocacy and scholarship.

4) Faculty members have the right to express views on educational policies and institutional priorities of their schools without the imposition or threat of institutional penalty, subject to duties to respect colleagues and to protect the school from external misunderstandings.[39]

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[39] Id. at 6.

Professor Byrne proposes that "an institution provide a fair internal-appeals mechanism to challenge adverse personnel decisions on the ground that they violate the faculty member's academic freedom."[40] He suggests a grievance system where the majority of the appeals panel should be professors and where the hearing procedure "make extensive use of the familiar legal devices of the prima facia case and shifting burdens of proof."[41] Additionally, Professor Byrne recognizes the importance of long-term contracts as part of any alternative to tenure.[42]

Although Professor Byrne concludes that this alternative could suffice in protecting academic freedom, he also acknowledges that this could vary depending on the institution. He notes that "[t]he benefits to academic freedom that will accrue by replacing tenure with the described procedures will vary depending on the mission of a particular school, and the administrative costs of adopting the procedures could be high, particularly the extensive

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[40] Id. at 7.

[41] Id. at 8.

[42] Id. at 11. Indeed, Professor Byrne notes that "[i]t is not surprising that most alternatives to tenure embrace long-term contracts." Id.

procedures required for not renewing a contract. The administrative costs will not be as high, of course, as they would be in any individual case of dismissing a tenured professor."[43]

B. The inadequacy of Professor Byrne's proposal

Professor Byrne's proposal provides neither the substantive nor the procedural protections contained in the current tenure system. From a substantive perspective, Professor Byrne's approach would accord faculty members much less protection than that provided by tenure. Each part of his statement of academic freedom gives the university substantial discretion to be able to dismiss the controversial teacher or scholar. The first part of his definition, as quoted above, says that faculty members have freedom to engage in their chosen research "but subject to fair professional evaluation by peers and appropriate institutional officers." This language would seemingly open the door for university officials to exercise control over faculty members' research. This permits university administrators to exercise control over faculty members' research and provides no limits on the permissible grounds for evaluation other than the very vague word, "fair."

The second part of the definition protects the right of faculty members to teach without the imposition or threat of institutional penalty, "subject to their duties to satisfy reasonable educational objectives and to respect the dignity of their students." The latter phrase is obviously vague and certainly provides less protection than the current definition of cause. Conceivably,

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[43] Id. at 14.

any unusual method of teaching or discussion of any controversial viewpoint could be seen as showing insufficient respect for the "dignity of the students."

More seriously, the third part of Professor Byrne's statement only provides protection for speech on "matters of public concern" and protects faculty members' speech only if they obey the "distinction between advocacy and scholarship." As expressed above, there is no reason why protection of speech should be limited to matters of public concern. Furthermore, a distinction between advocacy and scholarship, even if it exists, is incredibly difficult to define and apply. Undoubtedly, universities would attempt to use this language to terminate faculty members taking unpopular positions claiming that the writings were "advocacy" and not "scholarship." In many fields, faculty members take and defend positions in their scholarship. This is most likely to be dismissed as "advocacy" when the viewpoint is unpopular or the reader disagrees with the author.

The fourth part of Professor Byrne's definition protects the right of the faculty member to criticize the university "subject to duties to respect colleagues and to protect the school from external misunderstandings." The latter phrase is very troubling. Universities could use it to discipline faculty members who are perceived as embarrassing the university in the eyes of the public. Faculty members who take unpopular positions and especially those who criticize the university's administration can be easily disciplined under this standard for failing "to protect the school from external misunderstandings." A faculty member who publicly criticized the university and embarrassed it might be terminated for failing to adequately prevent "external misunderstandings." At the very least, the vague language of the rule likely would chill faculty members from engaging in public criticism of their university and risking punishment under this rule.

Comparing Professor Byrne's proposal as a whole to tenure, it provides far less substantive protection. Under tenure the university may terminate a faculty member only under the few circumstances that constitute cause. Under Professor Byrne's approach, the university could terminate a faculty member under any circumstances, except for those delineated under his statement of academic freedom. Even these are far less protective than tenure, for as explained above, each has vague language that could be exploited by the university.

From a procedural perspective as well, Professor Byrne's proposal is inferior to the current tenure system. Five year contracts are no substitute for a lifetime position. Knowing that their employment is uncertain, some faculty members are much less likely to take positions that are unpopular or that might anger university officials. At the very least, in the last year or two of a contract, a faculty member facing a renewal decision might behave much differently than one who has a lifetime position.

Professor Byrne recognizes that his approach provides less in the way of procedural protection than the tenure system. He writes that "[u]nder the described procedures, the school would need to be prepared only to prove that it did not act for forbidden motives. Not only would the institution's range of action be broader, its burden of proof would be lighter, and procedural hurdles lower."[44] The result inevitably would be that faculty members would feel less protected and academic freedom would suffer.

Conclusion

In this paper, I have argued that the strongest alternatives to tenure would be inadequate in safeguarding academic freedom. I have not focused on the benefits of these alternatives in

terms of increasing the accountability and performance of faculty members. Nor have I considered whether these benefits might be gained through other mechanisms within the tenure system. Rather, my focus has been limited to arguing that it would be a serious mistake to see the alternatives to tenure as adequate in protecting academic freedom for faculty members. The reality is that a university that seeks to abolish tenure and replace it with an alternative is doing so precisely to provide less job security for faculty members. Inevitably, this will have a detrimental effect on academic freedom.

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[44] Id. at 15.