

**Academic Freedom and Responsibility Symposium**

**\*573 ALTERNATIVES TO TENURE**

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Martin Michaelson's proposed Academic Freedom Policy and Procedures deserves serious consideration for several reasons. For one, Mr. Michaelson is a thoughtful and experienced adviser on faculty personnel policies, who has contributed substantially to our understanding of the elements essential to protection of academic freedom. Moreover, the specific proposal that he advances here recognizes the precepts of academic freedom, especially for those faculty members who do not hold de jure tenure. Perhaps most important, the need to address these issues, and to explore available options, gains ever mounting urgency from the growing number of university teachers, many of them full-time teachers who do not hold tenure and who have no serious prospect of ever attaining it. [\[FN1\]](#) Thus, all who are affected by, and who care deeply about, faculty personnel policies and procedures should value Mr. Michaelson's most recent contribution. The current debate over tenure and alternative faculty personnel systems deserves all the time and attention it can attract.

Nonetheless, one who is as deeply committed as I am to the system of faculty tenure in American universities is likely to have grave misgivings about any proposal that could, even if inadvertently, undermine or weaken the safeguards of tenure. Such misgivings are of several distinct types. The first concern is that even a system of formal, legally recognized, tenure does not always adequately protect academic freedom. The half-century anniversary of the start of McCarthyism as an American phenomenon offers a sobering occasion to reflect upon the frailties of tenure, even at some of the most seemingly secure universities. It is well to recall the progressive purge of nearly sixty senior professors, starting with three members of the University of Washington faculty discharged summarily in 1948, on through three others dismissed by the University of Michigan several years later, and through a litany of truly horrible events for the American professorate. [\[FN2\]](#)

What makes these memories so poignant, even today, is that appalling realization that most of the faculty firings of the fifties reflected nothing firmer than suspicion of disloyalty (based typically on inference or conjecture), or conscientious refusal to reveal political associations or activities to external investigatory bodies. Such a sobering reminder of the inherent limitations in even the best of tenure systems should give us pause, even in these calmer and much more secure times, before embracing any changes that might weaken or dilute the safeguards which tenure affords.

**\*574** Many critics of tenure suggest that McCarthyism is so long past, and is so dissimilar to anything of recent memory, that current thinking about tenure should disregard such ominous antecedents. Apart from the question whether such terrible times could ever recur--a prospect no responsible policy-maker can ever gainsay--much more modern events illustrate the value of a system that protects an outspoken professor's freedom. Recall three events of the 1990's, hardly a time of witch-hunting or red-baiting.

When Professor Lani Guinier was denied appointment as the U.S. Justice Department's chief civil rights officer because of controversial views she had expressed in law review articles about voting districts, she was able to resume her tenured professorship at Penn, and later moved to Harvard, where she has continued to challenge complacent assumptions about voting patterns. [FN3] When Professor Joycelyn Elders was fired as the U.S. Surgeon General, because of public statements she had made about teen sex education and especially about masturbation, she was welcomed back to her tenured post at the University of Arkansas, from which she has continued to speak out on important national health issues. [FN4] And when Professor Christina Jeffrey was dismissed by Speaker Newt Gingrich as U.S. House Historian, solely because in evaluating summer workshop proposals she had suggested the value of balance in treating the Holocaust, she promptly reclaimed her tenured position at Kennesaw State University and continued to challenge conventional assumptions about modern German history. [FN5] These are cases of the 1990's, not of the 1950's. The professors protected by tenure in these instances were, of course, threatened not by their own institutions, but rather by external political forces. Yet there is little question that, even though all three might have been welcomed back to campus after offending official Washington, without faculty tenure others who held or wished to express unconventional views would have been less ready to follow their footsteps. So we may assume, at our peril, that tenure is valuable to protection of academic freedom and free inquiry only in times of crisis.

Our current focus is chiefly on the needs and interests of those faculty who do not have tenure. There have always been substantial numbers of university teachers without tenure. That group includes, of course, all who are on the tenure track but have not yet achieved tenure or reached the stage at which a tenure judgment must be made. It also includes visitors, full-time university employees who teach substantially less than half time, and many part-time faculty who hold adjunct and lecturer appointments and who would not be considered for tenure unless their time commitment substantially increased.

**\*575** Several points need to be underscored about the current status of those faculty who lack tenure. Most basically, the tenure system is the vital source of protection both for those who have and those who have not yet achieved tenure. For those who are serving a term or probationary period on the tenure track, safeguards comparable to those afforded their already tenured colleagues preclude the termination of such an appointment before its stated expiration. A premature cancellation, even if described as a "non- reappointment" or given some other seemingly benign designation, is viewed by the American Association of University Professors (AAUP) and most responsible institutions as a dismissal. [FN6] Only those extreme conditions described below, would warrant such a termination. Thus in most respects the system of faculty tenure protects as much those who are seeking but have not yet attained it as those to whom it has already been granted.

The rub comes with respect to those who are not serving and never will serve, even though they may teach full time, on a tenure track. Central to discussions of tenure alternatives is an assumption that institutions may create full-time teaching appointments that will never lead to tenure and that will not even compel consideration of tenure status at the end of a probationary period because those who hold such appointments are never on "probation." Policies of the AAUP, most notably, and those of many universities as well, have always insisted that initial full-time teaching appointments be of limited duration, followed by a collegial judgment about tenure and continued service. [FN7]

That limitation--the maximum probationary period--is typically seven years, though some quite reputable institutions have varied the number slightly (the University of California has long had an eight-year probationary period). Growing numbers of medical schools with faculty approval (and tacit AAUP blessing) have extended to ten years the period for those who must excel in teaching, research, and clinical patient care as well as service. [FN8] Such policies are rightly viewed as forcing the choice between "up" and "out." For those probationary faculty who do not merit permanent appointments when the probationary period ends, the only legally possible way to remain within the institution is by assuming a primarily non-teaching

position.

While such policies may seem draconian, and may on occasion limit flexibility both of the institution and of the individual, they are vital to the integrity of the faculty personnel process. The requirement that so stark a judgment be made relatively early in a university teacher's career provides the most reliable form of quality control, an element that is almost inevitably lacking in non-tenure systems such as those that rely mainly on renewable \*576 long-term contracts. To the extent that tenure alternatives presuppose an indefinitely extendable teaching appointment without consideration of tenure--no "up or out" mandate, in short--they lack both the procedural safeguards of the tenure judgment and the substantive assurance of demonstrated academic and scholarly promise on the part of those who survive that process.

Equally troubling, contract-renewal systems often lack rigorous safeguards for the non-renewal of long-time university teachers. And to the degree that some such proposals, like Mr. Michaelson's, do recognize the importance of due process to protect senior faculty from the pique or bias of colleagues or political reprisal by trustees, they tend to become so tenure-like that a skeptic might well ask, "why not just call it tenure?" Indeed, one of the strengths and virtues of the Michaelson proposal is in precisely this area.

If a professor whose academic freedom has been threatened or abridged enjoys a right of appeal and review by a panel of peers, which any reputable institution would presumably provide, the potential benefits of avoiding the perceived rigidities of tenure would seem to diminish in direct proportion to the enhancement of such safeguards. Quite simply, one cannot have it both ways. The more a system looks and functions like tenure, and the more it actually protects academic freedom, the less it creates the sort of flexibility that many find appealing about tenure alternatives.

Such proposals do, however, display one commendable quality that should not be lost in the debate. If they are less solicitous of the academic freedom of those who would be tenured or tenure-track simply because they do not confer tenure, they may at the same time be more protective of many faculty who fall outside the tenure-bearing matrix. Because such proposals are not tied to the formal status of tenure or tenure track, they might well do a better job of safeguarding the outspoken part-timer or non-teaching professional who is too often off the screen or below the radar of conventional tenure systems. Mr. Michaelson should be commended for his evident solicitude for a larger slice of the academic community, and his appreciation that such groups may encounter genuine academic freedom problems. While the broader scope of potential protection afforded by such proposals does little to vindicate them at the core, it certainly establishes credibility at the margin.

A third concern about such proposals relates to the current context within which they have claimed attention and in some quarters have gained popularity. Mr. Michaelson rightly observes that recent years have brought unprecedented ambivalence about tenure, especially among younger faculty. [FN9] Such uneasiness naturally creates receptivity to alternatives. One would expect that mounting dissatisfaction would also spawn major change in personnel policies. Yet, curiously, such change in actual institutional policy has lagged far behind what one would have predicted a decade ago, when a surprising number of institutions responded to a Carnegie Foundation survey that they were giving "some consideration" to altering or even abolishing tenure.

\*577 Little of that sort has in fact happened during the decade; if anything, practice has even moved in the opposite direction. Of three institutions which would, a decade ago, have been viewed as poster children for non-tenure alternatives, two (Evergreen State University in Oregon [FN10] and the University of Texas-Permian Basin [FN11]) have embraced faculty personnel systems so closely resembling tenure that they clearly belong today on the other side of the ledger. Only Hampshire College, of the original three, remains fully committed (apparently to the complete satisfaction of its faculty) to long-term renewable contracts as a tenure alternative. [FN12]

Meanwhile, the experience of several institutions at which non-tenure alternatives surfaced during the last decade has not been wholly reassuring. Central Arkansas University's invitation to faculty to exchange tenure for substantially increased salaries received much national attention, especially among tenure critics, but few if any takers on campus. Of two candidates to whom the trade-off was specifically offered, one eventually accepted, while the other declined, observing that "tenure offers prestige" and remarking simply that tenure was "the way it works" at a university. [\[FN13\]](#)

Meanwhile, the Central Arkansas proposal has drawn sharp rebukes from staunch tenure defenders; Professor Robert Gorman, who has been AAUP President and has chaired its Committee A, terms it a "horrific proposal." In his view,

Faculty members should not be encouraged, or permitted, to barter [the larger social end that tenure serves] for cash, particularly when they are likely to feel that their academic freedom will never be curtailed and that the trade-off is therefore of little consequence. All too often, experience shows, that will prove not to be the case. [\[FN14\]](#)

The experience at Florida Gulf Coast University, site of the other widely heralded experiment, seems to inspire even less confidence. When this new campus opened several years ago, it had two classes of faculty--those who brought with them the academic tenure they had held on the parent campus of the University of South Florida, and a majority of new arrivals who accepted term contracts in lieu of the tenure that was not available to them under the new structure. Three years later, nearly a quarter of the charter faculty had departed, most voluntarily, and some of them because of concern \*578 over academic freedom. At least three of the founding faculty had been denied reappointment despite positive evaluations; two of those three argued that disagreements with administrators had caused their departure. [\[FN15\]](#)

The absence of formal protection for academic freedom at Florida Gulf Coast creates what the president of the faculty senate calls "an unstable environment that is unhealthy." [\[FN16\]](#) Faculty groups have pressed for changes in the personnel structure--specifically, to add a "rolling horizon" to the contractual structure, amounting in effect to an automatic renewal of the very type that, as one skeptical Regent observed, would deprive the institution of the flexibility the plan was supposed to create [\[FN17\]](#)--indeed, one might add, would actually leave Florida Gulf Coast with less flexibility than a regular tenure system provides, or the worst of both worlds.

Finally, among the alternatives, mention must be made of Bennington College. Several years ago, Bennington's president, Elizabeth Coleman, earned attention and in some quarters praise for effectively eliminating faculty tenure and substituting term appointments even for quite senior teachers. AAUP censure, condemnation by other faculty groups, and protracted litigation, ensued. All was fairly quiet on this bucolic Vermont campus for several years, suggesting that the new structure might be workable, even if clearly not optimal for the remaining faculty. But things changed when, in April 2000, a faculty critic of the administration was fired during the semester and a year and a half before the end of his contract term, allegedly because he had been tardy in submitting his student evaluations. (A later check showed that over a third of fall semester appraisals were not in on time.)

Since he had been Bennington's only teacher of philosophy, his hasty departure--he was given three days to clean out his office and his college apartment--left that vital subject uncovered in the College curriculum. Meanwhile, the contracts of several other administration critics were not renewed this past year, though under less widely publicized conditions. Some Bennington faculty generally supported the administration's course, and even its handling of specific cases, including the cause celebre in philosophy, noting that chronic tardiness in filing grades is especially inimical to student welfare at a small liberal arts college like Bennington. [\[FN18\]](#)

There are doubtless other examples of alternatives to tenure. One that seems to

have worked reasonably well for three decades is that of Hampshire College, which has never offered tenure but has relied entirely on long-term renewable faculty contracts. Hampshire is reputed to have denied reappointment or renewal beyond the seven-year period that would require an "up or \*579 out" decision at most tenure-track institutions. Yet there is no evidence that abridgment of academic freedom, or denial of due process, has ever been validly charged against Hampshire, and there has been no formal AAUP investigation, much less censure. (Such a non-reappointment beyond the seventh year is not vulnerable, under AAUP standards, at Hampshire so long as the process comports with the College's own regulations, and so long as the basis for such adverse action would not be deemed violative of academic freedom within a conventional tenure system.)

Hampshire thus remains the shining example--perhaps, indeed, the only example--of an institution at which academic freedom and due process appear to have been respected despite the absence of a formal system of faculty tenure. To understand better this anomaly, it would be helpful to know more than we do about the unique conditions under which Hampshire was founded--through a consortium of the four existing baccalaureate institutions in the central Connecticut River Valley, all of which retain traditional tenure systems while sharing faculty time and other academic resources with their new neighbor.

We do know at least two highly significant things. First, from the very start, faculty members joined Hampshire without any expectation of tenure, so that those for whom formal protection of academic freedom would have seemed essential may simply have chosen not to teach there. Second, we also know that a generation of Hampshire presidents and governing boards has insisted on protecting academic freedom as fully without tenure as have their colleagues and counterparts at Amherst, Mount Holyoke, Smith, and the University of Massachusetts. What all this tells us is that protecting academic freedom without tenure is not categorically impossible, however unique the Hampshire model may be. The Hampshire experience, taken in the context of Bennington and Florida Gold Coast, also tells us that a faculty personnel structure or system like that which Mr. Michaelson offers is neither necessary nor sufficient as a guarantor of academic freedom.

Finally, if one concedes that tenure is not perfect--and to claim perfection, even for an unrequited defender, would be myopic--it is fair to ask how it could be made better. For starters, the Michaelson proposal contains several provisions that might usefully find their way into a tenure policy. Certain of the recommended procedural safeguards go well beyond what many institutions currently afford, though not beyond the measures envisioned in, for example, section 5 of the AAUP's Recommended Institutional Regulations. [FN19] Others of the Michaelson provisions, reflecting as they do the insight and experience of a seasoned legal adviser to major universities, deserve careful consideration by institutions that may simply be anxious to identify novel ways of expressing accepted precepts and principles.

Second, the role and function of faculty tenure, including its central values, should be better understood as part of the case for its protection and preservation. \*580 Increasingly these days one hears from people who should know better--even some within the academic community--that tenure exists to protect "job security" or salaries, or perquisites or pensions. Too easily lost in such casual assumptions is the central fact that tenure serves first and foremost to protect free expression and freedom of inquiry within the academic profession, though it may incidentally (and not insignificantly) serve that end by preventing the arbitrary forfeiture of positions and benefits. But that is very different from asserting that the main function of tenure is to give college professors a high level of job security (which, the critics will often add, exceeds the security to be found in other professions). Security is of course hardly irrelevant, but to recognize that fact does not, and should not, elevate employment security to the level of paramount value.

Third, it is crucial to recognize that tenure, even at its most secure, is not an immutable guarantee of lifetime employment. The termination of tenured appointments may occur in several ways, including but not limited to dismissal for cause--a severe sanction, imposed infrequently, but probably (if not demonstrably) more often

than critics of tenure would admit--and which is made unnecessary in a far greater number of cases where a faculty member's conduct would clearly warrant dismissal for cause, but an alternative course such as resignation or early retirement intervenes and moots the formal charges.

Proof of a medical disability warrants termination of a tenured appointment if it demonstrates (in AAUP language) "that the faculty member cannot continue to fulfill the terms and conditions of the appointment"--a properly strict standard, but one that is not impossible to meet. [FN20] Genuine financial exigency, reviewed by a faculty body, may also warrant termination of tenured appointments; while the standard is certainly not one to be invoked casually, proof of "exigency" does not demand that the institution have declared bankruptcy, or forfeited all its material assets, or become unable to meet the next payroll. [FN21]

Finally, there is that basis for termination which is probably least well understood and potentially subject to greatest abuse--the discontinuance for valid academic reasons of a program or department where exigency is not a factor but rather the decision is driven by (again quoting the AAUP language) a "judgment that the educational mission of the institution as a whole will be enhanced by [such] discontinuance." [FN22] Here again the procedures are appropriately rigorous, but they can be and have in a number of instances been met to the full satisfaction of the AAUP and other faculty organizations. In each of these ways, unrelated to personal "cause," institutions have long had the capacity to terminate tenured appointments. Thus the assertion that tenure represents an immutable guarantee of academic employment, regardless of the gravity of personal transgression or institutional need, is not only untrue but is also irresponsible.

**\*581** Fourth, we easily forget that tenure is but one element of a sound faculty personnel policy. As such, it should not be viewed out of context. The process by which tenure may be denied, or tenure-track appointments not renewed, is as crucial to the protection of academic freedom as are the limits on ways by which and reasons for which a tenured professor may be dismissed. For if an outspoken or unpopular teacher could simply be denied continuing appointment for any reason, or for no reason, substantive limits on institutional policy would have considerably diminished value. Thus it was crucial three decades ago for the AAUP to promulgate a policy and procedure for the nonrenewal of nontenured appointments that, on one hand, recognize that during a term a nontenured person enjoys essentially the same level of protection as does a tenured colleague, but on the other hand that the decision not to renew or extend such an appointment is quite different from an action to dismiss an already tenured professor. [FN23]

While basic precepts of academic freedom apply at both stages, they apply in different ways. Establishing that an unexplained denial of reappointment reflected political animus, or desire to suppress criticism of the administration, will perforce be more difficult, and in some situations may even be impossible if the decision-maker refuses to state any reasons for the adverse action and if institutional policy does not require any explanation. In any event, the faculty member is likely at this stage to bear the burden of proof, where a person facing dismissal may insist that the administration bear that burden.

Finally, as any good university attorney like Mr. Michaelson well recognizes, the importance of clearly stated and fair campus procedures can hardly be overstated in the disposition of academic personnel issues. Nor can the importance of consistently applying those procedures be emphasized unduly; lay persons understandably make the mistake of assuming that when the merits of a case seem clear--when, for example, the case to be made for suspension or dismissal of a faculty member seem beyond doubt--summary action is justified. In fact, as lawyers well know, precisely the opposite view should prevail: it is the easy case where procedures must be scrupulous, for in the hard case the temptation to relax and use short-cuts is far less likely to afflict decision-makers.

On balance, while these are very anxious times for proponents and defenders of tenure, they are also paradoxically good times for the preservation and perpetuation of the system of tenure. Often unfairly indicted for a variety of failings--some of

which could not possibly be charged to a faculty personnel system [FN24]--tenure remains firmly in place at all but a handful of baccalaureate and graduate degree-granting institutions, and especially so at the nation's pre-eminent research centers. Yet, the quest for a different, and \*582 possibly even better, way of protecting academic freedom and free inquiry on the college campus remains a vital and lively one. Perhaps, for the moment, it is enough to paraphrase Winston Churchill's sage view of democracy among the world's political systems by remarking that tenure is the worst of faculty personnel policies, save for all the others.

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[FN1]. See Courtney Leatherman, Part-Timers Continue to Replace Full-Timers on College Faculties, CHRON. HIGHER EDUC., Jan. 28, 2000, at A18.

[FN2]. See ELLEN SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES 94-112 (1992).

[FN3]. See Richard Chacon, Guinier Named to Law Faculty at Harvard; Move Addresses Criticism on Diversity at School, BOSTON GLOBE, Jan. 24, 1998, at A1.

[FN4]. See Sean Harrison, Clamor Follows Elders Home to Arkansas Furor Dissipating as Doctor Resumes Teaching, DALLAS MORNING NEWS, Jan. 22, 1995, at 39A.

[FN5]. See Editorial, Conduct Unbecoming a Speaker, HARTFORD COURANT, Jan. 13, 1995, at A14.

[FN6]. See Academic Freedom and Tenure: University of Southern California, ACADEME, Nov.-Dec. 1995, at 47-48.

[FN7]. See generally American Association of University Professors, 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments, ACADEME, May-June 1990, at 37, reprinted in POLICY DOCUMENTS AND REPORTS 3 (8th ed. 1995).

[FN8]. See Report: Tenure in the Medical School, ACADEME, Jan.-Feb. 1996, at 45.

[FN9]. See, e.g., Valerie Strauss, The Trouble With Tenure, WASH. POST MAG., May 28, 2000, at 16.

[FN10]. See Is Tenure Evergreen?, ACADEME, Nov.-Dec. 1996, at 10-11.

[FN11]. See Mary Crystal Cage, American Association of University Professors Censures 3 Colleges, CHRON. HIGHER EDUC., June 21, 1996, at A13.

[FN12]. See Robin Wilson, A New Campus Without Tenure Considers What It's Missing, CHRON. HIGHER EDUC., May 12, 2000, at A19.

[FN13]. See Report: Academic Freedom and Tenure: University of Central Arkansas, ACADEME, Mar.-Apr. 2000, at 112. The specific and primary personnel matter on which the AAUP investigation focused was settled soon after publication of the report. See Robin Wilson, U of Central Arkansas Strikes Settlement with Growling Professor, CHRON. HIGHER EDUC., May 16, 2000. Other issues remained unsettled, however.

[FN14]. Report: Academic Freedom and Tenure: University of Central Arkansas, ACADEME, Mar.-Apr. 2000, at 112, 113 (quoting HARVARD MAGAZINE, Nov.-Dec. 1997).

[FN15]. See Robin Wilson, A New Campus Without Tenure Considers What It's Missing, CHRON. HIGHER EDUC., May 12, 2000, at A18.

[FN16]. Id. at A19.

[FN17]. See id.

[FN18]. See Robin Wilson, Bennington President Fires a Professor Who Criticized Her Fiercely and Openly, CHRON. HIGHER EDUC., Apr. 28, 2000, at A20. For an earlier report that led to AAUP censure, see Report: Academic Freedom and Tenure: Bennington College, ACADEME, Mar.-Apr. 1995, at 91.

[FN19]. See American Association of University Professors, Recommended Institutional Regulations on Academic Freedom and Tenure, ACADEME, Jan.-Feb. 1983, at 15a, reprinted in POLICY DOCUMENTS AND REPORTS, supra note 7, at 21, 26-27.

[FN20]. Id. at 25-26.

[FN21]. See id. at 23-25.

[FN22]. Id. at 25.

[FN23]. See American Association of University Professors, Statement on Procedural Standards in the Renewal or Non-Renewal of Faculty Appointments, ACADEME, Jan.-Feb. 1990, at 48, reprinted in POLICY DOCUMENTS AND REPORTS, supra note 7, at 15.

[FN24]. See The Incredible Shrinking Faculty--An Interview With Lawrence Poston, ACADEME, May-June 2000, at 26, 26-29.

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