RETRENCHMENT

STEVEN G. OLSWANG*
ELLEN M. BABBITT**
CHERYL A. CAMERON***
EDMUND K. KAMAI****

> Fiscal 2003 . . . was a grueling year . . . . Thirty-seven states were forced to reduce already enacted budgets by nearly $14.5 billion . . . the strategy has remained the same in almost every state – across-the-board, targeted reductions to programs. Few states have succeeded in exempting high priority programs such as K-12 education, Medicaid, higher education, public safety, or aid to towns and cities.[1]

I. OVERVIEW

The economic forecast for public and private institutions of higher education is grim. State revenues have declined with the dramatic slowdown of the economy over the last two years. Indeed, many states have implemented budget reductions. Since September 11, 2001, financial markets have further deteriorated and endowments, upon which most private and many public institutions depend, have declined precipitously.[2] At the same time, tuition and fees continue to increase,[3]

* B.A., Northwestern University, 1968; J.D., University of Illinois, 1971; Ph.D. Higher Education Administration, University of Washington, 1977. Vice Provost; Professor, Educational Leadership and Policy Studies, University of Washington.

** B.A., Vanderbilt University, 1977; J.D., Northwestern University School of Law, 1980. Ms. Babbitt served as counsel to Mundelein College and Loyola University in the *Gray v. Mundelein College* litigation, which is discussed in this article. The analyses of those cases, as well as the case analyses discussed in this article, represent the views of the authors alone.

*** B.H.S., University of Kentucky, 1977; M.S.Ed., University of Kentucky, 1978; Ph.D, University of Washington, 1986; J.D., Seattle University, 1994. Associate Vice Provost; Professor, School of Dentistry, University of Washington.

**** B.A., University of Washington, 1969; B.A., University of Washington, 1971; M.A., University of Washington, 1997; J.D., Seattle University, 2001. Legal Research Assistant to Vice Provost, University of Washington.

1. Press Release, National Governors Association, Fiscal Survey of States: Tough Economic Times Remain for States (June 26, 2003), *available at* http://www.nga.org/nga/newsRoom/1,1169,C_PRESS_RELEASE^D_5631,00.html. *See also* David W. Breneman, *For Colleges, This is Not Just Another Recession*, CHRON. HIGHER EDUC., June 14, 2002, at B7; John L. Pulley, *Well-Off and Wary: Even Small, Wealthy Private Colleges Like Oberlin are Feeling the Economic Pinch*, CHRON. HIGHER EDUC., June 21, 2002, at A27.

2. John L. Pulley & Anne Marie Borrego, *Wealthiest Colleges Lost Billions in Endowment Value in Last Year*, CHRON. HIGHER EDUC., Oct. 19, 2001, at A24; Martin Van Der Werf, *Bond*

while enrollments continue to shift toward career-oriented educational programs.

Together, these developments have placed intense pressure upon educational institutions to reexamine their rules on retrenchment, program elimination, and financial exigency. The severity of budgetary difficulty or extent of necessary programmatic realignment dictates the appropriate retrenchment strategy. In increasing order of severity, the strategic options include: program reduction; program elimination; declaration of financial exigency; merger, affiliation or consolidation; and institutional closure. Each such option has a profound effect upon faculty, staff, students and the entire educational community. Consequently, an institution must carefully consider the contractual and constitutional rights of its various constituencies before selecting any specific retrenchment option.

In higher education, an institution's public or private status is usually the critical factor in analyzing faculty and student rights and determining the institutional processes that may be triggered in retrenchment. In all cases, however, the fundamental source of authority, and the first place to look, is the institution's own rules and regulations. An institution's policies frame the relationships among the faculty, staff, students, and institution. Historically, courts have concluded that some or all such policies constitute, or at least supplement, the contract between the institution and its faculty.[4]

Institutions continue to fare relatively well in faculty lawsuits challenging retrenchment decisions. Typically, a court will discern the relevant institutional policies, determine whether they were applied in the particular situation and, if applied, honor the institution's decision. Courts also evaluate whether public institutions have complied with constitutional and statutory requirements. Generally, an institution's retrenchment decision will withstand contractual, statutory and constitutional scrutiny as long as the institution has complied with all clearly stated rules.

Where an institution has not adopted rules specifically addressing its rights and responsibilities in retrenchment situations, however, courts often turn for guidance to custom and practice in the academic community, particularly the policies of the American Association of University Professors ("AAUP").[5] Deference to the policies of the AAUP can greatly complicate a retrenchment. In some circumstances, the AAUP's recommended policies or regulations substantially

Analyst Takes Darker View of Outlook for Public and Private Colleges, CHRON. HIGHER EDUC., Jan. 9, 2002; John L. Pulley, *College Endowments on Average Posted Decline in Value in 2001*, CHRON. HIGHER EDUC., Jan. 17, 2002.

3. Julie D. Bell & Demaree K. Michelau, *Making Colleges Affordable*, NATIONAL STATE LEGISLATURES, Oct.–Nov. 2001, at 19.

4. *See, e.g.,* AAUP v. Bloomfield Coll., 322 A.2d 846, 847–48 (N.J. Super. Ct. Ch. Div. 1974), *appeal after remand*, 346 A.2d 615 (N.J. Super. Ct. App. Div. 1975) (The Faculty Handbook is acknowledged to form "an essential part of the contractual terms governing the relationship between the college and the faculty."). *See generally* McConnell v. Howard Univ., 818 F.2d 58, 62–63 (D.C. Cir. 1987); Greene v. Howard Univ., 412 F.2d 1128, 1135 (D.C. Cir. 1969); Strass v. Kaiser Found. Health Plan, 744 A.2d 1000 (D.C. 2000).

5. The AAUP publishes these policies and guidelines in AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, POLICY DOCUMENTS & REPORTS (9th ed. 2001), known as the "Red Book."

constrain the institution's otherwise wide discretion under law to achieve its educational mission through restructuring. If an institution has incorporated any aspect of the AAUP's policies, and particularly if it has failed to adopt its own procedures governing retrenchment, it risks having a court impose the AAUP's recommended retrenchment procedures, which may severely restrict the institution's ability to respond to a legitimate financial crisis in the manner it may choose.

A second circumstance in which judicial deference is significantly weaker arises when an institution cannot demonstrate strict and neutral compliance with applicable substantive and procedural limitations. Particularly when evaluating the conduct of public institutions, courts continue to hold academic institutions to a high standard of compliance with procedural requirements. While courts will defer to truly "academic" decisions, they do not hesitate to review—and, if warranted, reverse—the manner in which an institution applies its procedures to selected individuals.

The lesson of the case law continues to be that institutions of higher learning have significant discretion to restructure, including the option to terminate the employment of tenured faculty members. The institution must, however, follow all applicable contractual and constitutional requirements—and must be able to prove that it did so.

II. RETRENCHMENT STRATEGIES AND THE CONSEQUENCES TO FACULTY EMPLOYMENT

American educators enjoy a wide range of faculty employment arrangements. The vast majority of appointments fall into one of the following categories: (a) term, (b) at will, (c) conditional continuous, and (d) tenure. The nature of the faculty appointment usually dictates the level of job security enjoyed by the faculty member and the procedures required for termination of the appointment.

Tenure, of course, affords its recipient the greatest level of job security available in higher education. According to the AAUP, this extraordinary grant is intended to ensure the recipient's academic freedom and economic security.[6] But tenure is not an invariable, unconditional guarantee of lifetime employment. As a contractual concept, tenure can mean whatever the parties—limited by the relevant institutional policies and statutes—define it to mean.

In practice, most institutional grants of tenure conform to the basic parameters articulated by the AAUP. The AAUP's *Recommended Institutional Regulations*

6. The *1940 Statement of Principles on Academic Freedom and Tenure* states that:

> 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.

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *1940 Statement of Principles on Academic Freedom and Tenure With 1970 Interpretive Comments*, *in* POLICY DOCUMENTS & REPORTS, *supra* note 5, at 3.

define "tenure" broadly, to include only four grounds for termination: (1) cause,[7] (2) financial exigency,[8] (3) program discontinuance,[9] and (4) physical or mental disability.[10] The second and third such grounds constitute the AAUP's acknowledgment that tenure may be terminated during necessary retrenchment. But despite this general acknowledgment, the AAUP has formulated recommended retrenchment policies which are so restrictive that most institutions legitimately opt not to model their retrenchment procedures upon them. Given this tension within the academic community about the appropriate process due in a retrenchment—and the prospect that any court asked to interpret a *silent* manual or handbook would be tempted to impose AAUP standards—institutions should anticipate the possibility of retrenchment before it occurs and adopt specific procedures addressing each possible scenario. Moreover, any institution beginning to consider retrenchment strategies should proceed with the utmost caution. No response plan motivated by budget constraints or enrollment shifts should be developed without careful consideration of the effect of each possible solution upon the employment rights of the faculty.[11]

More and more frequently, faculty employment policies are developed in the context of collective negotiations. Union contracts are an appropriate locale to articulate policies governing the impact of retrenchment decisions on faculty. The declaration of the need to retrench is a management prerogative and any limitations on employment security prompted by retrenchment declarations become part of the employment agreement. Collective bargaining contracts define faculty terms and conditions of employment which may not be altered during the contract term, even from statutorily authorized oversight. In *University of the District of Columbia*

7. The AAUP's Recommended Regulation 4(a) provides that: "Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may be affected by the institution only for adequate cause." *Id*. at 23.

8. Recommended Regulation 4(c)(1) provides that: "Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may occur under extraordinary circumstances because of a demonstrably bona fide financial exigency . . . ." *Id.*

9. Recommended Regulation 4(d) provides that: "Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may occur as a result of bona fide formal discontinuance of a program or department of instruction." *Id.* at 24.

10. Recommended Regulation 4(e) provides that: "Termination of an appointment with tenure, or of a probationary or special appointment before the end of the period of appointment, because of physical or mental disability." *Id.* at 25.

11. Several early articles have focused on issues in institutional retrenchment. Some of the more classic titles include: ACADEMIC PROGRAM CLOSURES: A LEGAL COMPENDIUM (Corrine A. Houpt ed., 1991); 79 NEW DIRECTIONS FOR INSTITUTIONAL RESEARCH, MANAGING WITH SCARCE RESOURCES (William B. Simpson ed., 1993); JAMES MARTIN & JAMES E. SAMUELS, MERGING COLLEGES FOR MUTUAL GROWTH: A NEW STRATEGY FOR ACADEMIC MANAGERS (1994); JAMES R. MINGLE, CHALLENGES OF RETRENCHMENT (1981); Robert D. Bickel, *Termination of Faculty: Current Legal Developments*, 11 NOLPE L.J. 1 (1983); Annette B. Johnson, *The Problems of Contraction: Legal Considerations in University Retrenchment*, 10 J.L. & EDUC. 269 (1981); Steven G. Olswang, *Facing Financial Distress*, 16 J. HIGHER EDUC. 145 (1987); Steven G. Olswang, *Planning the Unthinkable: Issues in Institutional Reorganization and Faculty Reductions*, 9 J.C. & U.L. 431 (1982).

Faculty Association v. District of Columbia Financial Responsibility and Management Assistance Authority,[12] despite congressional delegation to the Management Assistant Authority to keep the District's budget in balance, the court ruled that the Authority did not have the legal ability to abrogate existing Collective Bargaining Agreements between the University of the District of Columbia and its Faculty Association. The court held that the Collective Bargaining Agreement's reduction-in-force ("RIF") procedures could not be disregarded.[13]

Regardless of whether retrenchment policies are institutionally derived, or their impact on faculty are confirmed in collective bargaining agreements, those policies are binding on the institution. Institutions may select from an array of retrenchment options of varying severity.

A. Program Reduction

Program reduction is one of the least drastic retrenchment strategies employed in higher education. It usually involves elimination of courses, majors, or degree tracks, but not of an entire department or program. Ideally, program reduction will allow an institution to reallocate and reduce expenditures within a program (or across multiple programs) while preserving the essential aspects of a course of study. Usually, the reduction will require the nonrenewal or termination of one or more faculty positions in the affected academic program if resources are to be saved.

The AAUP does not officially identify "program reduction" as a basis for terminating tenure, and its statements on program discontinuance, a more drastic retrenchment strategy, indicate that the AAUP would definitely disapprove of the termination of a tenured faculty member consequent to a mere program reduction. The AAUP's potential opposition to any termination consequent to program reduction makes it all the more imperative that institutions specifically reserve any such right in the relevant employee contracts and articulate specific procedures to govern the program reduction process.

The experience of Bennington College offers an example of a hotly disputed decision to terminate tenured faculty members consequent to a program reduction. In 1994, student enrollment at the College was significantly lower than in previous years and the College's endowment was estimated to have dipped below $7,000,000.[14] The president and board adopted a response plan entitled "The Bennington College Plan for Change in Educational Policy and Reorganization of Instructional Resources and Priorities" ("the Plan").[15]

Pursuant to the Plan, the College informed twenty-seven faculty members that

12. Univ. of the D.C. Faculty Ass'n v. D.C. Fin. Responsibility and Mgmt. Assistance Auth., 163 F.3d 616 (D.C. Cir. 1998).

13. *Id.*

14. American Association of University Professors, *Academic Freedom and Tenure: Bennington College*, ACADEME, Mar.–Apr. 1995, at 91, 95.

15. *Id*. at 95.

their positions were being eliminated.[16] The College cited one of three reasons for each elimination: (1) the subject being taught was being eliminated in the reorganization; (2) the individual faculty member did not meet newly defined professional requirements; or (3) the individual faculty member's reappointment, though approved by the faculty committee, was being countermanded by the president on substantive grounds.[17] All terminated faculty members were offered either one-year terminal appointments or one year of severance pay in lieu of further employment.[18] The Plan also provided for the suspension of existing faculty governance practices and procedures, a structural reorganization of the faculty, and the complete elimination of tenure.[19]

Seventeen faculty members sued Bennington College.[20] Bennington College did not repudiate the Plan and, indeed, has continued to reshape the institution in accordance with its Plan. Nevertheless, after five years of litigation the College eventually agreed to a reported $1.89 million settlement with the litigants.[21] The AAUP also censured Bennington College in 1995, criticizing the termination of tenured faculty members pursuant to the Plan.[22]

Despite the AAUP's opposition to the concept of tenure termination during program reduction, courts have typically upheld such decisions against breach of contract and constitutional challenge. For instance, in the leading case of *Krotkoff v. Goucher College,*[23] eleven untenured and four tenured faculty members were selected for termination "largely on the bases of the dean's study of enrollment projections and necessary changes in the curriculum."[24] Although the College's policies did not explicitly authorize termination of tenured faculty in this situation,[25] the court found implicit in the Goucher College tenure contract the right to terminate tenured faculty consequent to a program reduction.[26] Also significant to the court's decision was Krotkoff's acknowledgment that her termination was legitimately motivated by the financial need to reduce programs, not by inappropriate considerations or bad faith.[27]

In *Gardiner v. Tschechtelin,*[28] all ninety-six faculty members of a financially troubled community college were given performance reviews as part of the

16. *Id.*

17. *Id.* at 91–92.

18. *Id*. at 92.

19. *Id*. at 92.

20. Jennifer Jacobson, *Bennington Settles With and Apologizes to Professors It Dismissed*, CHRON. HIGHER EDUC., Jan. 12, 2001, at A12.

21. *Id.*

22. American Association of University Professors, *Academic Freedom and Tenure: Bennington College*, ACADEME, Mar.–Apr. 1995, at 91; Report of Committee A, 1994–95, ACADEME, Sept.–Oct. 1995, at 47, 48–49; Eighty-first Annual Meeting, ACADEME, July–Aug. 1995, at 52, 55.

23. 585 F.2d 675 (4th Cir. 1978).

24. *Id.* at 677.

25. *See id*. at 678.

26. *Id*. at 682.

27. *Id*. at 681.

28. 765 F. Supp. 279 (D. Md. 1991).

College's desperate try to reshape itself and streamline its offerings.[29] Seven faculty members were rated as having "poor" performance; six had been tenured and all seven were slated for termination.[30] A class comprised of tenured faculty members sued, alleging that the faculty members rated as "poor" were in fact being terminated for cause, not for financial or programmatic reasons, and were therefore entitled to enhanced due process.[31] The court disagreed.[32] Finding that the selection process was related to the accomplishment of the valid public purpose of developing a "quality institution that is responsive to the technological and continuing education needs" of the community,[33] the court upheld the college's evaluation and appeals process and affirmed the performance-based contractual terms of employment.[34]

The selection of a particular faculty member for termination often presents the most troubling issue in a program reduction and is also the aspect of the institutional decision that courts are most likely to scrutinize. Nevertheless, as long as the faculty member cannot present evidence that she was terminated arbitrarily, in violation of institutional rules or collective bargaining agreements, in retaliation for exercising academic freedom, or in violation of the anti-discrimination laws, courts give substantial latitude to the institution in selecting individuals for termination.

Brenna v. Southern Colorado State College[35] represents a case in which the College properly supported its decision to select a particular faculty member for termination. In *Brenna*, the College experienced a serious budget and enrollment decline, during which department chairs were eventually directed to cut back personnel.[36] Lyle Brenna, a tenured faculty member, was ultimately selected for termination, although other faculty members in his department, including untenured faculty members, were retained.[37] He sued, claiming that his tenured status gave him priority over non-tenured faculty members during program reduction.[38] Affirming the summary judgment granted to the College by the trial court, the court of appeals upheld his termination on both contractual and constitutional grounds:

> [T]he Fourteenth Amendment does not require that Southern Colorado

29. *Id*. at 282. The Community College of Baltimore ("CCB"), a city institution, became the New Community College of Baltimore ("NCCB"), a state institution. *Id.* at 281–82. With this transition, CCB faculty members were given notice of the termination of their employment. *Id.* at 282. NCCB continued to employ CCB faculty members; however, rather than a tenure appointment system, the term of employment was determined on the basis of a four-tier rating scale: excellent (two-year contract); good (one-year contract); fair (reevaluation); and poor (termination). *Id.*

30. *Id.*

31. *See id*. at 282–83.

32. *See Id.* at 290.

33. *Id*.

34. *Id.* at 289 (quoting MD. CODE ANN., EDUC. §16-601(b)(6) (Supp. 1989)).

35. 589 F.2d 475 (10th Cir. 1978).

36. *Id.* at 476.

37. *Id.*

38. *Id.* at 477.

> State College use any particular selection process, so long as the procedure chosen is a reasonable one. . . . "Substantive" due process requires only that termination of that interest not be arbitrary, capricious, or without a rational basis.[39]

In *Bignall v. North Idaho College,*[40] the court was squarely faced with the question of whether junior, non-tenured faculty members had been improperly retained over tenured colleagues during a program reduction. The College notified Annette Bignall, a tenured faculty member, that it was terminating her employment because of the College's financial shortfall.[41] Bignall alleged, among other things, that she was the victim of discrimination and breach of contract because the College used improper procedures in selecting her for removal and also "retained less senior faculty."[42] The College president testified that he formulated and applied appropriate guidelines to the entire fifty-person faculty, taking into account recent performance evaluations and the overall needs of the College.[43] Affirming the district court's ruling on the reasonableness and neutral application of these guidelines, the court of appeals concluded that Bignall's removal was valid and non-discriminatory.[44] The court found that the following evidence supported the College's decision to terminate the employment of Bignall:

> He [the President of the College] and various administrators, including the two heads of the two departments in which Mrs. Bignall taught, all testified that she was the least well qualified academically; that because she directed her instruction to the most gifted among her students, she alienated the less bright so that students regularly transferred out of her classes or tried to avoid her courses.[45]

The court held that "[w]hile there was some, perhaps unavoidable, flexibility in the selection process, the district court was not clearly erroneous in concluding that the College did not act discriminatorily."[46] *Bignall* thus stands for the proposition that individualized performance evaluations may justify selection of non-tenured over tenured faculty members for retention during a program reduction, so long as the evaluations are systematic and fairly carried out.

In *Hahn v. University of the District of Columbia,*[47] the plaintiff made a slightly different claim of *priority*. Worden Hahn, a former dean who returned to the college faculty as a tenured faculty member, was terminated consistent with the reduction in force procedures of the collective bargaining agreement.[48] After an unsuccessful appeal to the University president, Hahn filed a petition for review by

39. *Id.*
40. 538 F.2d 243 (9th Cir. 1976).
41. *Id.* at 247.
42. *Id*. at 250.
43. *Id.*
44. *Id*.
45. *Id*.
46. *Id*.
47. 789 A.2d 1252 (D.C. 2002).
48. *Id.* at 1255.

the Superior Court, which was denied.[49] On appeal, the court of appeals held that Hahn's prior status as dean did not give him superior tenure rights to those of any other tenured faculty member.[50] The court did find a question of fact about the scope of Hahn's tenure in the College of Professional Studies because his appointment was not department specific.[51] Hahn argued that the University's failure to recognize his *at-large* appointment status resulted in a miscalculation of his seniority status.[52] The court granted Hahn further due process review of his selection for termination.[53]

Tenure terminations are generally used as a final consequence of program reductions. When institutions face enrollment downturns, financial problems, or internal pressure to reallocate resources, the administration's first response will likely be to deny tenure, eliminate administrative appointments, or decline to renew annual or tenure-track appointments. Courts almost always approve these strategies as desirable, less drastic alternatives to the termination of tenure.

For instance, in *Spuler v. Pickar,*[54] the appointment of a non-tenured faculty member was not renewed; his employer, the University of Houston, cited financial difficulties as the reason for the decision.[55] Richard Spuler sued alleging that he was denied due process of law when he was denied tenure and terminated.[56] A jury found that Spuler had a reasonable expectation of continued employment and that the University acted arbitrarily and capriciously in denying tenure and terminating him.[57] The district court granted the University's motion for judgment notwithstanding the verdict.[58] On appeal, the court found that a non-tenured faculty member at the University did not have a property right in continued employment or an assurance of tenure.[59] Particularly in light of the institution's legitimate financial difficulties, and regardless of his compliance with tenure requirements, the court sustained the district court's ruling and found that the University had a rational basis for its decision to deny tenure and not to renew Spuler's contract.[60]

Similarly, in *Causey v. Board of Trustees of Community College District V,*[61] Charles Causey, a faculty member, was denied tenure on the stated ground of declining enrollment.[62] Causey sued, arguing that the state tenure statute provided

49. *Id*.
50. *Id*. at 1259.
51. *Id.* at 1260.
52. *Id.* at 1259–60.
53. *Id*. at 1261.
54. 958 F.2d 103 (5th Cir. 1992).
55. *Id*. at 105.
56. *Id.* at 104.
57. *Id.* at 105.
58. *Id*. at 104.
59. *Id.* at 107.
60. *Id*. at 107–08.
61. 638 P.2d 98 (Wash. Ct. App. 1981). *See also* Eyre v. Big Bend Cmty. Coll., 672 P.2d 1270 (Wash. Ct. App. 1983).
62. *Causey*, 638 P.2d at 98.

that tenure was to be granted based on teaching effectiveness, and that the College used impermissible criteria in denying him tenure.[63] Both the trial court and the appeals court disagreed, finding that the relevant state statute did not limit the College in its decision to deny tenure even if declining enrollment was the only criterion used in making the decision.[64]

In *Durrani v. Valdosta Technical Institute,*[65] state-required curriculum changes resulted in the conversion of a faculty member's courses from required to elective.[66] When course enrollments declined, the Institute did not renew Dost Durrani's contract.[67] He sued, alleging national origin, religion, age discrimination, and violation of his right to freedom of speech.[68] Durrani argued that he was engaged in protected speech when he testified before the Office of Fair Employment Practices during the investigation of another charge of discrimination, but he was unable to establish that his nonrenewal was in retaliation of this speech.[69] The court held that "[e]ven if the speech were a 'substantial or motivating factor,' defendants' actions were justified in light of the declining enrollment in the personal finance course."[70]

Courts have also approved the modification or discontinuance of administrative appointments as an attractive alternative to termination of tenured faculty during a program reduction. For instance, in *UDC Chairs Chapter, American Association of University Professors v. Board of Trustees,*[71] the University of the District of Columbia discontinued summer salary stipends to all fifty department chairs as a cost-savings measure.[72] On the challenge of the University's AAUP chapter, the court found for the University, holding that elimination of administrative appointments is constitutional and consistent with the rights of public employees, so long as adequate notice and due process are afforded.[73] Moreover, the University's decision, which amounted to a reduction in pay for a limited duration without personal stigma, was well justified by the University's budget difficulties.[74]

B. Program Elimination

Program elimination represents a more drastic remedy than program reduction for financial or programmatic difficulties, inasmuch as it involves the discontinuance of an entire course of study, major, or department within an

63. *Id.* at 99.
64. *Id.* at 100.
65. 810 F. Supp. 301 (M.D. Ga. 1992), *aff'd*, 3 F.3d 443 (11th Cir. 1993).
66. *Id*. at 304.
67. *Id*.
68. *Id*. at 303–04.
69. *Id*. at 304.
70. *Id*. at 306.
71. 56 F.3d 1469 (D.C. Cir. 1995).
72. *Id*. at 1470.
73. *Id*. at 1472.
74. *Id*. at 1474–75.

institution. Program elimination may involve the closure of an entire school within a larger university (such as the closing of a dental school that is administered as part of an academic medical center). Program eliminations tend to be chosen in the following circumstances: (1) when a budget shortfall is not so severe as to warrant a financial exigency, but reduction in institutional expenditures is nonetheless required; (2) when an academic program is no longer viable, attracting students, or germane to the programmatic emphases of the institution; or (3) when funds need to be redirected to other institutional uses and away from a program less central to the educational mission of the institution.

Courts have consistently approved program elimination as a permissible mechanism to reorganize an institution, even though such action results in the removal of tenured faculty.[75] As one court noted:

> American courts and secondary authorities uniformly recognize that, unless otherwise provided in the agreement of the parties, or in the regulations of the institution, or in a statute, an institution of higher education has an implied contractual right to make in good faith an *unavoidable* termination of right to the employment of a tenured member of the faculty when his position is being eliminated as part of a change in academic program.[76]

As with program reduction and other not-for-cause terminations, courts review faculty terminations motivated by program eliminations for strict compliance with procedural requirements. Courts hesitate, however, to second-guess the underlying academic decision of whether or not to close a particular program or terminate a particular individual. As a general rule, courts tend to affirm layoffs due to program eliminations as long as the applicable procedural requirements have been observed and the affected individuals are treated fairly.

In *Board of Community College Trustees for Baltimore County-Essex Community College v. Adams,*[77] the Maryland Court of Special Appeals addressed whether an institution has an inherent right to terminate faculty members consequent to program elimination. Following state budget cutbacks and a downturn in student enrollment, the Community College Board eliminated seven programs and terminated the tenured faculty members in those programs.[78] Two of the ten terminated faculty members sued, claiming that the terminations violated their employment contracts, which did not specifically reserve to the Board the right to terminate faculty for financial or programmatic reasons.[79] The Circuit Court granted a writ of mandamus requiring the reinstatement of these two faculty members, and the Community College Board appealed.[80]

The Maryland Court of Special Appeals disagreed with the faculty members. After an exhaustive summary of the available authorities regarding program

75. *See infra* notes 76–82, 84–98.

76. Jimenez v. Almodovar, 650 F.2d 363, 368 (1st Cir. 1981) (internal citations omitted).

77. 701 A.2d 1113 (Md. Ct. Spec. App. 1997).

78. *Id*. at 1115.

79. *Id*. at 1115–16.

80. *Id*. at 1115.

elimination, the court found that this right was an implicit limitation upon the grant of tenure:

> [A] tenured professor may be terminated when the reasons are not personal to the teacher, but are created by 1) the necessary or preferred discontinuance of courses or programs; 2) declining enrollment that alleviates the need for programs; or 3) when financial problems result in the necessity for termination of programs, positions, or courses.[81]

Equally important, the court stressed the strong public policy justifications for its conclusion:

> We note, in closing, that if tenured teachers could force schools to maintain programs, courses, and positions, the teachers would, themselves, be the policymakers—rather than the administrative bodies of the colleges. This is especially pertinent when a college is a publicly supported institution, such as appellant. The institution cannot compel the legislative and executive branches of government to fund programs. In fact, all the legislative and executive branches would have to do would be to legislate the institution out of existence.[82]

In contrast to its difficulties with program reduction, the AAUP explicitly acknowledges an institution's right to discontinue programs and terminate tenured faculty as a result. The AAUP does, however, recommend extensive procedural protections that would, among other things, give an affected tenured faculty member priority in employment elsewhere in the institution.[83]

A lurking issue in program eliminations is the definition of "program": is it a school, department, or an even smaller unit within a department? Where institutions have defined "program" and articulated criteria for program elimination, these issues are settled by internal rule. In the absence of definition, courts may be asked to intervene. In *Southeastern Community College v. Krieger*,[84] for instance, the College president informed a single faculty member, Dennis Krieger, that his position was terminated because no students enrolled in the program he taught.[85] Krieger unsuccessfully sought review of the decision by the Board of Directors.[86] Krieger then appealed the decision to an adjudicator who reversed the Board's decision and ordered reinstatement.[87] The College petitioned for judicial review, which resulted in the district court's reinstatement of the Board's termination decisions.[88] On appeal, Krieger claimed that his termination

81. *Id*. at 1139.

82. *Id*. at 1143–44.

83. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *Recommended Institutional Regulations on Academic Freedom and Tenure*, *in* POLICY DOCUMENTS & REPORTS, *supra* note 5, at 23.

84. 535 N.W.2d 140 (Iowa Ct. App. 1995).

85. *Id*. at 142.

86. *Id*.

87. *Id*.

88. *Id*.

did not constitute legitimate program elimination.[89] The court disagreed, finding that the College's enrollment and fiscal problems justified the decision to eliminate this position and that the elimination of even a single course could constitute program termination and justify termination of a tenured faculty member's contract.[90]

Whether tenure is granted within a program or within the institution as a whole also bears upon the institution's discretion to terminate tenured faculty during program elimination. *Texas Faculty Association v. University of Texas at Dallas,*[91] another leading case involving program elimination, exemplifies a situation in which the terminated tenured faculty members in a program had an argument for retention in the institution. After four years of self-study, the University of Texas at Dallas decided to eliminate its programs in special education and environmental sciences, and it terminated the faculty members anchoring those programs.[92] The faculty union sued on behalf of the terminated faculty, claiming that their union colleagues were unconstitutionally denied sufficient consultation, notice, and due process.[93] The magistrate granted the University's motion for summary judgment, which was affirmed in part and reversed in part by the court of appeals.[94]

The terminated faculty had, in fact, been given twenty months notice, and the court found that due process was satisfied with respect to the decisions to eliminate the programs and the positions of the affected faculty members.[95] The terminated faculty's right to continuation of employment elsewhere in the institution was a different matter, however, because the University, in its policies and collective bargaining agreements, granted tenure on an institution-wide, rather than school or program, basis.[96] The University was ordered to afford the terminated faculty additional process with respect to their retention and placement elsewhere in the institution.[97] Thus, although the University could eliminate the program, the University could not terminate the affected faculty members as a result of the elimination.[98] The inability to terminate the affected faculty members limits the financial savings that result from the use of program elimination as a budget saving strategy and highlights the need to clarify where tenure is vested.[99]

C. Financial Exigency

Beyond program reduction and elimination are institution-wide fiscal

89. *Id*. at 142–43.
90. *Id.* at 144.
91. 946 F.2d 379 (5th Cir. 1991).
92. *Id*. at 382.
93. *See id.* at 383.
94. *Id*. at 381.
95. *Id*. at 387.
96. *Id*.
97. *Id*. at 389.
98. *See id.*
99. For additional information on program closure, see ACADEMIC PROGRAM CLOSURES (Ellen M. Babbitt ed., NACUA 2d ed. 2002).

declarations. Financial exigency, a term of art in the world of higher education, is generally understood to signify a financial emergency, based on an operating budget deficit that requires *immediate* action to reduce the institution's expenditures. If current or projected expenditures exceed operating revenues (without regard to endowment or capital accounts), a financial exigency could well exist.[100] A valid financial exigency exists whenever the institutional board declares so, provided that the financial crisis is *bona fide* and not merely a pretext to accomplish another goal, such as the elimination of tenure.

The courts and the AAUP have recognized an inherent right on the part of the institution to terminate both untenured and tenured faculty in circumstances of financial exigency, as long as the institution observes applicable procedural requirements.[101] Most institutions specifically reserve a right to terminate tenured appointments in situations of financial exigency, but courts have also been willing to infer a financial exigency exception to tenure where institutional contracts and rules are silent.[102]

Financial exigencies are normally considered to be institution-wide, and the AAUP itself defines "financial exigency" as "an imminent financial crisis which threatens the survival of the institution as a whole."[103] Courts, however, have tended to disagree that an institution must wait until the entire institution's survival is threatened before taking steps pursuant to its financial exigency powers. For instance, in *Scheuer v. Creighton University,*[104] the University declared a unit-specific financial exigency.[105] In the resulting litigation, the Supreme Court of Nebraska affirmed this private institution's decision to terminate Scheuer's tenure appointment in the School of Pharmacy.[106] The court rejected arguments that the School's financial difficulties had not yet infected the budget or resources of the entire University (preconditions that the AAUP would have mandated prior to termination).[107] Instead, the court relied upon the following portion of the faculty handbook to conclude that financial exigency should be construed as a unit-specific determination: "Where termination of appointment is based upon financial

100. *See* Krotkoff v. Goucher Coll., 585 F.2d 675, 681 (4th Cir. 1978); AAUP v. Bloomfield Coll., 322 A.2d 846 (N.J. Super. Ct. Ch. Div. 1974), *aff'd*, 346 A.2d 615, 617 (N.J. Super. Ct. App. Div. 1975); *accord,* Refai v. Cent. Wash. Univ., 742 P.2d 137 (Wash. Ct. App. 1987).

101. The AAUP's Recommended Institutional Regulation 4(c)(1) defines financial exigency as "[a]n imminent financial crisis which threatens the survival of the institution as a whole and cannot be alleviated by less drastic means." AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *Recommended Institutional Regulations on Academic Freedom and Tenure*, *in* POLICY DOCUMENTS & REPORTS, *supra* note 5, at 23. *See also* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *On Institutional Problems Resulting from Financial Exigency: Some Operating Guidelines*, *in* POLICY DOCUMENTS & REPORTS, *supra* note 5, at 230.

102. *See* Bd. of Cmty. Coll. Trs. v. Adams, 701 A.2d 1113 (Md. Ct. Spec. App. 1997).

103. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *Recommended Institutional Regulations on Academic Freedom and Tenure*, *in* POLICY DOCUMENTS & REPORTS, *supra* note 5, at 23.

104. 260 N.W.2d 595 (Neb. 1977).

105. *Id*. at 595–97.

106. *Id*. at 602.

107. *See id*. at 597–602.

exigency, which may be considered to include bona fide discontinuance of a program or department of instruction or the reduction in size thereof."[108]

It is worth noting, however, that any program-specific declaration of exigency would be extremely difficult to sustain in a state-funded institution. While each college or program may be viewed as self-supporting in private institutions, budgets are usually centrally administered in public institutions.

Courts and the AAUP agree that universities bear the burden of demonstrating that the financial exigency is bona fide. Factors usually considered in determining whether a financial exigency is bona fide include: (1) the Board's motivation for its action;[109] (2) the adequacy of the institution's operating funds;[110] (3) the overall financial condition of the institution;[111] (4) the use of other cost-cutting or money-saving measures before the institution is forced to terminate faculty;[112] and (5) the efforts to find alternative employment for faculty.[113]

In evaluating financial exigency, courts continue to stress that deference is due to the institution's own determination of exigency, even while reviewing the decision to ensure that it is *bona fide*. The *Levitt* court memorably articulated the general rule that:

> Where there is a showing that the administrative body, in exercising its judgment, acts from honest convictions, and there is no showing that the acts are arbitrary or generated by ill will, fraud, collusion, or other such motives, it is not the province of the court to interfere and substitute its judgment for that of the administrative body.[114]

Cases in which courts have rejected a declaration of exigency tend to turn on the institution's failure to follow its own institutional procedures or to demonstrate that it examined alternative remedies short of faculty terminations. For instance, in *American Association of University Professors, Bloomfield College Chapter v. Bloomfield College*,[115] the Trustees of Bloomfield College declared a financial exigency, eliminated tenure entirely, and terminated the employment of thirteen tenured faculty members. In the resulting lawsuit, the faculty members argued that the College maintained sufficient assets (including a golf course) to address its financial crisis without terminating faculty members.[116] The court rejected the invitation to substitute its financial acumen for that of the College's board, finding plentiful evidence of a genuine financial crisis at the College.[117] Concurring with the trial judge's ruling, the court found, however, that the "defendants failed to

108. *Id*. at 597.

109. *See* Levitt v. Bd. of Trs., 376 F. Supp. 945 (D. Neb. 1974).

110. *See* AAUP v. Bloomfield Coll., 346 A.2d 615 (N.J. Super. Ct. App. Div. 1975).

111. *See id*.

112. *See* Pace v. Hymas, 726 P.2d 693 (Idaho 1986).

113. *See* Krotkoff v. Goucher Coll., 585 F.2d 675, 681 (4th Cir. 1978); Bd. of Cmty. Coll. Trs. v. Adams, 701 A.2d 1113, 1135 (Md. App. 1997).

114. *Levitt,* 376 F. Supp. at 950.

115. 346 A.2d 615 (N.J. Super. Ct. App. Div. 1975).

116. *See id*. at 616.

117. *Id*. at 617.

establish by a preponderance of the evidence that their purported action was in good faith related to a condition of financial exigency within the institution."[118] Therefore, the court upheld the reinstatement of the terminated faculty members to the Bloomfield College faculty.

Likewise, in *Pace v. Hymas*,[119] the Supreme Court of Idaho determined that the University of Idaho did not establish the proper groundwork for terminations consequent to financial exigency.[120] In *Pace*, the University declared a financial emergency and proceeded to terminate the employment of Lois Pace, the most experienced faculty member in the research and extension service of the College of Agriculture.[121] The applicable University rules incorporated the AAUP recommendation that the institution first demonstrate its inability to resolve the crisis by "less drastic means" than faculty terminations.[122] Pace sued claiming that her termination was invalid because all alternative budget cutting strategies were not considered prior to her termination.[123] The Idaho Supreme Court concurred with Professor Pace, finding that the University "did not consider alternatives other than a reduction in personnel in declaring the financial exigency; options such as freezing or reducing budgeted increases in areas such as salary, travel, capital outlay, supplies, or equipment, were not considered."[124] The court, in affirming the district court ruling, concluded that the University did not satisfy its own requirements for proving a financial exigency.[125]

In addition to its obligation to prove the legitimacy of a declaration of financial exigency, an institution must also prove the fairness of the criteria, and process used, in selecting individuals who will be terminated due to exigency. The AAUP's recommended selection procedures are intended to ensure that individuals are not selected for impermissible reasons such as discrimination or violation of academic freedom.[126]

Where an institution has explicitly or implicitly incorporated definitions and procedures related to faculty termination in situations of financial exigency into its

118. *Id*. at 618 (internal quotation marks omitted).

119. 726 P.2d 693 (Idaho 1986).

120. *Id.* at 700–02.

121. *Id.* at 694.

122. The AAUP's Recommended Institutional Regulation 4(c)(1) defines a bona fide financial exigency as "an imminent financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means." AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *Recommended Institutional Regulations on Academic Freedom and Tenure*, *in* POLICY DOCUMENTS & REPORTS, *supra* note 5, at 23. The University of Idaho faculty handbook defined a financial exigency as a "demonstrably bona fide, imminent financial crisis which threatens the viability of an agency, institution, office or department as a whole or one or more of its programs, or other distinct units, and which cannot be adequately alleviated by means other than a reduction in the employment force." *Pace*, 726 P.2d at 695.

123. *See Pace*, 726 P.2d at 696.

124. *Id*. at 702.

125. *Id.*

126. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *Recommended Institutional Regulations on Academic Freedom and Tenure*, *in* POLICY DOCUMENTS & REPORTS, *supra* note 5, at 23.

policies or into collective bargaining agreements, it must scrupulously follow them. If institutions do not do so, the decision is likely to be reversed in court, notwithstanding the legitimate financial difficulties of the institution. While many institutions have declined to incorporate the specificity of the AAUP's *Recommended Institutional Regulations*, an institution's efforts to offer at least some of these detailed practices, prior to making the decision to terminate, will serve as evidence of both legitimate exigency and of the legitimate selection of individuals to be terminated.

D. Merger, Consolidation, Affiliation

In extreme financial emergencies, an institution's difficulties may be too serious to address through internal restructuring, and its survival may depend upon its ability to affiliate with a financially stable institution.[127] In such cases, one critical question is whether the employment obligations of the failing institution are assumed, or should be assumed, by the acquiring institution. Obviously, the answer to this question may determine whether an acquiring institution is willing to commit to any kind of agreement with the failing institution.

Recognizing the difficult policy issues raised by this scenario, the AAUP has never taken a clear position on the vexing question whether, upon affiliation or merger, a failing institution's tenure rights survive, either as obligations of the failing institution or as new obligations of the acquiring institution. The AAUP guidelines provide that "[w]hen, in the context of financial exigency, one institution merges with another, . . . the negotiations . . . should include every effort to recognize the terms of appointment of all faculty members involved."[128] These guidelines continue by stating that, "[w]hen a [tenured] faculty member . . . can be offered only a term appointment following a merger . . . the faculty member should have the alternative of [one year's severance]."[129] The AAUP did not go so far, however, as to state explicitly that all tenure rights must continue and should be honored by either institution when a merger or affiliation stems from the extreme financial difficulty of one of the partners.

In a subsequently prepared statement, the AAUP again declined to take a position on the ability of tenure to survive in an exigency merger or affiliation. The AAUP recommended extensive faculty involvement in the decision whether to affiliate or merge but stopped short of taking any position as to the fate of tenure in this situation.[130]

The AAUP's silence on this issue appears to stem from an internal

127. For a broad discussion of the many other issues involved in merger, affiliation, or closure, see JAMES MARTIN & JAMES E. SAMUELS, MERGING COLLEGES FOR MUTUAL GROWTH: A NEW STRATEGY FOR ACADEMIC MANAGERS (1994).

128. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *On Institutional Problems Resulting from Financial Exigency: Some Operating Guidelines, in* POLICY DOCUMENTS & REPORTS, *supra* note 5, at 231.

129. *Id.*

130. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *Governance Standards in Institutional Mergers and Acquisitions*, *in* POLICY DOCUMENTS & REPORTS, *supra* note 5, at 236.

disagreement. During the 1980s, two AAUP subcommittees disagreed about whether, in the affiliation or merger of a failing and acquiring institution, the acquiring institution is required to maintain the tenured status of the faculty of the failing institution.[131] One subcommittee member expressed concern that any hard and fast rule requiring the survival of tenure would chill affiliations that might salvage at least some of the numerous small colleges that have been forced to close their doors over the past few decades.[132] The same member expressed the countervailing concern that any equivocation by the AAUP about tenure's survival in an affiliation or merger would simply encourage institutions to ignore tenure when structuring these transactions.[133] To this day, the AAUP has failed to resolve this internal dispute and simultaneously failed to provide possible guidance.

One court considering the issue, *Gray v. Loyola University*,[134] found that the tenure rights of the failing institution did not terminate when the failing institution affiliated or merged, provided that the failing institution continued to exist as a corporate entity (albeit one that no longer engaged in the business of education).[135] *Gray* arose from the affiliation of Chicago's Mundelein College with neighboring Loyola University.[136] In 1991, Mundelein was in a state of severe financial crisis and secured the agreement of Loyola, its neighboring institution along Chicago's lakefront, to affiliate.[137] Pursuant to the signed Affiliation Agreement, Loyola acquired Mundelein's assets; assumed designated financial obligations; agreed to enroll all of Mundelein's current students; and agreed to offer its own tenure to a majority, but not all, of Mundelein's tenured faculty.[138]

Significantly, Mundelein's Faculty Manual incorporated a version of the AAUP's *Recommended Institutional Regulations* regarding termination for financial exigency and program discontinuance, whereby the College was permitted to terminate faculty after declaring exigency and undertaking extensive procedures focusing on the legitimacy of the individual selections for termination.[139] Because the entire faculty would lose their Mundelein employment consequent to the Loyola affiliation (with most Mundelein faculty then being hired by Loyola), Mundelein did not declare exigency or institute faculty termination procedures.[140] Instead, it affiliated with Loyola and ceased to operate an

131. *See* American Association of University Professors*, On Institutional Mergers and Acquisitions*, ACADEME, Mar.–Apr. 1982, at 1a.

132. *Id*. at 2a–3a. The unfortunate trend toward the closure of small colleges has continued during recent years with over 20 small colleges having closed their doors completely since 1997. *See* Martin Van Der Werf, *Mount Senario's Final Act*, CHRON. HIGHER EDUC., June 14, 2002. (with attached list of "Colleges That Have Closed Since 1997").

133. American Association of University Professors*, On Institutional Mergers and Acquisitions*, ACADEME, Mar.–Apr. 1982, at 1a, 4a–7a.

134. 652 N.E.2d 1306 (Ill. App. Ct. 1995), *appeal after remand sub nom.* Gray v. Mundelein Coll., 695 N.E.2d 1379 (Ill. App. Ct. 1998).

135. *Id*. at 1311.

136. *Id.* at 1307.

137. *Id.*

138. *Id*. at 1307–08.

139. *Id*. at 1310.

140. *See id*. at 1307.

educational institution, although it remained in existence as a not-for-profit corporation.[141] Most of Mundelein's tenured faculty members were offered Loyola tenured positions, others were offered five-year appointments at Loyola, and a few were offered two-year severance packages with no further employment.[142]

A group of those offered severance packages and five-year appointments sued, alleging that Mundelein breached the tenure contract and that Loyola was liable for the Mundelein tenure obligations pursuant to the *de facto merger* theory of successor liability.[143] After prolonged litigation, the trial and appellate courts concluded that Mundelein breached its tenure obligations by failing to offer the procedural protections required by its Manual and failing to demonstrate *bona fide* exigency because it affiliated in lieu of declaring exigency.[144] On the other hand, the trial court also concluded, and the appellate court ultimately agreed, that Loyola had not assumed any of the tenure obligations of Mundelein.[145] The decisions yielded a strange result from a policy perspective, and perhaps not one desired by the AAUP, whose debates always focused upon whether the *acquiring* institution should be forced to honor the obligations of the failing institution (not whether the failing institution's obligations continued).[146] The long-term result of the *Mundelein* decisions may be that failing institutions face significant pressure from potential affiliates to declare bankruptcy and cease operations entirely before the affiliation occurs, thus indisputably ending the failing institution's tenure obligations.[147] The end of the institution's tenure obligations is precisely the possibility that Professor Finkin decried when he argued against the AAUP's adoption of a "portable tenure" rule in 1982.[148]

Mundelein, however, can be read more narrowly, as an extreme example of the courts' expectation of procedural fairness from colleges even when there are no obvious procedures applicable to a particular termination. *Mundelein* underscores, yet again, the courts' willingness to deal severely with any institution failing to comply with procedural requirements even arguably applicable to a termination.[149]

141. *Id.*

142. *Id.*

143. *Id.* at 1308.

144. *Gray v. Mundelein Coll.,* 695 N.E.2d 1379, 1388–89 (Ill. App. Ct. 1998).

145. *Id.* at 1388–89.

146. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *Governance Standards in Institutional Mergers and Acquisitions*, *in* POLICY DOCUMENTS & REPORTS, *supra* note 5, at 236.

147. The *Mundelein* court assumed that, had the College's not-for-profit corporation actually been dissolved, ceasing to do *any* business, the College's tenure obligations would necessarily have ceased as well. This is consistent with the treatment of tenure, and all employment contracts in general, under the Bankruptcy Code. The Code clarifies that, if an academic institution ceases to operate and files for bankruptcy, its tenured faculty contracts would be treated as other employment is treated under the code and would be voidable. Thus, in the event a college or university closes down completely, the status of tenure becomes an issue of bankruptcy law and ceases to be governed by the general law of higher education. *Gray*, 652 N.E.2d at 1309.

148. American Association of University Professors*, On Institutional Mergers and Acquisitions*, ACADEME, Mar.–Apr. 1982, at 7a–9a.

149. Another unfortunate lesson of the *Mundelein* litigation may be that the AAUP's and

III. DUE PROCESS AND OTHER POTENTIAL RIGHTS OF TERMINATED FACULTY MEMBERS

Apart from the ultimate question of whether a faculty position may be terminated in different retrenchment scenarios, the institution also must grapple with the due process and the ancillary rights, if any, owed to a terminated faculty member. The United States Constitution requires public institutions to afford a certain level of due process irrespective of the rights articulated in the faculty contract; the AAUP has recommended, unions have bargained for, and many institutions have adopted, numerous protections intended to ensure fairness for any faculty member terminated because of the institution's need to retrench or reorganize. Any institution contemplating faculty terminations as part of a retrenchment plan must also consider the ancillary procedures or benefits due to its tenured faculty in each circumstance, and scrupulously observe all contractual and constitutional requirements.

A. Due Process for Public Employees

For faculty in private universities, the contract—whether created by university policy or collective bargaining agreement—is the essential authority articulating the faculty member's terms of employment and rights to due process during a termination. For employees in public institutions, the contract terms are augmented by the due process guarantees of the Fourteenth Amendment.[150] The Supreme Court confirmed in *Perry v. Sinderman*[151] that tenured faculty members have a property interest in continued employment.[152] In practical terms, this entitles faculty at public institutions to some level of due process consequent to tenure termination even where the applicable contract documents do not articulate any specific procedures.

The process due to a public employee varies depending primarily upon the reason for the termination. Courts have found that terminations consequent to exigency or program reductions, being *impersonal* to the individual faculty member, do not require the full due process hearings or extensive appeal options

institution's failure to deal specifically with the rights of tenured faculty during an exigency termination may result in extremely prolonged litigation. The *Mundelein* case recently had its third appeal and may not be over yet. *See* Myers v. Mundelein Coll., 771 N.E.2d 1113 (Ill. App. Ct. 2002).

150. See *Krotkoff v. Goucher College*, 585 F.2d 675 (4th Cir. 1978), for private colleges, and in public colleges, *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972) for the proposition that the Fourteenth Amendment creates a property interest in an employment contract with a public university that cannot be removed without due process. The terms of the contract are defined by the parties in both public and private universities. *See also* Barbara A. Lee & Steven G. Olswang, *Legal Parameters of the Faculty Employment Relationship*, *in* 1 HIGHER EDUCATION: HANDBOOK OF THEORY AND RESEARCH 213 (1985).

151. 408 U.S. 593 (1972).

152. *Id*. at 601; *accord* N.D. State Univ. v. United States, 255 F.3d 599, 605 (8th Cir. 2001); Colburn v. Ind. Univ., 973 F.2d 581, 589 (7th Cir. 1992); Johnson v. Bd. of Regents, 377 F. Supp. 227, 234–35 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975); Johnston-Taylor v. Gannon, 907 F.2d 1577, 1581 (6th Cir. 1990), *appeal after remand*, 974 F.2d 1338 (6th Cir. 1992).

mandated by terminations for cause. In *Johnson v. Board of Regents of the University of Wisconsin System,*[153] the court described the minimal due process elements that institutions owe faculty members appealing layoff decisions during financial retrenchment:

> [F]urnishing each [faculty member] with a reasonably adequate written statement of the basis for the initial decision to lay-off; furnishing each [faculty member] with a reasonably adequate description of the manner in which the initial decision had been arrived at; making a reasonably adequate disclosure to each [faculty member] of the information and data upon which the decision-makers had relied; and providing each [faculty member] the opportunity to respond.[154]

The basis for the termination affects not only the type but also the timing of the required process. It is well-settled that faculty members at public institutions may not have their property interests impaired through termination for cause until *after* appropriate due process has been afforded.[155] It is equally well-settled, however, that the procedures due in terminations consequent to reorganization may be afforded *after* the termination is effected.[156]

Even so, public institutions must observe the governing precedent in their own jurisdictions and be careful to afford a terminated faculty member enough process and information to obtain a meaningful appeal of the termination decision. Courts have held that the public institution must provide some or all of the following: (1) a "reasonably adequate" written statement of the basis for the decision and the manner in which it was made;[157] (2) a "meaningful," not "illusory," opportunity to respond and argue for retention under the particular circumstances of the termination;[158] (3) an opportunity to demonstrate that the reason for his or her layoff was the result of discriminatory animus or some other impermissible basis (such as the violation of academic freedom);[159] (4) an opportunity to show that his or her selection for termination was arbitrary and unreasonable;[160] and (5) adequate notice under the circumstances.[161] The requirements vary from institution to institution, jurisdiction to jurisdiction, and circumstance to circumstance. One thing is clear, however: if a public institution deviates from its posted standard of due process in a particular termination situation, it will bear a heavy burden explaining why deviation was reasonable and constitutional under the

153. 377 F. Supp. 227 (W.D. Wis. 1974).

154. *Id.* at 240.

155. Levitt v. Univ. of Tex. at El Paso, 759 F.2d 1224 (5th Cir. 1985).

156. Klein v. Bd. of Higher Educ., 434 F. Supp. 1113 (S.D.N.Y. 1977); UDC Chairs Chapter, Am. Ass'n of Univ. Professors v. Bd. of Trs., 56 F.3d 1469 (D.C. Cir. 1995).

157. *Johnson*, 377 F. Supp. at 241; Milbouer v. Keppler, 644 F. Supp. 201, 205–06 (D. Idaho 1986).

158. *Tex. Faculty Ass'n. v. Univ. of Tex. at Dallas*, 946 F.2d 379 (5th Cir. 1991).

159. *Johnson*, 377 F. Supp. at 235–41.

160. *See id*. at 239–40; *compare* Brenna v. S. Colo. State Coll., 589 F.2d 475, 477–78 (10th Cir. 1978).

161. *Tex. Faculty Ass'n*, 946 F.2d at 387.

circumstances.[162]

For institutions that enter into collective bargaining relationships with unions representing faculty, grievance procedures in the agreements that cover termination in cases of financial exigency will be binding. In *Naval v. Fernandez*,[163] a tenured faculty member who was terminated because his department was abolished due to financial exigency sued City University of New York ("CUNY") alleging, among other things, breach of contract in denying him due process.[164] The federal court dismissed his breach of contract claims for lack of jurisdiction:

> Under New York law, "when an employer and a union enter into a collective bargaining agreement that creates a grievance procedure, an employee subject to the agreement may not sue the employer directly for breach of that agreement but must proceed, through the union, in accordance with the contract."[165]

B. Notice

The AAUP recommends that all institutions, public or private, afford tenured faculty members at least one year's notice before termination arising from program elimination or financial exigency.[166] Many institutions have incorporated this recommendation into their faculty manuals or handbooks, as a *goal* if not a requirement.

Unfortunately, institutions faced with financial crises are often unable to provide such lengthy notice periods. Recognizing that some circumstances may be legitimate emergencies, the courts have approved removals for financial exigency with notice as short as thirty days.[167] But the institution clearly will bear a burden if it departs from its published standards or if it acts in a manner that seriously prejudices its faculty. The notice period should thus be as long as possible, reasonable in light of the basis for the removals, and consistent with institutional rules.

162. *See, e.g.*, Christensen v. Terrell, 754 P.2d 1009, 1015 (Wash. Ct. App. 1988) (holding that while strict adherence to an institution's written procedures may not be required so long as minimal due process requirements are met, an institution will need a compelling rationale for offering a terminated faculty member less than the process due under the institution's written procedures and applicable statutes).

163. No. 97-CV-6800, 1998 WL 938942, at *1 (E.D.N.Y. Nov. 20, 1998).

164. *Id*. at *1–2. *See also* Polishook v. City Univ. of N.Y., 651 N.Y.S.2d 459, 460 (N.Y. App. Div. 1996), in responding to a lawsuit filed by the faculty union, the Professional Staff Congress, the N.Y. Appellate Division found CUNY's declaration of financial exigency had been made in good faith.

165. *Naval,* 1998 WL 938942, at *7 (quoting Bd. of Educ. v. Ambach, 517 N.E.2d 509 (N.Y. 1987)). *See also* MacKay v. Montana, No. 02-178, 2003 WL 22327835, at *4 (Mont. Oct. 2, 2003).

166. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *Recommended Institutional Regulations*, *in* POLICY DOCUMENTS & REPORTS, *supra* note 5, at 24.

167. Klein v. Bd. of Higher Educ., 434 F. Supp. 1113 (S.D.N.Y. 1977).

C. Alternative Placement and Priority Over Non-Tenured Faculty

The AAUP also recommends that, before terminating an appointment because of financial exigency, each institution, with faculty participation, should make every effort to place the affected faculty member in another suitable position within the institution.[168] Again, many institutions include such a commitment in their faculty handbooks, not realizing that the commitment is much easier said than done.

A period of financial retrenchment is the least likely time for an institution to have open positions available for displaced faculty members. Indeed, an institution is often required by its own regulations to exhaust less drastic means of reducing expenditures before beginning to cut tenured faculty—and the most common such methods are eliminating vacant positions, non-renewing temporary and probationary faculty members, and imposing a hiring freeze.[169] In simplest terms, a terminated faculty member is unlikely to have the opportunity for alternative placement within the same institution.

Even when an institution meets its internal rule of AAUP policy-generated obligations to find alternative positions for displaced faculty members, the university can rightfully expect the faculty member to honestly fulfill his or her institutional obligations. For example, in *Nash v. Trustees of Boston University*,[170] when Boston University eliminated its Humanistic Education and Human Services Department, Boston University committed to assign one of the faculty members in that program, Paul Nash, to an alternative position within the University, consistent with the terms of the faculty collective bargaining agreement.[171] Despite the University's assurance of security, Dr. Nash negotiated a severance agreement, while knowingly denying to the University that he accepted a full-time position at the Rhode Island School of Design.[172] When Boston University learned he misled the University, it voided the agreement.[173] The court ruled that Dr. Nash defrauded the institution.[174] Because the University fulfilled its obligation under its collective bargaining agreement to offer alternative placement, it owed no consideration for the severance agreement since Dr. Nash was not wrongfully terminated.[175]

AAUP policies state also that, at the very least, an institution terminating appointments due to financial exigency should "not at the same time make new appointments except in extraordinary circumstances where a serious distortion in

168. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *Recommended Institutional Regulations*, *in* POLICY DOCUMENTS & REPORTS, *supra* note 5, at 24.

169. Spuler v. Pickar, 958 F.2d 103 (5th Cir. 1992); Causey v. Bd. of Trs., 638 P.2d 98 (Wash. Ct. App. 1981); Durrani v. Valdosta Technical Inst., 810 F. Supp. 301 (M.D. Ga. 1992), *aff'd*, 3 F.3d 443 (11th Cir. 1993).

170. 946 F.2d 960 (1st Cir. 1991).

171. *Id.* at 961.

172. *Id.*

173. *Id.*

174. *Id.* at 967.

175. *See id.* at 964–67.

the academic program would otherwise result."[176] The requirement, while it does not directly aid the terminated faculty member in securing a job, does undermine any suggestion that the terminated faculty member has been removed for impermissible reasons rather than for valid exigency considerations.

In a related provision, the AAUP also recommends that, in a retrenchment due to exigency or programmatic problems, tenured faculty should not be terminated in favor of non-tenured faculty: "The appointment of a faculty member with tenure will not be terminated in favor of retaining a faculty member without tenure, except in extraordinary circumstances where a serious distortion of the academic program would otherwise result."[177] One court considering this issue has stated, in dicta, that: "An institution truly motivated only by financial considerations would not hesitate to place the tenured professor in another suitable position if one can be found, even if this meant displacing a nontenured instructor."[178]

Even so, there is no direct court decision requiring a university to place a tenured faculty member in a faculty position for which he or she is not qualified. At least one court has found that it is the "national academic community's understanding" that tenure includes the requirement that the university make a good faith effort to find another position for a released faculty member so long as he or she is qualified for the position.[179] But no court has ever required a university to fire an untenured faculty member to create a vacancy for a tenured faculty member displaced for financial reasons.

D. Retraining

The AAUP recommends that "every effort [be made] to place the faculty member concerned in another suitable position within the institution."[180] It also recommends in circumstances of program discontinuance not mandated by financial exigency that retraining be offered if "placement in another position would be facilitated by a reasonable period of training."[181] The recommendations, however, have not been widely adopted by institutions nor have the courts required retraining absent a specific university commitment to provide this benefit to displaced tenured faculty members. As one court noted: "[I]n the absence of an explicit contractual undertaking, the evidence discloses that tenure does not entitle a professor to training for appointment in another discipline."[182]

Like many other AAUP recommendations, the "retraining" concept may be a good goal if not a reasonable contractual commitment. Consideration should

176. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *Recommended Institutional Regulations*, *in* POLICY DOCUMENTS & REPORTS, *supra* note 5, at 24.

177. *Id*.

178. Browzin v. Catholic Univ. of Am., 527 F.2d 843, 847 (D.C. Cir. 1975).

179. *Krotkoff*, 585 F.2d at 679. *See also* Bd. of Cmty. Coll. Trs. v. Adams, 701 A.2d 1113, 1135 (Md. Ct. Spec. App. 1997).

180. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *Recommended Institutional Regulations*, *in* POLICY DOCUMENTS & REPORTS, *supra* note 5, at 24.

181. *Id.* at 25.

182. *Krotkoff*, 585 F.2d at 682 (citing *Browzin,* 527 F.2d at 850–51).

therefore be given to retraining faculty, taking into account the time and expense that it would take to do so. At the very least, this initiative would demonstrate the institution's good faith effort to help its tenured faculty; at best, it might result in the faculty member's retention in another position.

In *Krotkoff*, the court rejected the contention that a contractual right to retraining is an implicit right of tenure.[183] The faculty member was a Germanics professor demanding up to four years of retraining to fill a vacant position in economics.[184] The court found that the professor's request for retraining was not only extra-contractual but also unreasonable.[185] Even if an institution were to adopt the AAUP's recommendation, the obligation to retrain would only require a good faith effort to place the removed faculty member in a vacant position for which he or she was presently qualified (or could become qualified with a minimum of training). The AAUP has never suggested, and no court has ever found, that a vacant position must be held open—and a termination put on hold—while the displaced faculty member undergoes lengthy retraining into another discipline.

E. Replacement Rights

The AAUP recommends that a tenured faculty member removed for reasons of financial exigency retain the *right of first refusal* on his or her position should it become available again within three years of his or her removal.[186] The provision of *right of first refusal* has not been widely adopted by institutions. It is clear, however, that regardless of whether reinstatement provisions are adopted, all faculty removed for reasons of exigency or program eliminations should be given the same reemployment opportunities. No removed faculty should be excluded from the rights afforded others, for to do so raises the inference that the original termination decisions were motivated by illegitimate factors such as discrimination or the denial of academic freedom. Any reemployment opportunities should be offered equally to all.

IV. THE EFFECT OF STUDENT RIGHTS UPON FACULTY TERMINATION DECISIONS

In any decision to declare a financial exigency or eliminate a program, the impact on tenured faculty tends to take center stage. But the rights of students often become the most publicized and litigated issues in program elimination or school closure, and the rights of students can have a dramatic impact on the institution's decisions about faculty.[187]

It is generally agreed that, whether in private or public institutions of higher

183. *Id.* at 683.

184. *Id*. at 677–78.

185. *Id*. at 682–83.

186. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *Recommended Institutional Regulations*, *in* POLICY DOCUMENTS & REPORTS, *supra* note 5, at 24.

187. *See* Aase v. South Dakota, 400 N.W.2d 269 (S.D. 1987); Koenig v. S.E. Cmty. Coll., 438 N.W.2d 791 (Neb. 1989).

education, the relationship between colleges and universities and their students is one of contract. A description of the contract that is formed between an institution and a student, and cited by courts as authoritative, is found in a law journal note from 1963:

> This contract is conceived of as one by which the student agrees to pay all required fees, maintain the prescribed level of academic achievement, and observe the school's disciplinary regulations, in return for which the school agrees to allow the student to pursue his course of studies and be granted a diploma upon the successful completion thereof. Since a formal contract is rarely prepared, the general nature and terms of the agreement are usually implied, with specific terms to be found in the university bulletin and other publications; custom and usages can also become specific terms by implication.[188]

While courts have accepted this contract law interpretation, they still recognize that flexibility is inherent in the student-university contract:

> It is apparent that *some* elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and the University to provide some framework into which to put the problem of expulsion for disciplinary reasons. This does not mean that "contract law" must be rigidly applied in all its aspects, . . . [t]he student-university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category. . . . There are also many cases which refer to a contractual relationship existing between the student and the university, . . . [b]ut again, these cases do not adopt *all* commercial contract law by their use of certain elements.[189]

This "flexibility" results in serious ambiguity in the context of school closure. When programs contract or colleges close prior to the graduation of matriculated students, students tend to sue and tend to be afforded an extremely respectful hearing by judges and juries, as well as in the court of public opinion. Virtually all decisions discussing student closure claims have held that students have standing to sue, and fact finders are also extremely sympathetic to the argument that a matriculated student has an enforceable expectation that a program will continue until he or she has the opportunity to graduate.[190] Indeed, students have begun to sue alleging that precipitous closures constitute "fraud," entitling them to

188. Eugene L. Kramer, *Expulsion of College and Professional Students—Rights and Remedies*, 38 NOTRE DAME L. REV. 174, 183 (1963). *See also* Hazel G. Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183 (2000). For a recent case discussing the student-institution contractual relationship, see *Mangla v. Brown Univ*., 135 F.3d 80 (1st Cir. 1998).

189. Slaughter v. Brigham Young Univ., 514 F.2d 622, 626 (10th Cir. 1975). *See also* Boehm v. Univ. of Penn. Sch. of Veterinary Med., 573 A.2d 575, 581 (Pa. Super. 1990).

190. *See* Goode v. Antioch Univ., 544 A.2d 704, 706–07 (D.C. 1988); Eden v. Bd. of Trs., 374 N.Y.S.2d 686, 691–92 (N.Y. App. Div. 1975); Eden v. New York, 426 N.Y.S.2d 197, 199–200 (N.Y. Ct. Cl. 1980); Galton v. Coll. of Pharm. Sciences, Columbia Univ., 332 N.Y.S.2d. 909 (N.Y. Spec. Term 1972); Behrend v. Ohio, 379 N.E.2d 617, 620 (Ohio Ct. App. 1977); Lowenthal v. Vanderbilt Univ., No. A 8525 (Ch. Ct. Tenn. Aug. 15, 1977).

compensatory and punitive damages, as well as attorneys' fees.[191] Institutions may find themselves liable for substantial damages if students prevail in class actions challenging decisions to eliminate programs before enrolled students have graduated.

Under these circumstances, institutions may legitimately determine that the best plan for program elimination or discontinuance is a gradual one, and that precipitous termination of faculty members is an undesirable response to a financial crisis. If an institution decides to phase out a program and "teach out" all matriculated students, it needs to secure the services of its faculty during that period, not terminate them. In this circumstance, one option is to negotiate new, multi-year contracts with faculty needed during the "teach out." The contracts afford the faculty members a transition period within which to seek other employment or consider other options, rather than a precipitous loss of employment.

The solution can work well for both the faculty and student constituencies. But even where the institution cannot maintain a troubled program for the full "teach out" period, students should be given sufficient notice to allow them to transfer to a similar program without suffering a credit loss or postponement of their graduation date.[192] The quality of the program must be maintained during the phase-out period, and for that the institution will need its teachers.[193] In short, the need to deal compassionately with students may in turn offer the institution a method of discontinuing faculty in a less disruptive, less divisive manner.

V. SUMMARY

There is no set prescription for the process of institutional retrenchment. There is a set of common sequential questions that need to be asked and answered by those who participate in making—and defending—retrenchment decisions:

1. What is the level and scope of budgetary/enrollment shortfall?
2. What is the length of time the institution has to accomplish the retrenchment?
3. Who must be consulted in the process of identifying the retrenchment approach to be taken?

191. Galdikas v. Fagan, No. 01-C4268, 2001 WL 1223539, at *1 (N.D. Ill. Oct. 12, 2001); Craig v. Forest Inst. of Prof'l Psychology, 713 So. 2d 967 (Ala. Civ. App. 1997).

192. *See* Beukas v. Bd. of Trs., 605 A.2d 708 (N.J. Super. Ct. App. Div. 1992). In considering the fairness of the University's decision to close the dental college due to financial exigency and deprive students an opportunity to complete the program of study, the court reasoned that "[t]he University, faced with a substantial budgetary shortfall due to the State's unilateral decision to discontinue its financial aid, acted reasonably and humanely in arranging for transfers of its dental students to other dental schools and in subsidizing any differences in tuition." *Id.* at 709.

193. For additional discussion of student rights during retrenchment, see Hazel G. Beh, *Downsizing Higher Education and Derailing Student Educational Objectives: When Should Student Claims for Program Closures Succeed?* 33 GA. L. REV. 155 (1998) and Steven G. Olswang, Elsa Cole, and James Wilson, *Program Elimination, Financial Emergency, and Student Rights*, 9 J.C. & U.L. 163 (1982–83).

4. Have the retrenchment options been considered in sequential order of severity (Program Reduction, Program Elimination, Financial Exigency, Merger or Consolidation, Closure)?

5. Are there alternatives that allow meeting the retrenchment targets, short of staff and faculty terminations?

6. What are the institutional rules governing personnel reduction-in-force procedures?

7. What due process and contractual rights do faculty have in retrenchment terminations?

8. What are the institution's obligations to students?

The cases and trends discussed above clarify that retrenchment continues to be a major challenge for institutions of higher learning, as well as a major source of disruptive litigation. Most such litigation, though not all, can be avoided or reduced if institutions plan carefully for any proposed retrenchment and adhere to all applicable procedural and substantive protections due to the faculty. Courts still show admirable deference to legitimate academic decisions of institutions, but they have no patience for failure to adhere to clearly articulated procedure or well-established custom. Indeed, in some circumstances (such as in *Mundelein*), courts appear willing to apply a standard retrenchment procedure to an atypical circumstance that was unanticipated by the contracting parties—and to penalize the institution granting tenure for failing to anticipate the need to implement this procedure. This only underscores the need for institutions to anticipate future retrenchment possibilities. Before retrenchment is contemplated, institutions are well-advised to consider and adopt the rules and procedures that they want—before courts impose procedural obligations upon them.