TRIMMING THE DEADWOOD: REMOVING TENURED FACULTY FOR CAUSE

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I. INTRODUCTION

Many criticize the concept of academic tenure in higher education.[1] Some claim "guarantees of life employment" set up an "impenetrable barrier"[2] that reduces accountability and leads to a surplus of deadwood in higher education.[3] In the words of one scholar, academic tenure serves to

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1. James J. Fishman, *Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others*, 21 PACE L. REV. 159, 160 (2000).

2. *Id.* at 172; Brian G. Brooks, *Adequate Cause for Dismissal: The Missing Element in Academic Freedom*, 22 J.C. & U.L. 331, 332 (1995) ("Critics contend that tenure erects an impenetrable barrier to removing the teacher who cannot teach, the scholar who cannot publish or the poor university citizen.").

3. Fishman, *supra* note 1, at 187 (defining deadwood broadly as "anything use-

protect "the inert, the barely competent, the perfunctory reciter of ancient lessons, and the one-time scholar who now devotes his best energies to more lucrative pursuits."[4] An oft-repeated anecdote recounts the professor who has used the same yellowed lecture notes for decades, works only a handful of hours per week, and has not published anything since achieving tenure.[5]

This article explores whether tenure actually creates an impenetrable legal barrier that burdens higher education by protecting deadwood faculty. It does so by analyzing whether U.S. courts truly give such deference so that tenured faculty members are free to be insubordinate employees, poor colleagues, ineffective teachers, and inept researchers.[6] It concludes by finding that reported case law provides little cover for such activities and, instead, provides numerous examples of academic institutions successfully terminating tenured faculty for deadwood behaviors. In short, this article finds that courts routinely uphold the rights of institutions to dismiss deadwood tenured faculty so long as the institutions follow specified pretermination procedures and there is substantial evidence to prove the alleged behavior.

II. DEFINING ACADEMIC TENURE

More than ninety percent of American public and private colleges and universities have a tenure system.[7] However, these systems are far from uniform and no two systems of tenure are alike.[8] Despite their differences, tenure systems share two general goals: (1) to provide economic security to make the profession attractive to talented individuals, and (2) to protect a faculty member by safeguarding academic freedom.[9] The first goal is practical. Tenure entices individuals of ability to academia by providing a suf-

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less and burdensome" or more specifically as "an underperforming faculty member who has not attained the promise demonstrated when considered for tenure."); Robert W. McGee, *Academic Tenure: Should It Be Protected By Law?*, 20 W. ST. U. L. REV. 593, 598 (1993) ("One of the problems with tenure is that it forces universities to retain deadwood.").

4. ROBERT M. MACIVER, ACADEMIC FREEDOM IN OUR TIME 240 (1955).

5. Melanie Wood & Christine Des Jarlais, *When Post-Tenure Review Policy and Practice Diverge: Making the Case for Congruence*, 77 J. HIGHER ED. 561, 561 (2006).

6. This article will not consider cases of financial exigency or moral turpitude.

7. *Johns Hopkins Univ. v. Ritter*, 689 A.2d 91, 93 (Md. Ct. Spec. App. 1997).

8. Murphy v. Duquesne Univ. of the Holy Ghost, 777 A.2d 418, 430 n.9 (Pa. 2001); Hennessey v. Nat'l Collegiate Athletic Ass'n, 564 F.2d 1136, 1142 (5th Cir. 1977) ("[T]he court is mindful that there are great variations among—and even within—institutions in the granting and meaning of tenure."); *see* Worzella v. Bd. of Regents, 93 N.W.2d 411, 414 (S.D. 1958) (noting tenure's "vaporous objectives, purposes, and procedures are lost in a fog of nebulous verbiage.").

9. AAUP 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (1940), *available at* http://www.aaup.org/file/principles-academic-freedom-tenure.pdf.

ficient degree of economic security.[10] Tenure affords "the benefit of job security that offsets the negative salary differences between those who choose an academic, as opposed to a professional or business, career."[11] The second goal is a loftier goal.[12] As described by one scholar, academic freedom exists to ensure that society has "the benefit of honest judgment and independent criticism which otherwise might be withheld because of fear of offending a dominant social group or transient social attitude."[13] In *Sweezy v. State of New Hampshire*, the U.S. Supreme Court dramatically described the significance of academic freedom:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. [14]

In general, tenure protects academic freedom by ensuring that faculty cannot be summarily dismissed or sanctioned at will.[15] As discussed below, institutions must have adequate reasons to dismiss tenured faculty and the faculty member facing termination must have the opportunity to refute the reasons for dismissal.

In popular culture, academic tenure is often thought of as a guarantee of lifetime employment.[16] But this description is clearly untrue. Even the American Association of University Professors (AAUP), an organization that exists to champion academic freedom and economic security for university faculty,[17] admits that tenure "accurately and unequivocally defined,

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10. *Id.*

11. Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U.L. REV. 67, 70 (2006).

12. *See Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045 (1968).

13. CLARK BYSE & LOUIS JOUGHIN, TENURE IN AMERICAN HIGHER EDUCATION: PLANS, PRACTICES AND THE LAW 4 (1959).

14. 354 U.S. 234, 250 (1957).

15. ARVAL A. MORRIS, DISMISSAL OF TENURED HIGHER EDUCATION FACULTY: LEGAL IMPLICATIONS OF THE ELIMINATION OF MANDATORY RETIREMENT 9 (1992); Adams, *supra* note 11, at 70. *But see* Suzanne R. Houle, *Is Academic Freedom in Modern America on Its Last Legs after* Garcetti v. Ceballos*?*, 40 CAP. U.L. REV. 265, 265–66 (2012) (noting the doctrine of academic freedom and the associated protections formerly afforded to faculty member speech have been greatly eroded since 2006).

16. MORRIS, *supra* note 15, at 7.

17. The AAUP's full mission "is to advance academic freedom and shared gov-

lays no claim whatever to a guarantee of lifetime employment."[18] The AAUP notes that tenure is merely a statement of formal assurance that "the individual's professional security and academic freedom will not be placed in question without the observance of full academic due process."[19] As described by one scholar, "tenure essentially requires fairness before one is dismissed from a position, thereby giving expectation of continued employment."[20] U.S. courts also reiterate that tenure does not constitute a guarantee of life employment.[21] As noted by the Supreme Court of Washington, it "is not a license for activity at variance with job related procedures and requirements" and it does not "encompass activities which are internally destructive to the proper function of the university or disruptive to the education process."[22] While there may be an expectation of continued employment, faculty can still be terminated for cause.[23]

Tenure can also have a very different meaning in private, as opposed to public, institutions. Tenured faculty in public institutions have a "property interest" in continued employment via state statutes and the Fourteenth Amendment, but faculty in private institutions may[24] only have a contractual interest in continued employment.[25] In private institutions, tenure is

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ernance; to define fundamental professional values and standards for higher education; to promote the economic security of faculty, academic professionals, graduate students, post-doctoral fellows, and all those engaged in teaching and research in higher education; to help the higher education community organize to make our goals a reality; and to ensure higher education's contribution to the common good." *Mission*, AAUP, http://www.aaup.org/about/mission-description (last visited Oct. 15, 2014).

18. William Van Alstyne, *Tenure: A Summary, Explanation and "Defense"*, 57 AAUP BULL. 328, 328 (1971). One common legal definition is "a status granted, usually after a probationary period, which protects a teacher from dismissal except for serious misconduct or incompetence." Drans v. Providence Coll., 383 A.2d 1033, 1039 (R.I. 1978).

19. Van Alstyne, *supra* note 18, at 328.

20. Fishman, *supra* note 1, at 162.

21. Am. Ass'n of Univ. Professors v. Bloomfield Coll., 322 A.2d 846, 853 (N.J. Super. Ct. Ch. Div. 1974), *aff'd*, 346 A.2d 615 (N.J. Super. Ct. App. Div. 1975) ("Although academic tenure does not constitute a guarantee of life employment . . . it denotes clearly defined limitations upon the institution's power to terminate the teacher's services.").

22. Stastny v. Bd. of Trs., 647 P.2d 496, 504 (Wash. Ct. App. 1982).

23. Lyman v. Swartley, 385 F. Supp. 661, 665 (D. Idaho 1974) ("Tenure as a legal right means a reasonable expectation of continued employment so long as that employment is performed properly."). Union employees and civil servants have similar employment protections. Fishman, *supra* note 1, at 173; Van Alstyne, *supra* note 18, at 329.

24. *See* John M. Badagliacca, Comment, *The Decline of Tenure: The Sixth Circuit's Interpretation of Academic Tenure's Substantive Protections*, 44 SETON HALL L. REV. 905, 919–29 (2014) (discussing decisions with opposite rulings on the issue of whether the undefined contractual term "tenure" implies a continuing employment relationship in private institutions).

25. Perry v. Sindermann, 408 U.S. 593, 598–99 (1972); Stensrud v. Mayville

defined by the contract between the faculty member and the institution.[26] When interpreting this contract, courts look to the individual employment contract,[27] the faculty handbook,[28] and sometimes, if incorporated by reference, the AAUP's original definition of tenure as set forth in its 1940 Statement of Principles of Academic Freedom[29] or similar standards set forth by an applicable accrediting agency.[30] It is important to note the Sixth Circuit has recently ruled that, absent specific language in the contract, the term tenure does not imply any expectation of employment beyond the current academic year.[31] However, this interpretation is the sub-

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State Coll., 368 N.W.2d 519, 521 (N.D. 1985); Trimble v. W. Va. Bd. of Dirs., 549 S.E.2d 294, 301 (W. Va. 2001) ("Indeed, it is well-settled, and we so hold, that a tenured teacher [in a state institution] has a protected property interest in his/her position, which raises constitutional due process considerations when a teacher is faced with termination of his/her employment.").

26. Branham v. Thomas M. Cooley Law Sch., 689 F.3d 558, 562 (6th Cir. 2012); Gray v. Mundelein Coll., 695 N.E.2d 1379, 1386 (Ill. App. Ct. 1998) (finding the terms of faculty manual controlled over "custom and usage" evidence relating to the circumstances under which the defendant could terminate tenure). Tenured professors dismissed from private institutions may seek legal recourse through an action for breach of contract. WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 660 (5th ed. 2013) (noting that tenure is a contractual right defined by the terms of the contract); Murphy v. Duquesne Univ. of the Holy Ghost, 777 A.2d 418, 428 (Pa. 2001); Fishman, *supra* note 1, at 169.

27. Figal v. Vanderbilt Univ., No. M2012-02516-COA-R3-CV, 2013 Tenn. App. LEXIS 656, at *21 (Tenn. Ct. App. Sept. 27, 2013) ("As outlined above, the terms of Vanderbilt's contract with Dr. Figal are contained in the faculty manual, the college rules, and the memoranda generated at the time of her reappointments.").

28. Otero-Burgos v. Inter Am. Univ., 558 F.3d 1, 10 (1st Cir. 2009) ("The parties agree that IAU's Faculty Handbook sets forth the terms of Otero-Burgos's tenure contract."). At most institutions, the handbook describes the standards the institution will employ to determine whether a tenured faculty should be terminated and the procedures to be used in effecting that decision. Ronald C. Brown, *Tenure Rights in Contractual and Constitutional Context*, 6 J.L. & EDUC. 279, 282–84 (1977).

29. CONTEMPORARY ISSUES IN HIGHER EDUCATION LAW 93 (Joseph Beckham & David Dagley eds., 2005); *see, e.g.*, Krotkoff v. Goucher Coll., 585 F.2d 675, 678 (4th Cir. 1978); Adamian v. Jacobsen, 523 F.2d 929, 932 (9th Cir. 1975); Hill v. Talladega Coll., 502 So.2d 735, 737 (Ala. 1987); Browzin v. Catholic Univ. of Am., 527 F.2d 843, 846 (D.C. Cir. 1975); Karlen v. N.Y. Univ., 464 F. Supp. 704, 707 (S.D.N.Y. 1979); Drans v. Providence Coll., 410 A.2d 992, 994 (R.I. 1980). Some institutions directly or indirectly incorporate the AAUP policy. NORMA M. GOONEN & RACHEL S. BLECHMAN, HIGHER EDUCATION ADMINISTRATION: A GUIDE TO LEGAL, ETHICAL, AND PRACTICAL ISSUES 104 (1999).

30. *Branham*, 689 F.3d at 562 (noting the employment agreement could have incorporated standards from the American Bar Association); *see also Browzin*, 527 F.2d at 845–46 (using recommended regulations promulgated by the American Association of University Professors to determine contractual rights); Bason v. Am. Univ., 414 A.2d 522, 525 (D.C. 1980) (using the bylaws of the Association of American Law Schools to interpret contractual term).

31. *Branham*, 689 F.3d at 562–63.

ject of some dispute,[32] and at least one other court has found that the term does, by itself, imply indefinite employment absent circumstances justifying termination for cause.[33]

In public institutions, the tenure system is defined by the aforementioned sources plus applicable statutes and administrative regulations.[34] As a result, tenured faculty at public institutions have a protectable property interest in continued employment,[35] limited by college or university policy, that gives additional protections set forth by statute and the Fourteenth Amendment.[36] In public institutions, a successful legal challenge could result in both monetary damages and reinstatement of the terminated faculty member.[37] In private institutions, reinstatement is unlikely because many courts are reluctant to order specific performance of a personal services contract.[38]

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32. Badagliacca, *supra* note 24, at 919–29 (discussing decisions with opposite rulings on the issue of whether the undefined contractual term "tenure" implies a continuing employment relationship in private institutions).

33. Collins v. Parsons Coll., 203 N.W.2d 594, 597–98 (Iowa 1973).

34. *See* Cohen v. Bd. of Trs., 867 F.2d 1455, 1460–61 (3d Cir. 1989) (delineating tenure contractual terms in New Jersey statutes); KAPLIN & LEE, *supra* note 26, at 614; *see also Developments in the Law*, *supra* note 12, at 1099–1100.

35. *See* Bd. of Regents v. Roth, 408 U.S. 564, 578 (1972) (noting Wisconsin tenure statutes could create a property interest in tenure); Perry v. Sindermann, 408 U.S. 593, 602–03 (1972) (finding the statute and the college's unwritten common law created a "de facto" tenure system which created a property interest that obligated the college to grant the professor a pre-termination hearing); Arnett v. Kennedy, 416 U.S. 134, 153–54 (1974) (holding that a tenured public employee's property interest is defined by the terms of the statute that created the property interest); Tonkovich v. Kansas Bd. of Regents, 159 F.3d 504, 517 (10th Cir. 1998); Moore v. Warwick Pub. Sch. Dist., 794 F.2d 322, 328–30 (8th Cir. 1986); Agarwal v. Regents of the Univ. of Minn., 788 F.2d 504, 507 n.2 (8th Cir. 1986); Stermetz v. Harper, 763 F.2d 366, 367 (8th Cir. 1985); O'Neal v. City of Hot Springs Nat'l Park, 756 F.2d 61, 62–63 (8th Cir. 1985); Miller v. Dean, 552 F.2d 266, 268 (8th Cir. 1977); Fisher v. Snyder, 476 F.2d 375, 376–77 (8th Cir. 1973). Any protection attributable to the Fourteenth Amendment is limited to terminations for constitutionally impermissible reasons, such as arbitrary or capricious decisions, or terminations based on race, religion, or earlier exercise of freedom of expression. Kirschenbaum v. Northwestern Univ., 728 N.E.2d 752 (Ill. App. 1st Dist. 2000); Johnson v. Bd. of Regents, 377 F. Supp. 227, 238 (W.D. Wis. 1974), *aff'd mem.*, 510 F.2d 975 (7th Cir. 1975); *cf.* Rozman v. Elliott, 335 F. Supp. 1086, 1088 (D. Neb. 1971) (discussing a Fourteenth Amendment issue involving non-tenured faculty member); Timothy B. Lovain, *Grounds for Dismissing Tenured Postsecondary Faculty for Cause*, 10 J.C. & U.L. 419, 421–22 (1984).

36. As stated by one court, tenure at a public institution "does not grant any greater rights, either substantive or procedural, than the policy that defines the term." *Kirschenbaum*, 728 N.E.2d at 762.

37. MORRIS, *supra* note 15, at 29.

38. *Id.*

III. TERMINATION FOR CAUSE

Tenure systems generally protect tenured faculty from arbitrary dismissal by limiting terminations to instances of "adequate cause" or circumstances of financial exigency within the institution.[39] This requirement of a specified cause for dismissal has been called "the heart of the tenure system."[40] The AAUP describes adequate cause very broadly, noting that such dismissal "will be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers."[41] In 1973, a joint commission on academic tenure in higher education recommended that adequate cause in faculty dismissal proceedings should be limited to "(a) demonstrated incompetence or dishonesty in teaching or research, (b) substantial and manifest neglect of duty, and (c) personal conduct which substantially impairs the individual's fulfillment of his institutional responsibilities."[42] Institutions typically provide a more detailed list of behaviors that constitute adequate cause.[43] Common examples include incompetence or dishonesty in teaching or research, substantial and manifest neglect of duty, insubordination by refusal to abide by legitimate and reasonable directions from administration, improper personal conduct such as moral turpitude or criminal conduct that impairs the faculty member's ability to fulfill institutional responsibilities, and physical or mental inability to perform assigned duties.[44] Less common examples include "malicious gossip or public verbal abuse"[45] and "[f]ailure to maintain the level of professional excellence and ability demonstrated by other members of the faculty in the department or division of the institution."[46]

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39. 1940 STATEMENT OF PRINCIPLES, *supra* note 9, at 4 (stating tenured professors "should be terminated only for adequate cause, except in case of retirement for age, or under extraordinary circumstances because of financial exigencies."); *see also* KAPLIN & LEE, *supra* note 26, at 616.

40. *Developments in the Law*, *supra* note 12, at 1094.

41. Committee A on Academic Freedom and Tenure, *Recommended Institutional Regulations on Academic Freedom and Tenure*, ACADEME July–Aug. 2013, at 61, 71 n. 15, *available at* http://www.aaup.org/sites/default/files/RIR2013.pdf. "Adequate cause for a dismissal will be related, directly and substantially, to the fitness of faculty members of their professional capacities as teachers or researchers." *Id.* at 65.

42. COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE; A REPORT AND RECOMMENDATIONS 75 (William R. Keast & John W. Macy eds., 1973).

43. *See* BISWANATH SHAW, ACADEMIC TENURE IN AMERICAN HIGHER EDUCATION 62–65 (1971) (finding twenty-five different grounds for termination at approximately forty different universities).

44. Morris v. Clifford, 903 F.2d 574, 576 n.4 (8th Cir. 1990) (citing UNIVERSITY OF NORTH DAKOTA FACULTY HANDBOOK).

45. Larry G. Gerber & Larry D. Watson, *Academic Freedom and Tenure: Stillman College (Alabama)*, ACADEME, Mar.–Apr. 2009, at 94.

46. TENN. CODE ANN. § 49-8-302(7) (2014).

If a faculty member engages in such activities, the institution may terminate his or her employment. The following section highlights the major legal arguments proffered by faculty terminated for deadwood behavior.

A. Common Arguments Challenging For-Cause Termination Decisions

Beyond the occasional claim of pre-textual discrimination[47] or retaliation for exercise of free speech[48] or academic freedom[49] most legal challenges to the termination of deadwood tenured faculty center on arguments alleging procedural violations or lack of evidence to support the allegations of for-cause behavior.[50]

At private institutions, tenure provisions incorporated into the employment contract typically detail a specific pre-termination process outlining how a tenured professor can be terminated for cause.[51] A terminated pro-

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47. *See, e.g.*, Bidasaria v. Cent. Mich. Univ., No. 12-2030, 2013 U.S. App. LEXIS 19649, at *5 (6th Cir. March 25, 2013) (alleging the stated reasons for termination—missing classes and missing faculty preparation week—were merely a pretext for discrimination based on national origin).

48. *See, e.g.*, Harris v. Bd. of Trs., 542 N.E.2d 261, 267–68 (Mass. 1989) (dismissing tenured faculty member's claim that his termination was prompted by the exercise of free speech, rather than the stated reasons of hostile relations with students and colleagues).

49. MORRIS, *supra* note 15, at 30.

50. Some terminated faculty members have argued that the institution's definition of adequate cause lacked enough specificity so as to provide adequate notice that certain behaviors would justify termination. In one case, a terminated faculty member claimed the institution's definition of adequate cause—"failure to maintain standards of sound scholarship and competent teaching, or gross neglect of established University obligations appropriate to the appointment, or incompetence, or incapacitation, or conviction of a crime involving moral turpitude"—was unconstitutionally vague. San Filippo v. Bongiovanni, 961 F.2d 1125, 1127 (3d Cir. 1992). The Third Circuit rejected this argument, noting that such language was specific enough for any "ordinary person using his common sense and general knowledge of employer-employee relationships." *Id.* at 1137. Numerous appellate decisions demonstrate that courts seem unwilling to apply the vagueness doctrine in this context. *See* Stastny v. Bd. of Trs., 647 P.2d 496, 504 (Wash. 1982); Garrett v. Matthews, 474 F. Supp. 594, 597 (N.D. Ala. 1979) (upholding the revocation of tenure).

51. *See, e.g.*, Branham v. Thomas M. Cooley Law Sch., 689 F.3d 558, 563–64 (6th Cir. 2012); McConnell v. Howard Univ., 818 F.2d 58, 66–67 (D.C. Cir. 1987). The 1940 Statement of Principles on Academic Freedom and Tenure calls for the following due process safeguards:

> Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges and should have the opportunity to be heard in his or her own defense by all bodies that pass judgment upon the case. The teacher should be permitted to be accompa-

fessor may argue that the institution did not precisely follow the specified pre-termination process and therefore breached the employment contract.[52] For example, in *Branham v. Thomas M. Cooley Law School*, a tenured law professor refused to teach a course in constitutional law, citing her preference to teach a course in criminal law.[53] The Dean abruptly dismissed her, ignoring the process set forth in her employment contract that required a pre-termination hearing by her colleagues.[54] The tenured professor filed suit and the court determined that the institution had breached the employment agreement by not following the dismissal process as outlined in her employment contract and ordered that she be given a pre-termination hearing.[55]

In public institutions, the procedural argument often centers upon the minimum standards for due process as set forth by the United States Supreme Court in *Cleveland Board of Education v. Loudermill*.[56] In *Loudermill*, the Court stated that the terminated public employee is entitled to oral or written notice of the charges and a "pre-termination hearing" that gives the employee the opportunity to present "his side of the story" before the termination takes place.[57] The goal of the hearing is to provide "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the

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> nied by an advisor of his or her own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from the teacher's own or from other institutions.

1940 STATEMENT OF PRINCIPLES, *supra* note 9, at 4. Some private institutions have termination procedures that are fundamentally less than these suggested standards. Linda L. Carroll & John C. Shelley, *Academic Freedom and Tenure: Charleston Southern University*, ACADEME, Jan.–Feb. 2001, at 63.

52. *Branham*, 689 F.3d at 563–64. *See generally* Fishman, *supra* note 1, at 170–71.

53. *Branham*, 689 F.3d at 561.

54. *Id.*

55. *Id.*; *see also* Lyman v. Swartley, 385 F. Supp. 661, 665 (D. Idaho 1974) ("Here, the Board, without affording plaintiff any opportunity to respond, determined, unilaterally, that cause for discharge existed and purported to terminate the employment. This action deprived plaintiff of a valuable property right without due process of law in violation of the safeguards provided by the United States Constitution."). The school then held a pre-termination hearing and the panel of her peers recommended dismissal. *Branham*, 689 F.3d at 561. The district court then entered final judgment against the terminated professor. *Id.* The terminated professor's subsequent appeal was unsuccessful. *Id.*

56. 470 U.S. 532 (1985).

57. *Id.* at 542–48. The court found due process "requires 'some kind of a hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment." *Id.* at 542. Also, due process requires any "post-termination administrative procedures as provided by the [state] statute." *Id.* at 548.

employee are true and support the proposed action."[58] However, the Court noted that something less than a full evidentiary hearing is sufficient.[59]

Subsequent courts have expanded upon the *Loudermill* holding. For example, the Eighth Circuit concluded that due process proceedings for a tenured professor require: (1) notice in sufficient detail to permit the professor to refute the charges; (2) names of those whose charges constitute the basis for the termination and the facts upon which they rely; (3) reasonable time to prepare and an opportunity to present a defense; and (4) an impartial tribunal.[60] Other courts specify that the institution must ultimately provide a final statement of the grounds for termination.[61] If this final statement does not provide a clear statement of the reasons for dismissal and the evidence supporting those reasons, the statement does not constitute sufficient due process.[62] This final requirement cuts to the heart of most judicial challenges—whether there was enough substance, or evidence behind the allegations, to prove there was adequate cause for dismissal.[63] Tenured faculty members have a substantive due process right to be free from discharge for arbitrary and capricious reasons or "reasons that are trivial, unrelated to the education process, or wholly unsupported by a basis in fact."[64] A review-

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58. *Id.* at 545–46. The details governing the operation of this hearing are vague, but as stated by one Federal District Court Judge, there "is not a single case authority known to this court . . . that suggests that this particular brand of procedural due process requires the incorporation by reference of both the Federal Rules of Evidence (particularly, the hearsay rules in Rules 801-804), and the Federal Rules of Civil Procedure (particularly, the discovery rules under Rules 26 through 37)." Fong v. Purdue Univ., 692 F. Supp. 930, 950 (N.D. Ind. 1988).

59. *Loudermill*, 470 U.S. at 545. This hearing can still be burdensome and time consuming for the institution. *See, e.g.*, Bowling v. Scott, 587 F.2d 229, 230 (5th Cir. 1979) (noting that during the course of the termination proceedings the hearing committee met fourteen times, heard evidence from twelve witnesses and were presented with 175 evidentiary exhibits).

60. Riggins v. Bd. of Regents, 790 F.2d 707, 712 (8th Cir. 1986) (quoting King v. Univ. of Minn., 774 F.2d 224, 228 (8th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986)); *see also* Levitt v. Univ. of Tex., 759 F.2d 1224, 1228 (5th Cir. 1985) (noting the impartial tribunal must have "some academic expertise and an apparent impartiality toward the charges."). In *Chung v. Park*, 377 F. Supp. 524 (M.D. Pa. 1974), dismissal proceedings were characterized as comporting with the "bare minima of 'due process'" when the faculty member was given a lengthy hearing during which he was "fully able to cross-examine his accusers, subpoena witnesses, present evidence, and, in effect, demand a full accounting from the college as to whether the decision . . . to fire him was supported." *Id.* at 529.

61. *See, e.g.*, Potemra v. Ping, 462 F. Supp. 328, 332 (E.D. Ohio 1978).

62. Clarke v. West Va. Bd. of Regents, 279 S.E.2d 169, 177 (W. Va. 1981).

63. *See* Newman v. Burgin, 930 F.2d 955, 962–63 (1st Cir. 1991) (recognizing an arbitrary decision that significantly affects a tenured professor's employment status may violate substantive due process).

64. Morris v. Clifford, 903 F.2d 574, 577 (8th Cir. 1990) (recognizing tenured professor's due process right to be free from discharge for "arbitrary and capricious" reasons); *see* GOONEN, *supra* note 29, at 102 ("The substantive due process protection

ing court will not determine de novo whether it would have terminated the faculty member.[65] Instead, the review is deemed as one of substantial evidence.[66] Quite simply, if the termination decision was based on substantial evidence, then the court will affirm the decision.[67] What constitutes "substantial evidence" can vary among jurisdictions. For example, an oft-cited definition by the U.S. Supreme Court states that "substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[68]The Kansas Supreme Court defines substantial evidence as that "which possesses relevance and substance and which furnishes a substantial basis of fact from which the issue can reasonably be resolved."[69] The Supreme Court of North Dakota describes the analysis as "whether a reasoning mind reasonably could have determined that the factual conclusions reached [by the hearing panel] were proved by the weight of the evidence."[70] A constant refrain among definitions is that the evidence must not point to only one conclusion; the mere fact that differing opinions could be reached based on the same facts does not mean that the decision was inappropriate.[71]

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provided by the Fourteenth Amendment guarantees that the reasons for terminating a tenured faculty member at a public institution are not over broad, arbitrary and capricious or otherwise impair a constitutional right.").

65. Agarwal v. Regents of the Univ. of Minn., 788 F.2d 504, 508 (8th Cir. 1986); *King*, 774 F.2d at 227; *see* Wood v. Strickland, 420 U.S. 308, 325–26 (1975).

66. *Agarwal*, 788 F.2d at 508 ("The district court correctly held that a court's role is limited to examining the record of University proceedings to determine whether there was substantial evidence to support its determination."); *King*, 774 F.2d at 227 ("It is, of course, not for the District Court or for this Court to determine *de novo* whether we would terminate [him] based on the evidence presented during the [University's due process] hearings . . ."); MORRIS, *supra* note 15, at 24.

67. *Agarwal*, 788 F.2d at 508.

68. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). The Court goes on to note that "[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence." *Id.* at 230.

69. Haddock v. Bd. of Educ., 661 P.2d 368, 372 (Kan. 1983) (quoting Kelly v. Kansas City, 648 P.2d 225, 230 (Kan. 1982)); *see* Morton v. Mooney, 33 P. 2d 262, 265–66 (Mont. 1934) ("Substantial evidence is such as will convince reasonable men and on which such reasonable men may not reasonably differ as to whether it establishes the plaintiff's case, and, if all reasonable men must conclude that the evidence does not establish such case, then it is not substantial evidence.").

70. Peterson v. N.D. Univ. Sys., 678 N.W.2d 163, 169 (N.D. 2004) ("Because a de novo review of Peterson's breach of contract claim would render the Board's administrative review procedures meaningless . . . we are persuaded that the proper standard for courts to review a substantive Board decision dismissing a tenured faculty member for cause is determining whether a reasoning mind could have reasonably determined that the factual conclusions were supported by, as the policy manual provides, clear and convincing evidence.").

71. *Id.* at 173; Bernold v. Bd. of Governors, 683 S.E.2d 428, 432 (N.C. Ct. App. 2009) ("Our task is not to comb the record for evidence that would support a different outcome from that reached by the Board, but rather to look for substantial evidence to

A review of reported case law reveals only a handful of instances where a tenured professor successfully challenged the institution's decision to terminate for alleged deadwood behaviors. In *State ex rel. Richardson v. Board of Regents*, the court determined that innocuous statements of disagreement with the University President did not constitute insubordination so as to justify adequate cause for dismissal.[72] In *Trimble v. West Virginia Board of Directors*, the West Virginia Court of Appeals determined that a tenured professor's refusal to use a new computer software program to create his syllabus did not constitute sufficient insubordination to justify his dismissal especially in light of his previous "unblemished" record at the University.[73] In the context of a private institution, the court in *McConnell v. Howard University* determined that there was sufficient evidence to have a trial on the issue of whether the professor "neglected" his duties when he refused to teach a class that contained a student who openly called him a racist.[74] The *McConnell* case also provides an example of how a tenured professor successfully argued that the private institution did not follow the termination procedures set forth in its own employment contract.[75] Finally, in *State ex rel. Ball v. McPhee*, the Wisconsin Supreme Court reversed a termination of a tenured professor at a public institution because of numerous improprieties that resulted in an unfair pre-termination hearing.[76] These improprieties were notable. First, one of the members of the Board of Regents both prosecuted the case and took part in the ultimate decision to terminate.[77] Second, multiple witnesses at the hearing openly admitted they were afraid to testify in favor of the professor because of possible reprisals.[78] When the witnesses asked if they would be protected from such reprisals, they were given no such assurances.[79] Third, the University lost some of the professor's evidentiary exhibits, while the University's exhibits

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support the decision.").

72. 269 P.2d 265, 275–76 (Nev. 1954).

73. 549 S.E.2d 294, 304 (W. Va. 2001) (ordering back pay and reinstatement). The Court noted "constitutional due process is denied when a tenured public higher education teacher, who has a previously unblemished record, is immediately terminated for an incident of insubordination that is minor in its consequences." *Id.*

74. McConnell v. Howard Univ., 818 F.2d 58, 60 (D.C. Cir. 1987).

75. *Id.* at 66–67; *see* Branham v. Thomas M. Cooley Law Sch., 689 F.3d 558, 561 (6th Cir. 2012) (noting in the procedural history of the case how the tenured professor had been previously granted a remand for a proper pre-termination hearing).

76. 94 N.W.2d 711, 717–22 (Wis. 1959); *see also* Morris v. Clifford, 903 F.2d 574, 579 (8th Cir. 1990) (holding a professor's substantive due process claim against university personnel in their individual capacities should not be dismissed on pretrial summary judgment).

77. *McPhee*, 94 N.W.2d at 721–22.

78. *Id.* at 720.

79. *Id.*

were preserved for appeal.[80] Finally, the Board provided no factual findings to justify its decision and merely indicated that the allegations of misconduct were sustained.[81]

A thorough review of reported case law reveals that these cases are truly outliers. The vast majority of reported decisions suggest that when an institution terminates a tenured faculty member for poor teaching, incompetent scholarship, insubordination, or disruptive interactions with fellow employees, courts are highly unlikely to overturn that decision.[82]

IV. CASE LAW SUPPORTING THE TERMINATION OF DEADWOOD FACULTY

The following sections identify case law related to each of the aforementioned types of deadwood behavior. Although the sections are divided into specific categories of behavior, it should be noted that in nearly every instance there was evidence to support termination for more than one type of deadwood behavior.

A. Teaching

Courts routinely affirm terminations of tenured faculty based on allegations of incompetent teaching.[83] Beyond consistently poor course evaluations[84] and broad claims of poor teaching,[85] more specific examples of allegations that have withstood legal challenge include faculty members that failed to cover the assigned course material,[86] spent an inordinate amount of time on non-pertinent matters and routinely showed irrelevant films,[87] failed to meet classes as scheduled,[88] and failed to observe office hours.[89]

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80. *Id.* at 721.

81. *Id.* at 717–18.

82. *See generally* ROBERT M. HENDRICKSON, THE COLLEGES, THEIR CONSTITUENCIES, AND THE COURTS 46–47 (1991); MORRIS, *supra* note 15, at 23.

83. MORRIS, *supra* note 15, at 23 ("Courts are particularly loathe to find violations of 'substantive' due process of law and to substitute their decisions for final dismissal decisions made by college or university officials whenever the sole question in a dismissal case is one of professional competence or responsibility, and especially so when institutional decisions solely involve questions concerning what constitutes adequate teaching or research.").

84. Agarwal v. Regents of the Univ. of Minn., 788 F.2d 504, 508 (8th Cir. 1986).

85. King v. Univ. of Minn., 774 F.2d 224, 226 (8th Cir. 1985); Jawa v. Fayetteville State Univ., 426 F. Supp. 218, 221 (E.D.N.C. 1976); Chung v. Park, 377 F. Supp. 524, 526 (M.D. Pa. 1974); Peterson v. N.D. Univ. System, 678 N.W.2d 163, 166 (N.D. 2004).

86. Riggin v. Bd. of Trs., 489 N.E.2d 616, 619 (Ind. Ct. App. 1986); Saunders v. Reorganized Sch. Dist., 520 S.W.2d 29, 35 (Mo. 1975).

87. *Riggin*, 489 N.E.2d at 626.

88. *Id.* at 619 ("frequently failed to meet classes as scheduled, at the prescribed hour or for the prescribed length of time"); *Peterson*, 678 N.W.2d at 166 (ending a class one month early); McKenna v. Bowling Green State Univ., No. 13-4054, 2014

Other examples include faculty who refused to answer questions inside or outside of class,[90] those who were belligerent, rude, and unprofessional in class,[91] those who retaliated against students,[92] and those who were uncompassionate and inflexible in administering classroom policies.[93] One professor was terminated for refusing to follow assigned course content and for simply asking the students to memorize the glossary of a textbook.[94] Another professor was terminated after he gave a majority of the students failing grades, although he claimed the students had "conspired to flunk the course to harass" him.[95]

Occasionally, arguments that attempt to blur the lines between poor teaching and the professor's right to control the content and method of instruction have found some traction with appellate courts.[96] However, courts have been able to distinguish between academic freedom and poor teaching.[97] In total, available case law shows that courts are willing to support an institution's decision to terminate for incompetent teaching, so long as the decision is supported by substantial evidence of poor teaching behavior.[98]

B. Research

One of a professor's most important roles in society is the promotion of research that would not otherwise take place in the private sector.[99] The

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U.S. App. LEXIS 11200, at *1 (6th Cir. June 13, 2014); *see* Skehan v. Bd. of Trs. of Bloomsburg State Coll., 358 F. Supp. 430 (M.D. Pa. 1973) (nonrenewal of untenured faculty member).

89. *Riggin*, 489 N.E.2d at 619; Garrett v. Matthews, 474 F. Supp. 594, 597 (N.D. Ala. 1979) (upholding the revocation of tenure).

90. *Jawa*, 426 F. Supp. at 222; Potemra v. Ping, 462 F. Supp. 328, 330 (E.D. Ohio 1978); *Peterson*, 678 N.W.2d at 173 (refusing to respond to student questions).

91. *Potemra*, 462 F. Supp. at 330; Agarwal v. Regents of the Univ. of Minn., 788 F.2d 504, 506 (8th Cir. 1986).

92. Cameron v. Ariz. Bd. of Regents, 1 CA-CV 10-0323, 2011 Ariz. App. Unpub. LEXIS 1129, at *3 (Ariz. Ct. App. Aug. 30, 2011).

93. Phillips v. State Bd. of Regents, 863 S.W.2d 45, 48–50 (Tenn. 1993).

94. Saunders v. Reorganized Sch. Dist., 520 S.W.2d 29, 32 (Mo. 1975).

95. *Potemra*, 462 F. Supp. at 331.

96. *See* STEVEN G. POSKANZER, HIGHER EDUCATION LAW: THE FACULTY 73–80 (2002) (noting case law where courts have found that the style of teaching falls within the definition of academic freedom); Silva v. Univ. of N.H., 888 F. Supp. 293, 330 (D.N.H. 1994) ("Academic freedom permits faculty members freedom to choose specific pedagogic techniques or examples to convey the lesson they are trying to impart to their students"); GOONEN, *supra* note 29, at 102.

97. Riggin v. Bd. of Trs., 489 N.E.2d 616, 629 (Ind. Ct. App. 1986) (citing Petrie v. Forest Hills Sch. Dist. Bd. of Educ., 449 N.E.2d 786 (Ohio Ct. App. 1982)).

98. Lovain, *supra* note 35, at 423.

99. H. Lorne Carmichael, *Incentive in Academics: Why is there Tenure?*, 96 J. POL. ECON. 453, 455 (1988).

job security provided by a tenure system allows faculty to investigate topics and matters that may not ultimately result in a scholarly article or other output[100] and to take chances with their research without fear that failure will lead to termination.[101] However, as described above, most tenure programs explicitly list incompetent research as a specific example of adequate cause for dismissal.[102] The natural question is, what makes one an incompetent researcher? Three cases offer guidance in this area. In the first, the institution's decision to terminate for failing to engage in research or scholarly activities for at least ten years was upheld on appeal.[103] In the second, "undocumented" and "inadequate" research was one of many reasons listed for the termination.[104] In the last, an institution terminated a tenured faculty member for failing to seek and obtain outside funding despite numerous warnings to do so.[105] These rulings suggest that a lack of objective evidence of research output qualifies as incompetence. A question not addressed is whether a court would support an institution's determination that a tenured faculty member's research output was of such an inferior quality that it constitutes incompetent research. A review of decisions where faculty members have sought to reverse the institution's decision to deny them academic tenure suggest that courts may be unwilling to overturn an institution's finding of research incompetence.

Courts give strong deference to an institution's decision not to grant tenure based upon a subjective peer evaluation of the strength of the applicant's scholarly research.[106] As noted in *Pomona College v. Superior Court*, courts realize the importance of not over-stepping their bounds when it comes to reviewing a specific faculty member's research record in the context of granting or denying tenure:

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100. Fishman, *supra* note 1, at 182–83.

101. *Id.*

102. Morris v. Clifford, 903 F.2d 574, 576 n.4 (8th Cir. 1990) (citing UNIVERSITY OF NORTH DAKOTA FACULTY HANDBOOK); Committee A, *supra* note 41, at 65 ("Adequate cause for a dismissal will be related, directly and substantially, to their fitness of the faculty member in his professional capacity as a teacher or researcher."); San Filippo v. Bongiovanni , 961 F.2d 1125, 1128 (3d Cir. 1992) ("failure to maintain standards of sound scholarship"); COMMISSION ON ACADEMIC TENURE, *supra* note 42, at 75 ("demonstrated incompetence or dishonesty in teaching or research"); TENN. CODE ANN. § 49-8-302(1) (2014) ("[i]ncompetence or dishonesty in teaching or research").

103. Riggin v. Bd. of Trs., 489 N.E.2d 616, 625–26 (Ind. Ct. App. 1986).

104. King v. Univ. of Minn., 774 F.2d 224, 225–26 (8th Cir. 1985).

105. Wiest v. State, No. 89, 953, 2003 Kan. App. LEXIS 281, at *1 (Kan. Ct. App. Nov. 7, 2003).

106. Goswami v. DePaul Univ., No. 12 C 7161, 2014 U.S. Dist. LEXIS 46509, at *4 (N.D. Ill. Apr. 7, 2014) ("As we shall see, all the cases hold that assessments of 'scholarship' by universities are inherently subjective and not measurable by objective criteria."); *see* Zahorik v. Cornell Univ., 729 F.2d 85, 93 (2d Cir. 1984) ("[T]here is no common unit of measure by which to judge scholarship").

> Only one group of people is suited to undertake the responsibility of making these decisions: the candidate's academic peers who are knowledgeable about the candidate's chosen field of study and about the particular needs of the institution. These academic peers, unlike nonacademics, are equipped to evaluate the candidate's teaching and research according to their conformity with methodological principles agreed upon by the entire academic community. They also have the knowledge to meaningfully evaluate the candidate's contributions within his or her particular field of study as well as the relevance of those contributions to the goals of the particular institution.[107]

While there is an obvious distinction between denying one's application for tenure and revoking tenure, at least one court seems to suggest the distinction is not so great. In *Gutkin v. University of Southern California*, a tenured faculty member argued that a jury, rather than a panel of academic peers as directed in his tenure contract, had the proper academic expertise to determine whether there was adequate cause to terminate his employment for cause. The court flatly rejected this argument, specifically referencing the above quoted language from *Pomona College* and additionally stating that "such a determination still requires an assessment of whether the professor's conduct is consistent with or contrary to academic norms, which only academic peers, not lay jurors, are qualified to determine."[108] The court also noted that "[i]f a college or university has the 'essential freedom' to determine for itself 'who may teach'—as both this court and the United States Supreme Court have held—that necessarily includes the determination whether a faculty member who has tenure should be dismissed."[109] Though this decision dealt with whether it was appropriate for a tenured professor to refuse to teach certain courses, it still highlights that courts are unwilling to overturn cause determinations that have already been deemed appropriate by a panel of the terminated professor's peers.

C. Insubordination

Courts also consistently hold that tenure does not give a faculty member any special right to interfere in the efficient operation of his or her own educational institution.[110] As described above, many faculty policies specifi-

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107. Pomona Coll. v. Superior Court, 53 Cal. Rptr. 2d 662, 668 (Cal. Ct. App. 1996).

108. Gutkin v. Univ. of S. Cal., 125 Cal. Rptr. 2d 115, 123 (Ct. App. 2002).

109. *Id.*

110. Trimble v. W. Va. Bd. of Dirs., 549 S.E.2d 294, 302 (W. Va. 2001) (indicating tenure does not give a professor any "special privileges or immunities to interfere in the efficient operation of an educational institution"); *see* Baughman v. Unified Sch. Dist., 10 P.3d 21, 24 (Kan. Ct. App. 2000); *see also* Brooks, *supra* note 2, at 357–58

cally list insubordination or neglect of duties as specific types of adequate cause for termination.[111] As noted by one court, "case law which defines 'insubordination' in the college or public school context is rather meager,"[112] but at least one court has defined it as "willful disregard of express or implied directions or such defiant attitude as to be equivalent thereto."[113] Acts of insubordination reflected in reported termination decisions include refusing to teach assigned courses,[114] develop new courses,[115] hold appropriate office hours,[116] submit required reports,[117] attend required faculty workshops,[118] attend commencement, [119] follow institution grading policies, [120] and serve on committees or participate in departmental affairs.[121]

On occasion, terminated faculty members argue that termination for insubordination is an infringement of their First Amendment right to free speech.[122] Courts are alert for evidence of pre-textual dismissals,[123] but

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(noting how insubordination quickly leads to a focus away from advancing academic goals to a competition to determine who will win the battle between faculty and administrator).

111. Morris v. Clifford, 903 F.2d 574, 576 n.4 (8th Cir. 1990) (citing UNIVERSITY OF NORTH DAKOTA FACULTY HANDBOOK).

112. Butts v. Shepherd Coll., 569 S.E.2d 456, 458 (W. Va. 2002).

113. State *ex rel.* Richardson v. Bd. of Regents, 269 P.2d 265, 276 (Nev. 1954).

114. *See, e.g.*, Branham v. Thomas M. Cooley Law Sch., 689 F.3d 558 (6th Cir. 2012) (private institution); Smith v. Kent State Univ., 696 F.2d 476, 477 (6th Cir. 1983) (claiming to teach a course he had taught in the past would "somehow lower his standing among the academic community"); Riggin v. Bd. of Trs., 489 N.E.2d 616 (Ind. Ct. App. 1986); Jawa v. Fayetteville State Univ., 426 F. Supp. 218 (E.D.N.C. 1976). In *Sabinson v. Trustees of Dartmouth College*, 999 A.2d 380 (N.H. 2010), the Supreme Court of New Hampshire dismissed a tenured professor's claim that he had a contractual right to teach specific courses. *Cf.* Cussler v. Univ. of Md., 430 F. Supp. 602, 608 (D. Md. 1977) (noting that faculty members must "adapt their schedules to conform [to] the needs of the department and the capabilities of other faculty members" as "[n]o faculty member has a vested right in any course").

115. *See, e.g.*, Josberger v. Univ. of Tenn., 706 S.W.2d 300, 305–06 (Tenn. Ct. App. 1985).

116. *See, e.g.*, Heflin v. Kansas City, 224 P.3d 1201, 1204–05 (Kan. App. 2010).

117. *See, e.g.*, Bates v. Sponberg, 54 F.2d 325 (6th Cir. 1976); Garrett v. Matthews, 474 F. Supp. 594 (N.D. Ala. 1979) (upholding the revocation of tenure while noting the faculty member's failure to comply with his superior's request to supply a list of publications, failure to post and keep office hours, and failure to open mail from his supervisor).

118. *See, e.g.*, Shaw v. Bd. of Trs, 549 F.2d 929 (4th Cir. 1976).

119. *Id.*

120. *See, e.g.*, Jawa v. Fayetteville State Univ., 426 F. Supp. 218, 221–22 (E.D.N.C. 1976) (rejecting plaintiff's civil rights challenges as well).

121. *See, e.g.*, Bernold v. Bd. of Governors, 683 S.E.2d 428, 429–30 (N.C. App. 2009); Potemra v. Ping, 462 F. Supp. 328, 330 (E.D. Ohio 1978).

122. Johnson v. Lincoln Univ., 776 F.2d 443 (3d Cir. 1985).

123. *See, e.g.*, Daulton v. Affeldt, 678 F.2d 487 (4th Cir. 1982) (nonrenewal of non-tenured professor); Rampey v. Allen, 501 F.2d 1090 (10th Cir. 1974) (nonrenewal of non-tenured professor); Endress v. Brookdale Cmty. Coll., 364 A.2d 1080 (N.J. Su-

rarely find free speech violations in cases of alleged insubordination.[124] One court noted that a faculty member "does not immunize himself against loss of his position simply because his noncooperation and aggressive conduct were verbalized,"[125] while another court noted that "bickering and running disputes with colleagues does not constitute a form of protected speech under the First Amendment."[126] Similar arguments pertaining to academic freedom are also rarely persuasive.[127]

D. Disruptive Interactions with Colleagues

Courts have long recognized the importance of a faculty member's working relationship with his or her colleagues.[128] Case law indicates that courts are willing to uphold terminations if the faculty member's actions are disruptive to the institution and its efficient operation.[129] Examples of affirmed terminations in this area include faculty members who have threatened and harassed peers,[130] refused to cooperate with administrators,[131] disrespected the department dean and refused to cooperate with faculty and students,[132] refused to cooperate with colleagues concerning teaching assignments and class scheduling,[133] or exhibited continuous increasing

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per. Ct. App. Div. 1976) (nonrenewal of non-tenured professor). *See generally* Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (defining the parameters of protected speech for high school teacher employed by state).

124. Lovain, *supra* note 35, at 428–29.

125. Chitwood v. Feaster, 468 F.2d 359, 361 (4th Cir. 1972) (dismissal of non-tenured faculty); *see* Phillips v. State Bd. of Regents, 863 S.W.2d 45, 51 (Tenn. 1993) (finding no merit to free speech violation when statements consisted of complaints about her supervisor rather than matters of public concern).

126. Jawa v. Fayetteville State Univ., 426 F. Supp. 218, 230 (E.D.N.C. 1976).

127. *See, e.g.*, Saunders v. Reorganized Sch. Dist., 520 S.W.2d 29, 35 (Mo. 1975).

128. Gregory M. Heiser, *Because the Stakes Are So Small: Collegiality, Polemic, and Professionalism in Academic Employment Decisions*, 52 KAN. L. REV. 385, 388 (2004); Adams, *supra* note 11, at 92 ("Tenured faculty members have a duty of collegiality in the fulfillment of their job responsibilities, specifically teaching, scholarship, and service."). Moreover, collegiality is a foundation principle for tenure deriving from the notion of faculty self-governance.

129. Bernold v. Bd. of Governors, 683 S.E.2d 428, 432 (N.C. App. 2009) ("Petitioner relies on his argument that 'lack of collegiality' cannot constitute incompetence; however, he cites no authority that disruptive behavior cannot constitute incompetence."); Bowling v. Scott, 587 F.2d 229, 230 (5th Cir. 1979) ("acts inimical to the efficient functioning of the Department of English."); Heiser, *supra* note 128, at 388.

130. Fong v. Purdue Univ., 692 F. Supp. 930, 941–42 (N.D. Ind. 1988).

131. Kelly v. Kan. City. Kan. Cmty. Coll., 648 P.2d 225, 229–31 (Kan. 1982); *Jawa*, 426 F. Supp. at 224; *see also* Phillips v. State Bd. of Regents, 863 S.W.2d 45, 48 (Tenn. 1993) ("[l]ack of professional behavior towards peers, administrators, and staff").

132. Johnson v. Alabama Agric. & Mech. Univ., 481 So. 2d 336, 336–37 (Ala. 1985).

133. Riggin v. Bd. of Trs., 489 N.E.2d 616, 620 (Ind. Ct. App. 1986).

patterns of controversy with other professional areas of the college.[134] Similarly, inadequate service to the college or university is occasionally listed amongst other reasons for termination.[135]

V. CONCLUSION

Despite claims to the contrary, the tenure system does not create an impenetrable legal barrier that gives faculty members free reign to be ineffective teachers, incompetent researchers, insubordinate employees, and bad colleagues. The adequate cause standard gives academic institutions policing powers to both monitor and terminate underperforming tenured faculty.[136] Taxpayers and education consumers are not forced to subsidize academic incompetence. Judicial precedent shows how an institution providing a sufficient pre-termination hearing that produces substantial evidence of incompetence has little to fear from a judicial review of the termination decision.[137] Conversely, reported case law does not suggest that institutions are free to terminate tenured faculty for vindictive or petty reasons. Courts will not ignore the procedural and substantive safeguards of academic tenure. Courts will be quick to enforce the terminated professor's tenure rights in those rare instances where a tenured faculty member with a previously unblemished record is hastily terminated for a minor transgression,[138] or the institution utilizes a pre-termination hearing with

134. *Phillips*, 863 S.W.2d at 48 ("[l]ack of professional behavior towards peers, administrators, and staff").

135. Bernold v. Bd. of Governors, 683 S.E.2d 428, 429–30 (N.C. App. 2009); King v. Univ. of Minn., 774 F.2d 224, 225–26 (8th Cir. 1985); *Riggin*, 489 N.E.2d at 625–26; Potemra v. Ping, 462 F. Supp. 328, 330 (E.D. Ohio 1978).

136. *See* Brooks, *supra* note 2, at 357–58.

137. MORRIS, *supra* note 15, at 23 ("All American courts, whether federal or state, afford a considerably large amount of deference to personnel decisions made by institutions of higher education, including decisions involving dismissals of tenured faculty members, especially in cases that do not also involve any additional claims of constitutional rights such as academic freedom or free speech, or claims of violations of other constitutional or legal rights such as rights to due-process procedures."). *But see* McConnell v. Howard Univ., 818 F.2d 58, 69 ("[W]e do not understand why university affairs are more deserving of judicial deference than the affairs of any other business or profession. Arguably, there might be matters unique to education on which courts are relatively ill equipped to pass judgment. However, this is true in many area of the law, including, for example, technical, scientific and medical issues. Yet, this lack of expertise does not compel courts to defer to the view of one of the parties in such cases. The parties can supply such specialized knowledge through the use of expert testimony.").

138. Trimble v. W. Va. Bd. of Dirs., 549 S.E.2d 294, 305 (W. Va. 2001) (determining that a tenured professor's refusal to use a new computer software program to create his syllabus did not constitute sufficient insubordination to justify his dismissal especially in light of his previous "unblemished" record at the University); *see* State *ex rel.* Richardson v. Bd. of Regents, 269 P.2d 265 (Nev. 1954) (finding innocuous statements of disagreement with the University President did not constitute insubordination so as to justify adequate cause for dismissal).

glaring improprieties[139] or ignores the pre-termination hearing process altogether.[140]

139. State *ex rel.* Ball v. McPhee, 94 N.W.2d 711, 719–22 (Wis. 1959).
140. Lyman v. Swartley, 385 F. Supp. 661, 665 (D. Idaho 1974).