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# Academic Freedom, Job Security, and Costs

Richard K. Neumann Jr.

Claims are sometimes made that academic job security—whether tenure or another type required by accreditation—is not needed to protect academic freedom, and that job security imposes unnecessary costs. This article explains why those claims are false.

## 1. Job Security Is Essential to Academic Freedom

Our concept of a university originated in Germany in the late nineteenth century and arrived in the United States when American academics returned from study abroad, importing the idea of a university as a center for both learning and research protected by academic freedom.<sup>1</sup> German universities recognized academic freedom in two forms: *Lernfreiheit*, the student's freedom to learn, and *Lehrfreiheit*, the teacher's freedom "to examine bodies of evidence and to report his findings in lecture or published form," or in other words "freedom of teaching and freedom of inquiry."<sup>2</sup>

Inevitably, conflict ensued. American faculty members were vulnerable to powerful business interests, trustees, and donors who might be offended by unconstrained teaching and research. "Over and over again the same pattern repeated itself: an academic publicly urged reforms or criticized the existing social order and was then summarily dismissed for his trouble."<sup>3</sup>

The most notorious incident was Stanford University's dismissal of the economist Edward A. Ross—not for his scholarship, but instead for his politics. Among other things, Ross had supported Eugene V. Debs, the labor leader who had been convicted for defying a federal injunction during the

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1. RICHARD HOFSTADTER & WILLIAM P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 367-412 (1955). The oldest European universities (Bologna and Paris) date from the eleventh century, but our model is the nineteenth-century German model.
2. *Id.* at 386-87.
3. CHRISTOPHER J. LUCAS, *AMERICAN HIGHER EDUCATION: A HISTORY* 202 (2006). The history, including the AAUP's founding, are well described in two classic works: HOFSTADTER & METZGER, *supra* note 1, and *FREEDOM AND TENURE IN THE ACADEMY* (William W. Van Alstyne ed., 1993).

1894 Pullman Strike<sup>4</sup> and who later ran for President five times on the Socialist Party ticket. Stanford had no board of trustees. It instead had *one* trustee, Jane Lothrop Stanford, who was Leland Stanford's widow. Leland Stanford, who died in 1893, had accumulated his fortune building and operating railroads, which he constructed by underpaying Asian laborers who had been imported for the purpose. In 1900 Ross made off-campus speeches arguing, in part, that importation of labor should be illegal and that railroads should be owned by government and operated for the public good. The university's sole trustee demanded that he be dismissed, and he was, through a forced resignation. The chair of the history department was fired after he protested what had happened to Ross. Seven other members of the Stanford faculty resigned in protest.

This and many other incidents led to the creation of the American Association of University Professors in 1915. Its first President was John Dewey, who is still considered a leading figure in philosophy and educational psychology. He was an education reformist, and, out of solidarity with K-12 teachers, he joined the American Federation of Teachers. Immediately he appointed an AAUP committee of fifteen academics, including Roscoe Pound, dean of the Harvard Law School,<sup>5</sup> to draft the AAUP's 1915 *Declaration of Principles on Academic Freedom and Academic Tenure*.

Eight of the fifteen had studied in German universities,<sup>6</sup> and the *Declaration's* first sentence refers, using the German terminology, to both *Lernfreiheit*, the student's academic freedom, and to *Lehrfreiheit*, the teacher's academic freedom. But having acknowledged the former, the *Declaration* concentrated exclusively on the latter,<sup>7</sup> which it divided into "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of [extramural]

4. Affirmed by a unanimous Supreme Court. *In re Debs*, 158 U.S. 564 (1895). A later conviction, for giving a speech opposing U.S. participation in World War I, was affirmed by the Supreme Court in an opinion by Holmes. *Debs v. United States*, 249 U.S. 211 (1919). While imprisoned in the Atlanta Penitentiary, Debs ran for President one last time and received almost a million votes.
5. Pound's fingerprints are on the *Declaration's* assertion that "the relationship of professor to trustees may be compared to that between judges of the Federal courts and the Executive who appoints them. University teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the trustees, than are judges subject to the control of the President . . ." AM. ASS'N OF UNIV. PROFESSORS, REPORT OF THE COMMITTEE ON ACADEMIC FREEDOM AND ACADEMIC TENURE 12 (1915) [hereinafter 1915 *AAUP Declaration*].
6. HOFSTADTER & METZGER, *supra* note 1, at 396.
7. Although U.S. courts do not use the German term *Lernfreiheit* or even the phrase *student academic freedom*, the concept is alive and well in American case law adjudicating the rights and obligations of tenured faculty. In the reported cases in which a teacher sued after tenure was revoked for behavior that made it substantially harder for students to learn, the teacher almost always lost in court. For example, see the cases in notes 28 and 30 as well as *Tarasenko v. Univ. of Ark.*, 63 F. Supp. 3d 910 (E.D. Ark. 2014). The exceptions typically involve internal procedures rather than the facts on the merits. See note 18. As far as the law is concerned, student academic freedom outranks faculty academic freedom.

utterance and action.”<sup>8</sup> In later years, a consensus within the academy has added a fourth: freedom of *intramural* utterance and action, which means the freedom both to participate in governance and to comment within a school on how it is administered, all without fear of retribution.

The *Declaration* is perhaps the most eloquent and passionate justification for academic freedom and academic job security. In its twenty-three pages are the following:

The responsibility of the university teacher is primarily to the public itself, and to the judgment of his own profession; and while, with respect to certain external conditions of his vocation, he accepts a responsibility to the authorities of the institution in which he serves, in the essentials of his professional activity his duty is to the wider public to which the institution itself is morally amenable . . . .<sup>9</sup>

It is scarcely open to question that freedom of utterance is as important to the teacher as it is to the investigator. [No one] can be a successful teacher unless he enjoys the respect of his students, and their confidence in his intellectual integrity. It is clear, however, that this confidence will be impaired if there is suspicion on the part of the student that the teacher is not expressing himself fully or frankly . . . . It is not only the character of the instruction but also the character of the instructor that counts; and if the student has reason to believe that the instructor is not true to himself, the virtue of the instruction as an educative force is incalculably diminished. There must be in the mind of the teacher no mental reservation.<sup>10</sup>

In that same year the AAUP created its Committee A, which in the century following has investigated and reported countless violations of academic freedom. Its first case involved the University of Utah’s firing of teachers for comments made in class and for expressing—in private—unfavorable views of the university’s administration.

Of the dozens of faculty fired before and around the time of the *Declaration*, none had any form of the job security other than, at best, one-year contracts.

The 1915 *Declaration* stated the faculty argument for academic freedom and job security. But for practical purposes the AAUP needed a less passionate document that colleges and universities might be willing to adopt as institutional policy. It negotiated with the Association of American Colleges to produce the 1940 *Statement of Principles on Academic Freedom and Tenure*. That document has been adopted as policy by the overwhelming majority of American universities. The 1915 *Declaration* expresses the policy behind academic freedom. The 1940 *Statement* expresses some but not all of the rules.

8. 1915 *AAUP Declaration*, *supra* note 5, at 6.

9. *Id.* at 12.

10. *Id.* at 14.

## 2. Job Security Promotes Innovation

In addition to protecting academic freedom, job security has been shown by empirical research to increase innovation and creative problem-solving—especially among highly educated employees such as J.D. faculty. The converse has also been shown empirically: People who can easily lose their jobs will not innovate because they cannot afford the risk.

The leading researcher on workplace creativity describes a study of “scientists working in research organizations . . . [with] doctorates or master’s degrees”:

Four social-psychological factors seemed most important in facilitating the realization of creative potential: (1) high responsibility for initiating new activities, (2) high degree of power to hire research assistants, (3) no interference from [an] administrative superior, and (4) *high stability of employment*.<sup>11</sup>

In laboratory and other sciences, research assistants are essential in ways that are barely relevant to law faculty. But the rest of this list—and especially the last item—replicates what happens in law schools. One study found:

[E]mployees who fear that they might be laid off may be more likely to try to avoid any behavior that would increase the likelihood of losing their positions. . . . The possibility that the threat of losing one’s job may have a negative impact on creative problem-solving is provocative. Our results demonstrate that this is the case. . . .<sup>12</sup>

According to another study:

Two key features of job roles may be important for ultimately realizing creativity in the workplace, specifically, a challenging job and freedom. When these are provided by the organization, employees are motivated to . . . attempt new approaches and ideas, even if they involve risk of failure.<sup>13</sup>

And still another one:

The findings involving . . . resistance to change are consistent across studies. . . . The positive correlation between job insecurity and resistance to change also is of interest because it . . . appears to contradict rational behavior.<sup>14</sup>

11. TERESA M. AMABILE, *CREATIVITY IN CONTEXT* 210-11 (1996) (emphasis added).
12. Tahira M. Probst, Susan M. Stewart, Melissa L. Gruys & Bradley W. Tierney, *Productivity, Counterproductivity and Creativity: The Ups and Downs of Job Security*, 80 J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 479, 483, 491 (2007).
13. Ravit Cohen-Meitar & Abraham Carmeli, *Linking Meaningfulness in the Workplace to Employee Creativity: The Intervening Role of Organizational Identification and Positive Psychological Experiences*, 21 CREATIVITY RES. J. 361, 371 (2009).
14. Leonard Greenhalgh & Zehava Rosenblatt, *Job Insecurity: Toward Conceptual Clarity*, 9 ACAD. MGMT. REV. 438, 443 (1984).

### 3. Tenure Per Se Does Not Impose Significant Costs

Tenure is *not* lifetime employment,<sup>15</sup> which even the AAUP concedes.<sup>16</sup>

Tenure is a contract for indefinite employment, which can be terminated by the school, following specified procedures, whenever there is cause or financial exigency. Through its power to make institutional policy, the school can define cause<sup>17</sup> and can determine the procedures.<sup>18</sup>

If the employer is a public institution, tenure can be contractual, but it is also subject to state statutes and involves constitutionally protected property rights<sup>19</sup> as well as contract rights. A statute might define cause and financial exigency, and it might set out tenure-revocation procedures. If there is no statute, the school decides, through its internal policies, the meaning of cause and the nature of the procedures. Either way, procedures for public institutions must meet due process requirements.

As explained below, the tests for cause and for financial exigency are easier to satisfy than faculty members might imagine. In the reported cases on tenure revocation, the dismissed faculty member rarely wins in court.

The tenure contract is not usually expressed in a single, integrated writing executed by both parties. Instead the contract incorporates the school's regulations and personnel policies as well as any agreements directly between the school and the faculty member.<sup>20</sup> The school is free to change the relevant regulations and policies, and the tenure contract is automatically revised to incorporate the changes. A faculty member who continues to work at the school is deemed to have agreed to those changes. Throughout contract law,

15. STEVEN G. POSKANZER, *HIGHER EDUCATION LAW: THE FACULTY* 208 (2002).

16. A former AAUP president wrote in the AAUP's own journal that tenure "lays no claim whatever to a guarantee of lifetime employment." William Van Alstyne, *Tenure: A Summary, Explanation, and "Defense,"* 57 AAUP BULL. 328, 328 (1971).

17. If the school's policy documents use the word *cause* without specifying its meaning, courts enforce the meaning found in other schools' policy documents or in the case law, which contract law categorizes as trade usage or industry practice. See RESTATEMENT (SECOND) OF CONTRACTS § 203 (AM. LAW. INST. 1981).

18. Even where the school initially does not follow its internal procedures, the faculty member will still be dismissed as long as the school is *eventually* able to prove cause or financial exigency. If a court rules for the faculty member on the internal procedural error, the school simply redoes the internal process, after which a court will rule for the school on the merits, or the parties will settle privately. For example, *Branham v. Thomas M. Cooley Law School*, 689 F.3d 558 (6th Cir. 2012).

19. Because the due process clause does not protect contract rights, courts will accept an argument that tenure is a property right, but only for the purpose of adjudicating federal due process claims involving public universities. In those cases, however, a state law contract claim can usually be pleaded on the same facts.

20. The tenure-revocation case law is filled with statements like this: "Plaintiff's contractual relationship with the University appears to consist of only two documents: the Faculty Code and the Faculty Handbook." *Saha v. George Wash. Univ.*, 577 F. Supp. 2d 439, 442 (D. D.C. 2008), *aff'd*, 358 F. App'x 205 (D.C. Cir. 2009).

this is a familiar practice. Credit card companies amend our contracts the same way, with the same effect.

*Tenure does not protect a faculty member's salary.* Nothing in the law of tenure prevents reduction of a tenured faculty member's salary.<sup>21</sup> Courts hold that "tenure by itself does not guarantee any particular salary level"<sup>22</sup> and "no college is required to perpetuate and even improve salaries or benefits each year, simply because the incumbent is tenured . . ."<sup>23</sup> To bring compensation in line with value, a school can legally reduce the salary of an unproductive faculty member, tenured or not. Medical schools began experiencing cost crises in the 1990s, partially because federal funds became less freely available, and began then in some instances to reduce salaries for nonproductivity.<sup>24</sup> Law schools have the legal authority to do the same thing.

*Tenure does not protect other workplace benefits.* It does not guarantee assignment to teach a faculty member's favorite courses,<sup>25</sup> or to keep an office the faculty member has used for decades, or to be provided with resources such as research assistants or travel funds.<sup>26</sup> Tenure protects only a job. It does not guarantee a good job. And it does not guarantee as good a job next year as the faculty member had last year.

*Tenure does not prevent a school from downsizing faculty.* When a university has a bona fide financial exigency, courts uniformly hold that a tenured faculty member may be dismissed on that basis alone, regardless of how well the faculty member is doing the job, with the sole condition that the school have acted in good faith.<sup>27</sup> A financial exigency can be based entirely on enrollment declines

21. See, e.g., *Williams v. Tex. Tech Univ. Health Sci. Ctr.*, 6 F.3d 290 (5th Cir. 1993); *Keen v. Penson*, 970 F.2d 252 (7th Cir. 1992); *Chang v. Univ. of Toledo*, 480 F. Supp. 2d 1009 (N.D. Ohio 2007); *Tavoloni v. Mount Sinai Med. Ctr.*, 26 F. Supp. 2d 678 (S.D.N.Y. 1998); *Univ. of Miami v. Frank*, 920 So.2d 81 (Fla. Dist. Ct. App. 2006). The single reported contrary case was decided for the plaintiff only because his offer letter had promised that throughout his employment, he would be paid a salary computed according to a formula recited in the letter—a rare situation in higher education and unheard of in law schools. *Helpin v. Trs. of the Univ. of Pa.*, 10 A.3d 267 (Pa. 2010).

22. *Conlay v. Baylor Coll. of Med.*, No. H-08-1038, 2010 WL 774162, ¶ 19 (S.D. Tex. 2010).

23. *Klinge v. Ithaca Coll.*, 634 N.Y.S.2d 1000, 1003 (Sup. Ct. 1995), *aff'd on other grounds*, 652 N.Y.S.2d 377 (App. Div. 1997).

24. See Sarah A. Bunton, *The Relationship Between Tenure and Guaranteed Salary for U.S. Medical School Faculty*, ANALYSIS IN BRIEF, Apr. 2010, [https://www.aamc.org/download/125190/data/aibvol9\\_no6.pdf](https://www.aamc.org/download/125190/data/aibvol9_no6.pdf) [https://perma.cc/G579-M944].

25. See e.g., *Cussler v. Univ. of Md.*, 430 F. Supp. 602, 608 (D. Md. 1977) ("[n]o faculty member has a vested right in any course"); *Sabinson v. Trustees of Dartmouth College*, 999 A.2d 380 (N.H. 2010) (same).

26. *Gertler v. Goodgold*, 487 N.Y.S.2d 565, 567-68 (App. Div. 1985), *aff'd*, 489 N.E.2d 748 (N.Y. 1985) ("[N]othing in the complaint or the record show[ed] that tenure guarantees a faculty member any office at all, much less space of his own choosing").

27. Even where an institution's internal regulations and personnel policies do not explicitly provide for terminations due to financial exigency, courts have held that the power is

or failure to meet enrollment projections.<sup>28</sup> Even if the university as a whole is financially healthy, it can downsize a specific unit for declining enrollment and can choose to dismiss tenured faculty members in that unit alone.<sup>29</sup> Some courts have even permitted institutions downsizing faculty to retain untenured faculty members while discharging or furloughing tenured ones.<sup>30</sup>

*Tenured faculty can be fired for behavior that leads to firing outside academia.* A school can terminate tenured faculty who do their jobs badly. This can include inadequate teaching,<sup>31</sup> inability to get along with co-workers,<sup>32</sup> sex

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implied in tenure contracts because “[t]he authority to terminate tenured faculty members because of an economic crisis is an important tool to college administrators in maintaining fiscal stability.” T. Michael Bolger & David D. Wilmoth, *Dismissal of Tenured Faculty Members for Reasons of Financial Exigency*, 65 MARQ. L. REV. 347, 348 (1982).

28. See, e.g., *Bignall v. N. Idaho Coll.*, 538 F.2d 243, 249 (9th Cir. 1976); *Johnson v. Bd. of Regents*, 377 F. Supp. 227, 230, 235 (W.D. Wis. 1974); *Graney v. Bd. of Regents*, 286 N.W.2d 138, 145 (Wis. App. 1979).
29. See, e.g., *Krotkoff v. Goucher Coll.*, 585 F.2d 675 (4th Cir. 1978); *Rose v. Elmhurst Coll.*, 379 N.E.2d 791, 794 (Ill. App. 1978); *Scheuer v. Creighton Univ.*, 260 N.W.2d 595 (Neb. 1977).
30. *Brenna v. S. Colo. State Coll.*, 589 F.2d 475, 476–77 (10th Cir. 1978); *Graham v. Columbia Coll.*, 2012 WL 1098625 & 2012 WL 1072231 (D. S.C. 2012); *Odynocki v. Southern Univ. at New Orleans*, 2006 WL 3230348 (E.D. La. 2006). But in some schools a collective bargaining agreement might require that untenured faculty be dismissed before tenured faculty are.
31. See, e.g., *Agarwal v. Regents of the Univ. of Minn.*, 788 F.2d 504, 506 (8th Cir. 1986) (“incompetent as a teacher, frequently harassing students and behaving in an unprofessional manner toward colleagues”); *King v. Univ. of Minn.*, 774 F.2d 224, 225 (8th Cir. 1985) (“poor teaching performance, excessive unexcused absences from class, absences from faculty meetings, low enrollment in his classes”); *Potemra v. Ping*, 462 F. Supp. 328, 330–31 (S.D. Ohio 1978) (not responding to questions in class, criticizing students for asking questions, behaving belligerently to students, giving failing grades vindictively, and refusing to attend faculty meetings); *Jawa v. Fayetteville State Univ.*, 426 F.Supp. 218, 224 (E.D. N.C. 1976) (“a poor teacher . . . apparently unwilling to prepare for class; . . . difficulty interacting with . . . [and] little interest in his students; . . . failed to keep office hours and to advise properly his students”); *Peterson v. N.D. Univ. Sys.*, 678 N.W.2d 163 (N.D. 2004) (revealing confidential information about a student to other students, ending a class a month before the semester ended, and ignoring student questions and individual student requests for assistance); *Riggin v. Bd. of Trs.*, 489 N.E.2d 616 (Ind. Ct. App. 1986) (teaching without adequate preparation, habitually discussing irrelevant material in class, failing to cover material listed in the school’s official course description, canceling classes, and not keeping regular office hours). But see *Silva v. Univ. of N.H.*, 888 F. Supp. 293 (D.N.H. 1994) (“academic freedom permits faculty members freedom to choose specific pedagogic techniques”) (italics added) (quoting affidavit of William Van Alstyne).
32. See, e.g., *Bowling v. Scott*, 587 F.2d 229, 230 (5th Cir. 1979) (“failed to perform his assigned duties and committed acts inimical to the efficient functioning of the Department of English”); *De Llano v. Berglund*, 282 F.3d 1031 (8th Cir. 2002) (repeatedly insulted colleagues, made false accusations, and filed frivolous job grievances); *Sengupta v. Univ. of Alaska*, 21 P.3d 1240 (Alaska 2001) (treating colleagues and administrators in a dishonest, abusive, and demeaning manner); *Bernold v. Bd. of Governors*, 683 S.E.2d 428, 431 (N.C. Ct. App. 2009) (“interactions with colleagues had been so disruptive that the effective and efficient operation of his department was impaired”); *Phillips v. State Bd. of Regents*, 863 S.W.2d 45, 48 (Tenn. 1993) (“[l]ack of professional behavior towards peers, administrators, and staff”).



harassment,<sup>33</sup> nonexistent or defective scholarship,<sup>34</sup> and insubordination.<sup>35</sup> Although academics might be surprised at the last item in that list, abundant case law supports firing tenured faculty for insubordination. Tenure does not give a faculty member the power to refuse, for example, a directive to attend graduation or an assignment to chair a heavy-workload faculty committee. Academic freedom does not prevent university officials from managing their organization, assigning tasks, or enforcing workplace rules.

Revocation of tenure isn't the only available remedy. A university can suspend a tenured faculty member without pay in an attempt to resolve a personnel problem short of dismissal<sup>36</sup> or as a last step before dismissal.<sup>37</sup> And it can reduce salary for the reasons explained above.

#### 4. Job Security Under ABA Standard 405(c) Imposes No Significant Costs

Law schools are accredited by the American Bar Association—or more specifically, the governing Council of the ABA Section of Legal Education and Admissions to the Bar. The ABA's Standards for Approval of Law Schools require every school to have a system of tenure.<sup>38</sup> For faculty outside the conventional tenure system, the ABA requires other forms of job security.

33. See, e.g., *McDaniels v. Flick*, 59 F.3d 446 (3d Cir. 1995); *Levitt v. Univ. of Tex.*, 759 F.2d 1224 (5th Cir. 1985); *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504 (10th Cir. 1998); *Traster v. Ohio N. Univ.*, 2015 WL 10739302 (N.D. Ohio 2015); *Haegert v. Univ. of Evansville*, 977 N.E.2d 924 (Ind. 2012); *Murphy v. Duquesne Univ.*, 777 A.2d 418 (Pa. 2001).
34. See, e.g., *Roberts v. Columbia Coll. Chi.*, 821 F.3d 855 (7th Cir. 2015) (plagiarism); *Agarwal*, 788 F.2d at 504 (plagiarism combined with poor teaching); *King*, 774 F.2d at 225 (“undocumented research” combined with poor teaching); *Riggin*, 489 N.E.2d at 626 (“had not engaged in research or scholarly activities for at least 10 years,” combined with poor teaching).
35. See, e.g., *McConnell v. Howard Univ.*, 818 F.2d 58 (D.C. Cir. 1987) (refusing to teach a class that included a student who had clashed with the professor); *Shaw v. Bd. of Trs.*, 549 F.2d 929 (4th Cir. 1976) (refusing to attend a faculty workshop and refusing to participate in a graduation ceremony); *Branham v. Thomas M. Cooley Law Sch.*, (6th Cir. 2012) (refusing to teach an assigned course); *Smith v. Kent State Univ.*, 696 F.2d 476, 477 (6th Cir. 1983) (refusing to teach a course because it would “lower his standing among the academic community”); *Garrett v. Mathews*, 474 F.Supp. 594, 597 (N.D. Ala. 1979) (“failing to supply a list of publications, failing to open mail from Dr. Hobby, and failing to post and keep office hours”); *Jawa*, 426 F.Supp. at 224 (“uncooperative with his colleagues and the administration; . . . unwilling or unable to follow . . . directives of his superiors and comply with University policies and procedures”); *Pollock v. Univ. of S. Cal.*, No. B145203, 2001 WL 1513870, \*7 (Cal. Ct. App. Nov. 29, 2001) (refusing a teaching assignment); *Heflin v. Kansas City Kansas Cmty. Coll.*, 224 P.3d 1201 (Kan. 2010) (refusing to hold office hours at a designated location); *Josberger v. Univ. of Tenn.*, 706 S.W.2d 300 (Tenn. Ct. App. 1985) (refusing to perform assigned tasks).
36. See, e.g., *Wexley v. Mich. St. Univ.*, 25 F.3d 1052 (6th Cir. 1994); *Tennyson v. Univ. of Minn.*, No. A07-1095, 2008 WL 2344257 (Minn. Ct. App. June 10, 2008); *Mills v. W. Wash. Univ.*, 246 P.3d 1254 (Wash. 2011).
37. See, e.g., *Murphy*, 745 A.2d at 1228; *Potemra v. Ping*, 462 F. Supp. 328 (S.D. Ohio 1978).
38. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2015-2016, at 29 (Standard 405(b)) (2015) (“A law school shall have an established and announced policy with respect to

## Under ABA Standard 405(c):

A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members.<sup>39</sup>

This is supplemented by ABA Interpretation 405-6:

A form of security of position reasonably similar to tenure includes a separate tenure track or a program of renewable long-term contracts. Under a separate tenure track, a full-time clinical faculty member, after a probationary period reasonably similar to that for other full-time faculty, may be granted tenure . . . For the purposes of this Interpretation, “long-term contract” means at least a five-year contract that is *presumptively renewable* or other arrangement sufficient to ensure academic freedom.<sup>40</sup>

(Interpretations are published with the Standards and are considered as binding as the Standards.)

In the law of evidence, a presumption shifts or assigns a burden of proof by presuming a conclusion of law.<sup>41</sup> If a teacher has a Standard 405(c) presumptively renewable contract, the teacher has a contractual right, when that contract ends, to a new (renewed) contract of the same length unless the school has admissible evidence sufficient to overcome the presumption that the teacher satisfies the school’s renewal criteria, which the ABA requires every school to establish.<sup>42</sup> The teacher is not required to prove that she satisfies the criteria. That is presumed. Instead the school must prove that she does *not* satisfy them. For example, if the school’s written policy requires “excellence” in teaching, and if that is the issue, the school must prove that the teacher’s teaching is not “excellent.” If the school cannot prove that but nevertheless fails to renew the contract, the school, as a matter of contract law, is liable for breach of the expiring presumptively renewable contract. (The teacher’s remedy is in court—not at the ABA.)

The ABA also requires a school to provide governance rights (and responsibilities) to clinical faculty:

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academic freedom and tenure . . . .”) [hereinafter 2015-16 ABA STANDARDS].

39. *Id.* (Standard 405(c)).

40. *Id.* (Interpretation 405-6 (italics added)).

41. For example, the criminal presumption of innocence assigns to the government the burden of proving guilt because, unless the government carries that burden, the law considers the defendant innocent.

42. 2015-16 ABA STANDARDS, *supra* note 38, at 30 (Interpretation 405-7): “. . . A law school should develop criteria for retention, promotion, and security of employment of full-time clinical faculty.”

"A law school shall afford to full-time clinical faculty members participation in faculty meetings, committees, and other aspects of law school governance in a manner reasonably similar to other full-time faculty members."<sup>43</sup>

Clinicians are the faculty members most likely to be attacked by outside interests in exactly the kind of interference that led to creation of the AAUP and its 1915 *Declaration*. Robert Kuehn and Peter Joy identified thirty-six publicly known instances from 1968 to 2010 of interferences, or attempted interferences, with clinicians' academic freedom, by governors, government agencies, legislatures, private industry, donors, alumni, and university administrators and trustees.<sup>44</sup> These thirty-six incidents are just the tip of an iceberg. Most attacks on clinical academic freedom happen quietly and never become public. In a 2005 survey, twelve percent of clinicians "reported similar interference in their courses."<sup>45</sup>

The ABA's Standards do not define the term *clinician*, but in practice the ABA appears to treat it as including both those who teach in client-based clinics and those who teach skills in other settings, such as simulation courses. A number of schools have provided legal writing faculty with 405(c) clinical tenure or presumptively renewable contracts even though not required by the ABA. (The ABA's legal writing job security requirements, in Standard 405(d), are less stringent than those in Standard 405(c).<sup>46</sup>)

Schools provide 405(c) job security to legal writing faculty for the same reason they grant tenure to casebook teachers: to protect faculty academic freedom and to gain the benefits of each teacher's capacity to innovate. Additionally, as other articles in this volume explain, legal writing is an overwhelmingly female field, and a school that provides lesser forms of job security to its legal writing faculty can create issues of sex discrimination regardless of whether the school satisfies ABA requirements.

A number of legal writing teachers have described instances in which their academic freedom has been compromised in ways that doctrinal faculty would not tolerate in their own courses. These include requiring all the school's legal writing teachers to use identical syllabi, to grade each assignment in specified ways, to give certain types of writing assignments, and to assign certain textbooks, prohibiting other types of writing assignments and other

43. *Id.* (Interpretation 405-8, which includes an exception for temporary teachers specified in the last sentence of Standard 405(c)). *Id.* at 29 (Standard 405(c)).

44. Robert R. Kuehn & Peter A. Joy, "Kneecapping" Academic Freedom, *ACADEME*, Nov.-Dec. 2010, at 11.

45. *Id.*

46. 2015-16 ABA STANDARDS, *supra* note 38, at 29 (Standard 405(d): "A law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction as required by Standard 303(a)(2), and (2) safeguard academic freedom.").

textbooks. These are violations of the academic freedom to teach as one thinks best, which the 1915 *Declaration* eloquently describes, and they can extinguish creativity and the capacity to innovate in the school's legal writing program.

The Association of American Law Schools requires that member schools guarantee as much academic freedom to skills and legal writing teachers as to casebook faculty. Under AALS Executive Committee Regulation 4.2:

*"Definition of Faculty.* For purposes of this chapter, 'faculty member' means a professional who is or was tenured, on the tenure track, or, *although not on the tenure track*, engaged in teaching or scholarship, including work in a *clinical or research and writing program* at a member school."<sup>47</sup>

Under AALS Bylaw 6.6(d):

"A faculty member shall have academic freedom and tenure in accordance with the principles of the American Association of University Professors."<sup>48</sup>

An ABA committee summarized the AAUP documents as follows:

"Neither the 1915 Declaration nor the 1940 Statement says or implies that it might be permissible to discriminate among fields of study by allocating more academic freedom to some and less to others."<sup>49</sup>

## 5. Conclusion

Job security—tenure or another form under ABA Standard 405(c)—is essential to every full-time faculty member's academic freedom.

Despite myths to the contrary, no form of job security inherently raises the cost of education to any significant degree. Nothing in academic employment law prevents discharge, suspension, or salary reduction for a bad teacher, a bad scholar, a disruptive colleague, or an insubordinate faculty member. Job security does not protect salary or other workplace benefits. And it does not prevent faculty downsizing.

Because the law does not link salary to job security, a school can, without increasing its annual budget, grant tenure-track protection to 405(c) and 405(d) faculty. Fairness and wisdom, however, should motivate a school to do more by equalizing salaries as well as job security, and the other articles in this volume eloquently explain why. This article shows that even if a school will not equalize salary, it can still equalize job security.

Cost is no excuse.

47. ASS'N OF AM. L. SCHS., 2016 HANDBOOK 75 (2016) (emphasis added).

48. *Id.* at 59.

49. *Report of Special Committee on Security of Position*, AM. BAR ASS'N 6 (May 5, 2008), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/reports/2008\\_security\\_of\\_position\\_committee\\_final\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2008_security_of_position_committee_final_report.authcheckdam.pdf) [<https://perma.cc/VL2V-DRJ8>].